CONSENT DECREE PRACTICE
AFTER THE ITT SETTLEMENT:
SOME COMMENTS ON THE
PROPOSED ANTITRUST
PROCEDURES AND
PENALTIES ACT

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In the wake of the Justice Department's controversial settlement
of its three antimerger cases against the International Telephone &
Telegraph Corporation,1 Congress is nearing completion of the first
significant change in consent decree practice in more than a de-
cade.2 If enacted in anything like its present form, the new Antitrust
Procedures and Penalties Act not only will increase criminal anti-
trust penalties and provide for initial review of most government
antitrust cases in the courts of appeals, but will also substantially

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1. United States v. International Tel. & Tel. Corp. (Grinnell Corp.), 1971 Trade
Cas. ¶ 73,665 (D. Conn. 1971) (ordering divestiture of Fire Protection Division of
Grinnell Corp. within two years); United States v. International Tel. & Tel. Corp.
and The Hartford Fire Ins. Co., 1971 Trade Cas. ¶ 73,666 (D. Conn. 1971) (divest-
iture within three years of either all interest in Levitt, Avis and Hamilton Life, or
all interest in Hartford Fire Insurance Co.); United States v. International Tel. &
Tel. Corp. (ITT Canteen Corp.), 1971 Trade Cas. ¶ 73,667 (N.D. Ill. 1971) (divest-
iture within two years of all interest in Canteen Corp.). All three consent decrees
were entered on the same day, September 24, 1971.

2. The last major development in consent decree practice occurred in 1961 when,
prompted by congressional criticism of the AT&T-Western Electric decree [see
text accompanying notes 33-35 infra], the Department of Justice adopted regula-
tions providing for a 30-day period during which interested non-parties could sub-
mit comments to the consent decree court prior to the entry of a judgment. 28
modify the administrative and judicial procedures governing the negotiation and acceptance of antitrust consent decrees.³

Three principal changes in consent decree practice would be brought about by the proposed legislation. First, the Department of Justice would be required to prepare a "public impact statement" designed to elucidate the competitive effect of any consent decree it submits for judicial approval. Second, prior to entry of the decree, the defendant would be required to file with the court a description of any communications which its representatives have had with government officials relevant to the decree, other than routine contacts with the Justice Department by defendant's counsel. Third, the consent decree court would be authorized to conduct any proceedings necessary for a determination that the proposed decree is consistent with the purposes of the antitrust laws. Other provisions of the legislation expand the opportunity for interested non-parties to comment on consent decrees by requiring more adequate public notice of proposed decrees, lengthening the public comment period, and requiring a response by the Department to all such comments.

In this article we offer our view as to the merits of these proposed changes and our prognosis as to their likely effects on antitrust consent decree practice.

I. THE ROLE OF CONSENT DECREES IN ANTITRUST ENFORCEMENT

Everyone familiar with antitrust enforcement recognizes the immensely important role of consent decrees.⁴ The great majority of civil antitrust actions brought by the Department of Justice are terminated by consent judgments.⁵ Given the severely limited re-

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³ The Antitrust Procedures and Penalties Act was introduced by Senator Tunney and three co-sponsors as S. 782 on February 6, 1973. After several days of hearings before the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee, the bill was reported with amendments to the full Senate [S. Rep. No. 298, 93d Cong., 1st Sess. (1973) (hereinafter cited as S. Rep. No. 298)] and, after further perfecting amendments, was unanimously passed on July 18, 1973. 119 Cong. Rec. 13,934 (daily ed. July 18, 1973). The Monopoly Subcommittee of the House Judiciary Committee held hearings on S. 782 and related House bills (e.g., H.R. 9203) in September and October of 1973, and prospects for favorable action by the House during 1974 are believed to be excellent.


sources of the Antitrust Division, there is no realistic alternative to the consent decree if we are to have effective antitrust enforcement. Even if the Department has sufficient resources to try all of its cases, going to trial would be wasteful and pointless in cases where adequate relief could be obtained by consent of the defendant. Indeed, proceeding to trial may sometimes be counterproductive from the government's standpoint, for it may lose and obtain no relief in situations where it might have obtained substantial relief by consent.

Because of the value of the consent decree process, any modification of that process which would have the effect of significantly limiting its availability would present a serious threat to antitrust enforcement. But this fact does not mean that the consent decree process cannot be improved, or at least protected more carefully against occasional abuse. Consent decrees, by their nature, pose delicate problems of public policy that are not present when government antitrust actions are terminated by litigated judgments.

One significant problem associated with the consent decree is the matter of public confidence. While consent decrees are typically entered after a public decision to sue has been made and announced by the Department of Justice, they are the product of private negotiation which affords relatively little opportunity for participation by affected non-parties or the courts. Further, the product, being a compromise, may not give the government all the relief it could have obtained if it had litigated the case successfully. Under these conditions, suspicions may arise that the government has been outbargained or that it has changed its original position as a result of improper political pressures.

It may, of course, be objected that the same opportunities for undue influence exist—and probably are more likely to occur—when the Department decides not to bring a case in the first instance. In this situation, however, there at least is no public change of position, which carries inevitable implications for future enforcement policy, and there is no foreclosure of the government's opportunity to change its mind and challenge the same or similar practices in the future.

The distinction between consent orders and decisions not to sue suggests a second unique feature of the consent decree process. The

6. The Antitrust Division currently employs approximately 350 lawyers and economists. 1972 ATT'Y GEN. ANN. REP. 63, 64.
breadth of the antitrust laws gives enforcement agencies the widest possible discretion, and the exercise of this discretion represents an important aspect of economic regulation. Therefore, what the Department of Justice says or agrees to may be as important as what it gets the courts to decide. As a result, consent orders, although obviously not designed as announcements of public policy, are viewed by the public as one of the means by which the Department announces its enforcement policies.

The Department has recognized that its enforcement discretion creates both an opportunity to achieve substantial antitrust compliance by the announcement of its enforcement intentions and an obligation to provide business with a clear understanding of governmental policy. For these reasons, the Department regularly makes public its enforcement intentions through such devices as its merger guidelines and the speeches and other public statements of its officials. Enforcement policy is also expressed in the briefs and other pleadings which the Department files in litigated cases, as well as in the consent decrees which it negotiates with defendants.

The relief requested or agreed to by the Department in an antitrust case reflects the Department’s view of the violation alleged. In fact, in some cases the prayer for relief is more revealing than the allegations of the complaint. In addition, because so many antitrust cases are terminated by consent decrees, they are inevitably looked to for guidance and cited as precedent by businessmen and their counsel—warnings to the contrary by Department officials notwithstanding. On occasion, virtually an entire area of antitrust law has been developed through a series of consent decrees. For example, cases challenging reciprocal dealing have almost without exception been terminated by consent decree, and the provisions of these decrees are at least as instructive as the complaints themselves in

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7. To me the dominant fact in the last ten years of antitrust policy is the progressive withdrawal of the Supreme Court from the rule-making, law-making function in antitrust. The policy of the Supreme Court has been to broaden the boundaries of antitrust law to the point where virtually no issue of law remains, and where virtually any practice challenged by the Antitrust Division, should it get into court and be appealed, will be decided in favor of the government. . . . [T]his was deliberate, and the result, it seems to me, is that the Justice Department now has a vast discretion in the antitrust field.

Current Antitrust Enforcement and its Critics: Recent Proposals for Reform and Restructure in the Antitrust Division, the FTC and the Courts, 40 A.B.A. ANTITRUST L.J. 341, 345 (1971) (remarks of Prof. Posner).
showing what the Department believes to be the elements of the offense in question.\textsuperscript{8} Thus, consent decrees necessarily play a major role in the critical function of articulating antitrust doctrine. Where for undisclosed reasons—however meritorious those reasons may be—a consent decree appears inconsistent with the allegations of the complaint or the prayer for relief, it may seriously impair this function of antitrust enforcement and raise doubts about the integrity of the enforcement process itself.

This danger is particularly acute in areas of legal uncertainty. For the purpose of precedent or guidance, it matters little whether or not a consent decree in a civil price-fixing case includes a particular relief provision such as a requirement for the issuance of new price lists. The presence or absence of such a provision conveys no indication of the Department's position with regard to the legality of simple price fixing. On the other hand, when the complaint involves complex practices such as patent licensing provisions, or challenges changes in industry structure resulting from mergers or alleged monopolization, public understanding of the Department's theory may be strongly affected by the relief it requests or accepts. For example, when a merger case is settled on the basis of the divestiture of assets other than those acquired in a challenged transaction, there may be a legitimate question as to whether the Department is still relying on the theory reflected in its complaint. Such relief may well be entirely appropriate, but when it is accepted without explanation, there is a danger of public confusion, and even mistrust, about the Department's enforcement policy.

The provisions of the proposed Antitrust Procedures and Penalties Act reflect two basic strategies for dealing with the problems peculiar to the consent decree process. One approach reflected in the Act is directed at making the reasons underlying the acceptance of a consent decree, and the process by which it was negotiated, more open to public view. The relevant provisions of the Act are the requirement for the filing of a "public impact statement" by the Department of Justice, the requirement that the Department consider and respond to comments submitted by interested persons, and the requirement that the defendant file with the court a de-

scription of all contacts with governmental officials relating to the decree which are not part of the normal communication between defendant's counsel and the Department.

The second approach in the Act contemplates a somewhat more extensive involvement by the courts in the consent decree process than normally occurs at the present time. The effort here is to enable the court to review what the parties have agreed to, to investigate the merits of complaints from affected non-parties, and to determine whether the entry of the decree is genuinely consistent with sound antitrust policy. As we will explain, we regard the first strategy as the primary one.

II. PUBLIC DISCLOSURE IN CONSENT DECREE PRACTICE

The "public impact statement" mandated by the proposed Antitrust Procedures and Penalties Act would require the Department of Justice, at the time it submits a consent decree to a district court for approval, to explain, inter alia, the nature and purpose of the government's complaint; the anticompetitive practices or events allegedly involved; and the anticipated effects on competition of the relief contained in the consent decree. As passed by the Senate, the Act would also require the impact statement to describe the remedies available to potential private plaintiffs and the procedures available for modification of the proposed judgment—two items of "boiler-plate" that presumably will not vary much from statement to statement. Finally, the statement must describe and evaluate alternatives to the proposed decree actually considered by the Department. 9

9. S. 782 (as passed by the Senate) provides in part:

Simultaneously with the filing of the proposed consent judgment, unless otherwise instructed by the court, the United States shall file with the district court, cause to be published in the Federal Register and thereafter furnish to any person upon request a public impact statement which shall recite—

"(1) the nature and purpose of the proceeding;

"(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

"(3) an explanation of the proposed judgment, relief to be obtained thereby, and the anticipated effects on competition of that relief, including an explanation of any unusual circumstances giving rise to the proposed judgment or any provision contained therein;

"(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that the proposed judgment is entered;
While the inspiration for these provisions is clearly the impact statement required by the National Environmental Policy Act to accompany major federal actions affecting the environment, the requirement for a public explanation of the basis of antitrust consent decrees is not a new idea. Professor Louis Schwartz suggested such a requirement in a dissenting statement in the 1955 Report of the Attorney General’s National Committee to Study the Antitrust Laws. This recommendation was repeated in the 1959 Report of the House Antitrust Subcommittee on the Department of Justice’s consent decree program:

When the Department of Justice presents a consent decree to the court for its approval, it should be accompanied by a statement that sets forth the facts involved, the defendant’s position, the meaning of the provisions used in the decree, and the reasons that form the basis for the department’s acceptance of the particular compromise. The necessity to make such a statement should go far to insure against arbitrary action in the consent disposition of antitrust litigation.

In a different enforcement context, it is interesting to note that the reasons for the settlement of various immigration and naturalization suits must be disclosed and made a matter of record.

The public impact statement holds the promise of providing a valuable vehicle for the explication of antitrust enforcement policy. Properly used, it should also prevent the confusion which may arise when the provisions of a consent decree do not on their face appear consistent with the prayer for relief or the allegations of the complaint. The requirement will also make it more difficult for the

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“(5) a description of the procedures available for modification of the proposed judgment;
“(6) a description and evaluation of alternatives actually considered to the proposed judgment.”
14. It would have been preferable for the proposed Act expressly to require that the Department’s public impact statement include an explanation of any respects in which the proposed judgment differs from the prayer for relief or does not clearly
Department to justify an obviously defective decree and will provide a basis on which the court can decide whether acceptance of the decree is truly in the public interest.

The requirement that alternatives to the consent decree "actually considered" by the Department be described is significantly narrower than NEPA's treatment of alternatives, but it is still a potential source of confusion and delay. Public discussion of what the defendant would not agree to during the negotiations, or might have agreed to if the government had bargained harder or made concessions elsewhere, is likely to be fruitless at best and at worst an invitation to non-parties or an insensitive court to tamper with a painstakingly constructed, fragile compromise. While the "alternatives provision" of the proposed legislation is clearly not to be given an expansive interpretation, the Act would still be better off without it.

The provision of the legislation requiring consideration and public response by the Department to non-party comments concerning the proposed consent decree appropriately supplements the public impact statement. This section will insure that the Department in fact considers and responds to all expressed concerns relating to the decree and not merely to the problems which may occur to it in the preparation of its initial statement.

Two other public disclosure requirements are unnecessarily burdensome, however. One is the necessity for newspaper publication of information relating to the proposed consent decree. Given existing antitrust reporting services and the Act's requirement of Federal Register publication, all genuinely interested non-parties will receive adequate notice without this rather quaint effort to respond to the allegations of the complaint. We understand that such an explanation is presently required by the Federal Trade Commission's internal procedures when its staff submits a proposed consent agreement to the Commission for approval.

15. Originally, the "alternatives provision" of the proposed Act closely resembled the NEPA model, but amendments adopted by the Senate Judiciary Committee [see S. Rep. No. 298, supra note 3, at 3], and by the full Senate [see 119 Cong. Rec. 13,925-34 (daily ed. July 18, 1973)], substantially narrowed the scope of the Department's duty to consider and describe alternative forms of relief.

16. The Senate report, for example, indicates that the alternative forms of relief to be described are only those "which the [Antitrust] Division considered in final form." S. Rep. No. 298, supra note 3, at 3.

17. S. 782, 93d Cong., 1st Sess. § 2 (1973) (as passed by the Senate).

18. Id.
involve the average citizen in the complexities of antitrust enforcement. The other burdensome provision is that the Department routinely file with the court "materials and documents which the United States considered determinative in formulating the proposed consent judgment," other than certain types of commercial information and internal government communications that are exempt from disclosure under two specific sections of the Freedom of Information Act. Discovery of such ill-defined, potentially voluminous materials should be required only upon a showing to the consent decree court that the interests of justice demand their production.

The one overall reservation that needs to be expressed is the substantial additional burden that preparation of the public impact statement will unavoidably place on Antitrust Division officials. Such statements will be among the most important expressions of the Department's antitrust enforcement policy and will be relied upon as precedent by businessmen and their counsel. Thus the Department's statements will require the most careful preparation and review at the highest level of the Antitrust Division, a place where available manpower is a very scarce resource. This cost should be considered by the Congress, and adequate appropriations should be provided for the performance of these additional functions. Failing such an infusion of funds, the new public disclosure requirements will not necessarily be a net plus for effective antitrust enforcement.

The remaining section of the Act relating to greater public exposure of the consent decree process would require the filing with the court of a description of all written and oral communications by or on behalf of the defendant with any government officials concerning the proposed decree, other than communications involving counsel of record and officials of the Justice Department. The provision

19. Id.
21. S. 782 (as passed by the Senate) provides in part:
"(g) Not later than ten days following the filing of any proposed consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any officer, director, employee, or agent thereof, or other person with any officer or employee of the United States concerning or relevant to the proposed consent judgment: Provided, that communications made by or in the presence of counsel of record with the Attorney General or the employees of the Department of Justice shall be excluded from the requirements of this subsection. Prior to the entry of any
properly refrains from seeking to prohibit such communications with other governmental agencies and departments, since they may serve a valuable function. Agencies of the government other than the Justice Department may well possess special knowledge concerning the industry or practices concerned, and there is surely no reason why these agencies should not be encouraged to communicate such information to the Department. Moreover, by excluding contacts with the Justice Department made by or in the presence of counsel of record, this provision properly declines to require burdensome recordkeeping of all the many routine contacts between the parties which are a necessary part of every consent decree negotiation. With this exception written into the Act, no persuasive reason appears as to why communications with other branches of the government concerning a proposed decree should not be recorded and made a matter of public record, for one would anticipate that only improper contacts would be seriously inhibited by the need for public disclosure.

III. THE ROLE OF THE COURTS IN CONSENT DECREE PRACTICE

The provisions of the proposed Antitrust Procedures and Penalties Act relating to the role of the consent decree court are designed to facilitate judicial supervision of the consent decree process without undermining the ability of the government to achieve its antitrust enforcement objectives by settlement rather than by trial. Thus, the Act requires that before entering a consent decree, the court shall determine that the decree is "in the public interest as defined by law."22 The Act enumerates several factors which the court may consider in making this determination, among them the termination of the alleged violation, the duration of the relief, the anticipated effects of alternative remedies actually considered, and the effect of the decree on individuals injured by the claimed violation.23 In addition, the proposed Act sets forth a variety of proce-

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22. Id. (as passed by the Senate). The Senate Report makes it clear that the reference is specifically to the antitrust laws. S. Rep. No. 298, supra note 3, at 3.
dURES by means of which the court can apprise itself of the facts necessary to make the public interest determination.24 In analyzing these provisions, one may properly begin by noting that the consent decree court has an important role in assuring the proper functioning of the Act’s provisions relating to the Department’s impact statement and to the defendant’s disclosure of contacts. The realization that the court will review the impact statement will tend to encourage the Justice Department to prepare a careful, accurate statement. If there were no judicial role in the consent process at all, the impact statement could well become a pro forma exercise of little value. Similarly, judicial supervision will tend to insure the accuracy of the defendant’s list of reportable governmental contacts.

A second point to be made is that the entry of an antitrust consent decree is indeed a judicial act, and not merely the execution of a private contract between two adversary parties. That teaching goes back at least to the Supreme Court’s decision in United States v. Swift & Co.25 It has also been clear for nearly as long that the court should perform the judicial act of entering an antitrust consent decree only if it believes that the settlement is “equitable and in the public interest.”26 Thus, the concept that the court has a role to play in seeing that antitrust settlements are in the public interest has considerable precedent supporting it.

On the other hand, the judicial role in consent decree practice is necessarily a sharply limited one. A court can go only so far in second-guessing the Justice Department’s determination that a proposed settlement is a good one. For example, the degree of the defendant’s culpability and the strength of the government’s case are matters that simply cannot be probed by the court without a full trial, and yet these factors may be a vital part of the Justice Department’s determination to enter into the particular settlement. Another relevant factor that the court cannot fully assess is the impact of settlement vel non on the Department’s allocation of enforcement

24. The available procedures range from mere review of the materials submitted with the decree to a mini-trial of the merits of the settlement. S. 782, 93d Cong., 1st Sess. § 2 (1973) (as passed by the Senate). The Act makes it clear that resort to any of these fact-gathering procedures will not have the effect of turning the consent decree or related documents (such as the impact statement) into evidence of guilt in subsequent treble damage litigation. Id.
resources. If the court attempts to get into these matters very deeply, it may end up having a kind of mini-trial and delaying the settlement to the point where the need for speedy relief—another relevant factor in the Department’s decision to settle—is largely frustrated.

Moreover, the court can neither compel the government to prosecute its case nor force the defendant to consent to any particular settlement. Would-be intervenors complaining about the decree are similarly limited. If the court rejects a proposed consent decree, it cannot control what will be substituted for it. Finally, from the point of view of the need for coherent and consistent development of antitrust policy, courts clearly cannot insist that a consent decree reflect a reliable articulation of antitrust doctrine. This can be done only by the Department of Justice.

With these considerations in mind, we can discern three types of responsibility that can properly be placed on the courts with regard to consent decrees. They are the duty to insure adequate disclosure by the government of the bases of settlement; the duty to protect non-party interests affected by consent decrees; and the duty to disapprove grossly inadequate decrees. Because these functions comprise the principal opportunities for judicial participation in consent decree practice, it is useful to analyze the “court provisions” of the proposed Act under these headings.

A. Assurance of Compliance With Disclosure Requirements

At the present time, the courts do not normally require disclosure of the considerations leading the Department to settle antitrust cases. A recent example of this kind of judicial restraint is the Supreme Court affirmance of the district court's decision in the ITT-Hartford case. The lower court held that the Justice Department was not under a duty to disclose that ITT's “hardship” claim was a motivating factor in the Department’s willingness to enter into settlement negotiations.27 The intent of the proposed Antitrust Procedures and Penalties Act is to change this result, and to enable the consent decree court to require adequate disclosure of the bases for particular settlements. The present drafting of the Act on this point, however, leaves something to be desired.

The Act requires that the public impact statement contain "an explanation of the proposed judgment . . . including an explanation of any unusual circumstances giving rise to the proposed judgment or any provision contained therein,"\(^\text{28}\) and the consent decree court is authorized, in making its public interest determination, to examine "any . . . considerations bearing upon the adequacy of the judgment."\(^\text{29}\) What the proposed Act as presently drafted does not do is clearly instruct the court to review the public impact statement and related documents for the purpose of making the essentially procedural determination that there has been an adequate explanation by the Department of the considerations that have led it to propose the particular consent settlement. Instead, the specific language of the Act relating to judicial approval of the proposed decree looks only in the direction of a substantial judicial second-guessing of the Department's decision to settle, which, as we have suggested, is something the court is largely unable to do. The Act should have focused the court's attention more on the adequacy of the Department's description of its decision-making process (as reflected in the public impact statement and related documents on file with the court), and less on the merits of the particular result of that process.

### B. Protection of Non-Party Interests

Since the injunction and divestiture provisions of a consent decree can substantially affect the economic interests of non-party suppliers, customers, and competitors of the consenting defendant, any complaints on behalf of these interests should properly be heard by the court in considering whether a proposed decree is in the public interest.  

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\(^{28}\) S. 782, 93d Cong., 1st Sess. § 2 (1973) (as passed by the Senate).

\(^{29}\) Id., providing:

"(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that entry of that judgment is in the public interest as defined by law. For the purpose of this determination, the court may consider—

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

"(2) the public impact of entry of the judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint.

Id.
interest as defined by the antitrust laws. For example, in the *Blue Chip Stamp* case brought against a trading stamp company and its backers the court withheld its consent from a proposed decree after considering the effects that the relief provisions of the decree would have on smaller retail stores using the stamps. The proposed Act enables the court to protect the competitive interests of third parties by providing a whole panoply of procedural mechanisms for the development of a factual record.

In our view, however, the Act goes much too far in inviting the court to permit full intervention by third parties in government antitrust litigation. There is the attendant danger that they will thereby obtain an effective veto power over the government's conduct of the litigation, or, at least, the ability to delay settlement through skirmishing before the trial court and subsequent resort to the appellate courts. Normally *amicus* status will suffice for third parties, and in the rare event that the court should desire a third party to present evidence, intervention should be strictly limited to the purposes for which the court has determined it to be desirable.


31. S. 782 (as passed by Senate) provides in part:

"(f) In making its determination under subsection (e), the court may—

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

"(2) appoint a special master, pursuant to rule 53 of the Federal Rules of Civil Procedure, and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual group or agency of government with respect to any aspect of the proposed judgment or the effect thereof in such manner as the court deems appropriate;

"(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to rule 24 of the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

"(4) review any comments or objections concerning the proposed judgment filed with the United States under subsection (d) and the response of the United States to such comments or objections;

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

To be sure, the Senate Report indicates that the court should "ad-
duce the necessary information through the least complicated and
least time-consuming means possible," preferably "on the basis of
briefs and oral argument," but this helpful legislative history may
not prevent the mischief that could arise from the expansive lan-
guage of the Act itself.

C. Disapproval of Grossly Inadequate Decrees

The third situation in which the court has a significant affirm-
ative role in the consent decree process is when the provisions of the
proposed settlement grossly deviate from the relief contemplated by
the Department's original complaint. In this unusual situation the
court's role may go beyond the procedural function of requiring the
government to explain how it reached its decision that the settle-
ment was acceptable. In such a case, hearing no satisfactory explana-
tion, the court may well have to make the substantive determina-
tion that the public interest in effective antitrust enforcement
would be better served by a refusal to accept the settlement at all.
(In the same way, the court's decision to reject a consent decree
because of its adverse effect on third parties would be a "substan-
tive" judgment about the merits of a decree.)

This aspect of the court's function in the consent decree process
can be illustrated by the famous AT&T-Western Electric decree. In
1949 the Justice Department charged AT&T and its subsidiary,
Western Electric, with monopolizing the manufacture and sale of
telephone equipment in violation of the Sherman Act. The suit was
based on a four-year FCC investigation specifically authorized by
Congress, and the basic relief sought was the separation of Western
Electric from AT&T and its dissolution into three competing manu-
factoring concerns. In 1956 the suit was settled with no divestiture
and without several other major forms of relief that had originally
been sought, such as a requirement of competitive procurement of
equipment by AT&T. The primary relief obtained related to com-
pulsory licensing of Bell System patents.

The Antitrust Subcommittee of the House Judiciary Committee
concluded after investigation in 1959 that in entering the consent
decree the government had abandoned "what was at the heart of its
case, namely, the AT&T-Western Electric relationship and the ef-

32. S. REP. No. 298, supra note 3, at 6.
fort to sever Western Electric from the Bell System or otherwise limit its role as a virtually exclusive supplier to the system.\textsuperscript{34} The Subcommittee regarded the decree as "devoid of merit" and as a "blot on the enforcement history of the antitrust laws."\textsuperscript{35}

Under the regime of the proposed Antitrust Procedures and Penalties Act the district court to which the AT&T-Western Electric consent decree was presented for approval would be required to examine the decree with considerably more rigor and attention to the public interest than the court evidently did in 1956. If the court were to reach the same conclusion about the merits of the decree as the House Subcommittee, it should refuse to approve the decree.

One result of that disapproval might be further consent negotiations and a better decree. On the other hand, the case might go to trial and be either won or lost by the government. If won, then the original theory of the government would be vindicated and more adequate relief would be available without the need for the defendant's consent. If lost, then the government would not be entitled to any relief, even the weak relief that would have been obtained in the rejected consent decree, and by definition the public interest would not have suffered.

The third possible outcome of judicial disapproval of the decree—and one that can never be ignored by the court—is that the defendant refuses to re-enter consent negotiations and the government declines to prosecute further. In that event, the court would presumably dismiss the action without prejudice, as rule 41 of the Federal Rules of Civil Procedure appears to empower it to do.\textsuperscript{36} If this happens, there will be no relief at all, but there will also be no consent decree to establish a legal or practical obstacle to prevent a future Attorney General, with different ideas about antitrust enforcement, from bringing a new action based on the same theory as the original one and perhaps getting more effective relief. In our

\textsuperscript{34} Antitrust Subcomm. of the House Comm. on the Judiciary, 86th Cong., 1st Sess., Consent Decree Program of the Department of Justice 39 (Comm. Print 1959).

\textsuperscript{35} Id. at 290, 293.

\textsuperscript{36} Fed. R. Civ. P. 41 provides inter alia:

(a) Voluntary Dismissal: Effect Thereof. . . .

(2) By Order of Court. . . . [A]n action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

\textit{Id.}
example, if the court concludes that the AT&T-Western Electric consent decree is grossly inadequate to remedy the violations complained of, then the public interest would be better served by keeping the option of a future action open and sacrificing the inadequate relief in the decree, rather than embracing the decree and raising a permanent umbrella of antitrust protection over the fundamental AT&T-Western Electric relationship. 37

The trouble with the proposed Act is that it does not focus the court's attention on the critical issue of the degree of disparity between the relief contemplated by the complaint and the relief obtained in the decree, 38 and it does not delineate the appropriate circumstances for judicial disapproval of a decree on the ground of gross disparity. As the foregoing analysis suggests, a court normally should refuse to enter a decree only when it is so grossly inadequate (or so damaging to the competitive interests of third parties) that it would be preferable to have no decree at all. That is the basic choice, because the court cannot compel the defendant to consent to any particular decree, nor the government to prosecute its case, even though it may speculate as to what either party may do if the decree is rejected. While various provisions of the Act implicitly recognize these limitations on the court's substantive role in approving or disapproving a consent decree, 39 the Act does not contain an explicit statement of the standard that should guide the court in performing that role.

**CONCLUSION**

Consent decree practice has been described as moving in “an orbit in the twilight zone between established rules of administra-

37. Interestingly, the House Subcommittee found that while counsel for AT&T would have been happy with the dismissal that had been suggested by some Antitrust Division staff members who were opposed to the settlement, counsel also indicated that they preferred the proposed settlement to a dismissal without prejudice. Antitrust Subcomm. of the House Comm. on the Judiciary, 86th Cong., 1st Sess., Consent Decree Program of the Department of Justice 90 (Comm. Print 1959).

38. As mentioned previously, the Act does not expressly require that the Department's impact statement explain discrepancies between the complaint and the decree. See note 14 supra.

39. For example, it is clear that the Act is not intended to enable the court to attempt to force the government to trial for the benefit of private plaintiffs. See S. Rep. No. 298, supra note 3, at 6-7; 119 Cong. Rec. 13,928 (daily ed. July 18, 1973).
tive law and judicial procedures." That is where, because of its subtlety and complexity, consent decree practice will always be. But the implied rebuke contained in the term "twilight" is one that is undeserved in the overwhelming majority of cases. While the Antitrust Procedures and Penalties Act could be improved in several respects, this legislation will add some sunlight to consent decree practice, and bolster confidence in a basically sound process that comes to general public attention only in the rare case when something goes seriously wrong.