Judicial Review of Justice Department Consent Decrees:

Is the Tunney Act Glass Half-Empty or Half-Full?

Remarks By

Jay L. Himes
Chief, Antitrust Bureau
Office of the New York Attorney General

COMPTEL PLUS
Spring Convention and Expo
Las Vegas, Nevada

February 28, 2007
Judicial Review of Justice Department Consent Decrees:

Is the Tunney Act Glass Half-Empty or Half-Full?

By Jay L. Himes

I will first speak briefly to the antitrust consent decree background that led Congress to pass the Tunney Act in 1974. After that, I will address the Court’s role under the statute, and the Act’s importance generally in the competitive landscape.

Consent Decree Background

The nation’s first federal antitrust law is the Sherman Act, which Congress passed in 1890. The law itself did not produce very much immediate antitrust enforcement at the federal level. But during the first decade of the 20th century, in the administrations of Presidents Roosevelt and Taft, federal antitrust enforcement picked up. The Justice Department’s use of consent decrees to settle antitrust cases, which are submitted to the court for approval, began back in that early period of activity, about 100 years ago.

On the order of 80% of Justice Department civil antitrust cases came to be settled by consent

---

1 Chief, Antitrust Bureau, Office of the New York Attorney General. The views expressed are those of the author, and do not represent the views of the Office of the New York Attorney General, or of the Office’s Antitrust Bureau.


4 See United States v. Otis Elevator Co., Docket No. 13884 (C.C.N.D.Cal. June 1, 1906), published in Decrees and Judgments in Federal Anti-Trust Cases July 2, 1890 – January 1, 1918 107 (1918); Antitrust In Action, supra n.3, at App. D.
The practice, however, faced criticism from antitrust scholars and commentators over the years. The authors of a landmark study, prepared for Congress in 1940, described the consent decree process this way:

In theory [the judge] . . . is supposed to lay bare the questions in controversy, and in informed judgment satisfy himself that the agreement does justice between the industry and the public. In fact, his role is ceremonial; he brings to the accord a passive spirit and his imprimatur. The adverse parties have been in protracted conference; they have arrived at the terms of settlement; they confront the judge with a fait accompli. The jurist has only casual knowledge of the issues; he lacks facilities for informing himself; he has no ready norms for testing the fairness of the provisions. He asks a few perfunctory questions; he may make a minor change or two. The lawyers for the Government appear satisfied. He accepts the instrument on faith.6

A 1959 congressional report similarly called judicial consent decree approval “a matter of purely formal routine,”7 and sharply criticized the overall secrecy of the Justice Department’s program.8 Thereafter, the Justice Department adopted a practice of issuing a press release upon the filing of a proposed consent decree with the court, and of affording interested parties an opportunity to comment or object before seeking court approval. The Department also reserved to itself a 30-day period within which to withdraw its consent.9

---


7 1959 Subcommittee Report at 14. See also id. at x.

8 Id. at 12-14, 25-26. Indeed, the House Antitrust Subcommittee concluded that “[t]he consent decree practice has established an orbit in the twilight zone between established rules of administrative law and judicial procedures.” Id. at 15. See also 119 Cong. Rec. 24597, 24598 (July 18, 1973) (statement of Sen. Tunney) (“[t]he history books are replete with instances of antitrust settlements hammered out behind closed doors completely out of the public view, and with virtually no regard for the requisites of due process”).

Congress Adopts the Tunney Act

Not until 1974, however, did Congress impose a statutory framework on the Justice Department’s practice or enhance the court’s review authority. Disclosures in the wake of the Watergate scandal suggested that Nixon administration officials may have settled a merger case against IT&T in exchange for funding the Republican National Convention.\(^\text{10}\) Congress responded by enacting what has come to be known as “the Tunney Act” to shine light on the Justice Department’s antitrust consent decree process.\(^\text{11}\)

A leading witness, testifying in support of Senator Tunney’s bill, was a judicial luminary, Circuit Court Judge J. Skelly Wright. Judge Wright reminded that Antitrust Division officials are neither omniscient nor infallible.\(^\text{12}\) In approving a particular consent decree, “the Justice Department attorneys may overlook certain issues, ignore certain concerns, or misunderstand certain facts.”\(^\text{13}\) Judge Wright further cautioned that the defendants in antitrust matters often “wield great influence and economic power. They can often bring significant pressure to bear on Government, and even on the courts, in connection with the handling of consent decrees.”\(^\text{14}\)

---

\(^{10}\) The *ITT* Dividend, *supra* n. 6, 73 Colum. L. Rev. at 603-06.


\(^{13}\) 1973 Senate Hearings at 146, *reprinted in* 9 *Federal Antitrust History* 6592.

\(^{14}\) 1973 Senate Hearings at 147, *reprinted in* 9 *Federal Antitrust History* at 6593. *See also* 119 Cong. Rec. 3449, 3451 (Feb. 6, 1973) (statement of Sen. Tunney) (“[p]ut simply, the bigger the company, the greater the leverage it has in
Thus, under the Tunney Act, whenever the Justice Department proposes to settle an antitrust case, the court – not the Justice Department, and not the merger parties – must determine whether the proposed settlement is “in the public interest.” 15

To set in motion this judicial review process, the Tunney Act directs that, before an antitrust consent decree may be approved, the Justice Department must explain the decree in something called a “competitive impact statement,” which is published publicly. 16 Then, interested persons may submit comments on the proposed decree, to which the Justice Department itself typically responds. 17 At this point, the Justice Department may ask the court to approve the proposed consent decree. In connection with these proceedings, the Tunney Act court may hold hearings to receive evidence from government officials or experts witnesses, or appoint a special master or outside consultants to aid its public interest determination. 18 The court may also permit interested parties to participate. 19

As Senator Tunney said at the time, the law is intended to “make our courts an independent force . . . in reviewing consent decrees” and to “assure that the courtroom . . . becomes the final arbiter in antitrust enforcement.” 20 In a leading early Tunney Act ruling, Judge Greene in the AT&T

16 15 U.S.C. § 16(b) & (c).
17 15 U.S.C. § 16(b) & (d).
19 15 U.S.C. §16(f) (3). The Act’s provisions permitting interested persons to participate in the public interest determination are intended to go beyond the court’s authority to grant intervention under Rule 24 of the Federal Rules of Civil Procedure. 9 Federal Antitrust History at 6536.
case, emphasized that, by passing the new law, Congress sought to eliminate “judicial rubber stamping” of Justice Department proposals, and, instead, to cement the court’s role as “an independent check upon the terms of decrees negotiated by the Department of Justice.”

Judge Greene had the right idea. However, other court decisions eroded the judicial function under the Tunney Act, and adopted, instead, a review standard that was much more deferential to the Justice Department’s settlement position. In a frequently quoted ruling, the federal appeals court in San Francisco said that the Justice Department’s settlement should be approved so long as it was “within the reaches of the public interest”– thus effectively diluting the “in the public interest” language of the statute itself. Still later, in the the first Microsoft case, the appeals court in Washington said that the court should approve a consent decree unless doing so would make “a mockery of judicial power.”

These judicially-developed standards of review denied any significant role for the courts. It was a rare court, indeed, that declined to approve a Justice Department consent decree. As a result, in 2004, Congress amended the Tunney Act to “correct[]” the law’s “misinterpretation” by

---


the courts.\textsuperscript{25} Congress legislated specifically to drive home that the judicial review function is not – and was never intended to be – a paper tiger.

**The 2004 Tunney Act Amendments**

The changes that Congress made in 2004 are intended to “restore” the federal court’s review authority to assure that proposed consent decrees “are good for competition and consumers.”\textsuperscript{26} The Tunney Act thus provides that, in making its public interest determination, the court must – “shall” – “consider” various enumerated factors. Among these factors are:

(A) the competitive impact of [the] judgment . . . and any . . . competitive considerations bearing upon the adequacy of [the proposed consent] judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint . . . \textsuperscript{27}

The 2004 amendments made it mandatory – not merely discretionary – for the court to take these considerations into account. Senator Kohl explained the reason for this change:

Requiring, rather than permitting, the court to examine these factors will strengthen the review that courts must undertake of consent decrees and will ensure that the court examines each of the factors listed therein. Requiring an examination of these factors is intended to preclude a court from engaging in “rubber stamping” of antitrust consent decrees . . . \textsuperscript{28}

Requiring, rather than permitting, review of a series of enumerated factors, the Senator added, represents Congress’ intent to “restor[e] a robust and meaningful standard of judicial review . . .”\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{26} 150 Cong. Rec. S3615 (Apr. 2, 2004) (statement of Sen. Kohl). See also id. (statement of Sen. Kohl) (the amendments “will restore the original intent of the Tunney Act, and make clear that courts should carefully review antitrust consent decrees to ensure that they are in the public interest”).
\item \textsuperscript{27} 15 U.S.C. § 16(e)(1)(A) & (B).
\item \textsuperscript{28} 150 Cong. Rec. S3618 (Apr. 2, 2004).
\item \textsuperscript{29} Id.
\end{itemize}
Interestingly, this particular statutory change reversed a 1973 change – made in response to Justice Department criticism – at the time of the Tunney Act’s enactment.30

The central purpose of the 2004 changes was to reaffirm judicial empowerment. By the amendments, Congress intended the courts to “undertake meaningful and measured scrutiny of antitrust settlements to insure that they are truly in the public interest . . . .”31 At the same time, the legislative history repeatedly rejects any notion that the courts should simply defer to the DOJ.32

The Court’s Role

If one reads the words of the Tunney Act and the legislative history of both the 1974 law and the 2004 amendments, you could come away thinking that courts will have an important role in making sure that anticompetitive mergers do not take place, and in protecting the benefits of competition for the public at large. There is not, however, much in the experience to date to confirm that assessment, although – and this is an important qualification – the effect of Congress’ recent amendments remains to be seen. Thus far, no court has decided just how much Congress


changed the judiciary’s role.

As I said earlier, only rarely have Tunney Act review courts declined to approve a Justice Department settlement because it was not in the public interest.\textsuperscript{33} The most controversial settlement of all – that involving Microsoft in 2001 – produced tens of thousands of public comments, which included extensive opposition from sophisticated industry participants and commentators.\textsuperscript{34} The District Court approved the settlement’s substantive terms nonetheless, and the Court of Appeals affirmed.\textsuperscript{35}

In short, the courts have been reluctant to second-guess the Justice Department’s assessment that its negotiated settlement appropriately protects the public. The concern producing this disengaged judicial approach really is this: in deciding whether to challenge a merger or other conduct under the antitrust laws, the Justice Department exercises prosecutorial discretion. The discretion affects whether to charge a violation at all, and if so, the settlement terms on which the Justice Department is prepared to resolve the violation that it has alleged.

Courts are themselves loathe to review this exercise of authority by the executive branch. The judiciary simply has not been inclined to re-mold the Justice Department’s complaint into a new case, even though Tunney Act commenters may protest that the violation alleged by the Justice Department is too narrow or otherwise inappropriate.\textsuperscript{36} Moreover, the Justice Department itself can

\textsuperscript{33} See n. 24, supra. For pre-Tunney Act cases, see United States v. Blue Chip Stamps Co., 272 F. Supp. 432 (C.D. Cal. 1967), aff’d sub nom. Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968) (consent decree was submitted three times before approved); United States v. Pan American World Airways, Inc., 1959 Trade Cas. (CCH) ¶ 69,300 (S.D.N.Y. 1959) (directing parties to try the case); The ITT Dividend, supra n. 6, 73 Colum. L. Rev. at 610-15.

\textsuperscript{34} United States v. Microsoft Corp., 231 F. Supp. 2d 144, 151 (D.D.C. 2002) (noting that 32,392 comments were received), aff’d sub nom. Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004).

\textsuperscript{35} The District Court required only that the parties include an express provision recognizing the court’s authority to act \textit{sua sponte} to enforce the consent decree. United States v. Microsoft Corp., 231 F. Supp. 2d at 201-02.

\textsuperscript{36} See Microsoft I, 56 F.3d at 1459 (the Tunney Act does not authorize the court to “construct [its] own hypothetical
be expected to argue that constitutional separation of powers principles bar judicial oversight, except perhaps in the most unusual of circumstances.\footnote{See Maryland v. United States, 460 U.S. 1001, 1004-06 (1983) (Rehnquist, J., dissenting); Heckler v. Chaney, 470 U.S. 821, 831 (1985) (noting that “an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion,” citing, among other authorities, Confiscation Cases, 74 U.S. (7 Wall.) 454 (1869)).}

For this reason, the Justice Department regards the Tunney Act as a sort of crazy relative up in the attic.\footnote{See generally 1973 Senate Hearings at 93 (testimony of Thomas E. Kauper) (arguing that the bill’s “extensive and rather undefined judicial review . . . would seriously disrupt the settlement process, impair [the Antitrust Division’s] ability to obtain meaningful settlements, delay antitrust relief in cases having direct bearing on the health of our economy, and unnecessarily require the use of Department and judicial resources”), and 1973 House Hearings at 62 (testimony of Deputy Assistant Attorney General Bruce B. Wilson) (arguing that the bill “will seriously disrupt settlement proceedings in the courts, and weaken [the Antitrust Division’s] ability to obtain consent decree settlements from defendants”), \textit{reprinted in} 9 Federal Antitrust History at 6576, 6634. The Justice Department’s resistance to oversight of its antitrust consent decree program is longstanding. \textit{See} 1959 Subcommittee Report at xiii (noting that the “extent to which the Department of Justice went to withhold information from the committee in this investigation is unparalleled in the committee's experience”); \textit{see also} \textit{id.} at ix, xix.} It’s someone you can’t get rid of – Congress, after all, has legislated – but it’s not someone that you go out of your way to showcase.

**The Pending Telecom Tunney Act Proceedings**

Bearing in mind this experience since 1974, many of us are watching with interest to see how the court in Washington, D.C. deals with the settlements in the Verizon/MCI and SBC/AT&T mergers. Let me quickly summarize where that stands.

The Justice Department undertook a lengthy antitrust investigation after these two multi-billion deals were announced a couple years ago in close time proximity to each other. The New York Antitrust Bureau, which I head, began its own investigation into the Verizon/MCI deal. The New York Attorney General has long advocated for competition in the telecommunications industry, and it appeared to us that the Verizon/MCI transaction represented a step backward towards re-concentrating an industry that the judiciary and Congress sought to make more
competitive. The same could be said, of course, for the SBC/AT&T merger, but that deal, in itself, had a lesser impact in New York.

The Justice Department’s investigation eventually produced antitrust complaints and settlements directed to only a very narrow slice of the telecommunications industry. Briefly, federal antitrust officials concluded that there likely would be anticompetitive effects in “local private lines” (or “special access”) services, offered to large and medium size businesses or government customers.\(^{39}\) The analysis goes like this:

At any given commercial building, one can identify the telecommunications providers. At some buildings in the Verizon or SBC footprints, the only two providers are the two merger partners themselves – Verizon and MCI on the one hand, or SBC and AT&T on the other. Insofar as each of those individual buildings may be thought of as a relevant market under the antitrust laws, then the two deals present a situation where you go from two competitors in that “market,” pre-merger, to only one, post-merger. This is what antitrust practitioners call a “merger to monopoly.”

For antitrust enforcers, a merger to monopoly is very bad. It’s hard to escape the conclusion that such a transaction will raise prices to customers. So, this is a scenario in which antitrust officials are likely to intervene, either to block the transaction altogether, or to require a remedy that preserves the pre-merger state of competition.\(^{40}\)

The Justice Department identified buildings like this – which are referred to as 2-to-1 buildings – throughout the country. Its remedy for the condition is to require that

---


telecommunications access to 2-to-1 buildings be made available to another competitor, post-merger, via divestiture. That is the settlement that the Justice Department has submitted to the court in Washington for approval.\footnote{Proposed Final Judgments, dated October 27, 2005, in United States v. SBC Communications, Inc., Civil Action No. 05CV2102 (EGS) (D.D.C.), and United States v. Verizon Communications, Inc., Civil Action No. 05CV2103 (EGS) (D.D.C.).}

We in the New York Attorney General’s office, and industry participants as well, think that this approach misses the forest for the trees, insofar as protecting competition in the telecommunications industry is concerned. We could run an entire program around that thesis, and I’m not going to develop it here today.

The on-going Tunney Act proceedings before the court in Washington raise several narrower questions. One is whether the local private lines “market” that the Justice Department posits – which consists of individual buildings – comports with the way that businesses operate in the real-life telecommunications world. This is important because the alleged market cannot simply be contrived, or gerrymandered, to justify a settlement.\footnote{See Brown Shoe Co v. United States, 370 U.S. 294, 336-37 (1962) (the market must “both correspond to the commercial realities of the industry and be economically significant,” quoting American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 398 (S.D.N.Y. 1957)).}

New York maintains that this approach does not faithfully depict reality, and that, in consequence, the Justice Department is not remediying anything that matters in the real world. The public interest, in our view, is not served by creating a straw-person, and then offering up voodoo medicine to preserve its health.

Beyond that, however, New York and interested industry participants argue in the court proceedings that, even on its own terms, the Justice Department’s remedy cannot protect the public interest for other reasons. For example, although the Justice Department found a number of 2-to-1
buildings throughout the country, it filtered out of its remedy more than 50% of those 2-to-1 buildings. The filtering out took place because the Justice Department concluded that, for these particular buildings, entry by new competitors, post-merger, could not be excluded as a possibility. How the Justice Department went about reaching this conclusion is a black box.

The Department has not presented to the court the universe of 2-to-1 buildings that it began with. It similarly has not presented the data needed to allow the court or anyone else to replicate the exercise that produced the final list of buildings that are subject to its remedy.

To give you a more concrete picture of what this means, let me refer specifically to New York. There, the Justice Department’s proposed remedy calls for divestiture of access at 17 commercial buildings in all of the 5 boroughs comprising the City of New York, and a total of 38 buildings in the entire state. This is the remedy in a transaction where Verizon took out its most significant competitor for business customers in New York. Across the entire United States, in the Verizon service regions only 356 commercials buildings are involved.

As yet, the Washington court has not decided whether the Justice Department’s two settlements are in the public interest.

**Conclusion**

Although a consent decree represents a negotiated settlement, it is not merely a contract between the parties. The decree’s approval is a judicial act by a branch of our government. It is, therefore, imperative that the court avoid allowing the decree to become “an instrument of wrong”

---

43 See Appendix A to the Proposed Final Judgment in United States v. Verizon Communications, Inc., Civil Action No. 05CV2103 (EGS) (D.D.C.). The 21 additional buildings outside the City of New York are all in the City’s metropolitan area.

44 Id.
to the public. At the same time, however, too much judicial review will dilute the incentive of merger parties and other antitrust defendants to negotiate, rather than litigate, and thereby impair the effectiveness of the consent decree as an enforcement tool.

Despite this tension, the judicial review function must be real. Otherwise, the Tunney Act will fail in its mission to guard against not only overt mis-use of the government’s exercise of prosecutorial discretion, but also against Justice Department action that fails to protect the public interest, albeit inadvertently.

In this respect, antitrust is like many areas of the law. It achieves compliance by holding out the prospect of robust enforcement and judicial oversight. Adherence to statutory obligations is thus achieved by “dang[ing] before the many the fate of the few.”


46 See, e.g., Antitrust Consent Decree Review, supra n. 6, 65 Antitrust L. J. at 37-40; 1959 Subcommittee Report at 24 (noting that too lax a consent decree program “tends to convert antitrust violation into a calculated business risk”).

47 Antitrust in Action, supra n.3, at 81.