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Judicial Regulation of Industry:
An Analysis of Antitrust Consent Decrees

Michael E. DeBow†

Since the first antitrust consent decree was entered some eighty years ago, consent decrees have been an important feature of the civil antitrust litigation conducted by the Department of Justice and the Federal Trade Commission. Roughly 70 percent of the Department's civil antitrust actions are settled by consent decrees in an average year, a percentage that has remained fairly constant since 1962.¹

This paper discusses the policies of the Department of Justice with respect to antitrust decrees, as well as the practical problems attendant to this method of settlement. Part I outlines the Departmental procedures—both internal procedures and those procedures required by statute—followed when consent decrees are used. Part II discusses the problems created by the use of long-term and "reg-

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¹ During fiscal years 1962-1974, 564 civil antitrust cases were terminated by the Department, 387—or 68.7 percent—by the entry of consent decrees. Milton Handler, Antitrust—Myth and Reality in an Inflationary Era, 50 N.Y.U. L. Rev. 211, 240 n.149 (1975). During fiscal years 1975-1981, 190 of the 268 cases terminated, or 70.9 percent, involved consent decrees. Eric J. Branfman, Antitrust Consent Decrees—A Review and Evaluation of the First Seven Years Under the Antitrust Procedures and Penalties Act, 27 Antitrust Bull. 303, 352-53 n.188 (1982). The statistics for fiscal years 1982-1985 are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases terminated</th>
<th>Consent decrees filed</th>
<th>Percentage terminated by consent</th>
</tr>
</thead>
<tbody>
<tr>
<td>1982</td>
<td>42</td>
<td>28</td>
<td>66.7</td>
</tr>
<tr>
<td>1983</td>
<td>20</td>
<td>15</td>
<td>75.0</td>
</tr>
<tr>
<td>1984</td>
<td>16</td>
<td>10</td>
<td>62.5</td>
</tr>
<tr>
<td>1985</td>
<td>22</td>
<td>18</td>
<td>81.8</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
<td>71</td>
<td>71.0</td>
</tr>
</tbody>
</table>

Source: United States Dept. of Justice, Antitrust Division Workload Statistics (undated) (on file with the University of Chicago Legal Forum).
ulatory" decrees—those that are broadly drawn and dependent on recurrent supervision by the courts and, by extension, the Department—as well as recent attempts by the Department to address these problematic decrees. Part III examines the 1982 settlement of the AT&T litigation as a contemporary example of a regulatory decree, and outlines a proposed legislative solution to certain problems raised by that settlement.

I. DEPARTMENTAL PROCEDURES FOR ENTERING, MODIFYING AND TERMINATING CONSENT DECREES

The Department will settle an antitrust case by consent decree when it believes that the decree will: "(1) stop the illegal practices alleged in the complaint, (2) prevent their renewal, and (3) restore and monitor competitive conditions." Use of consent settlements permits the Department to use its enforcement resources in the most efficient and productive manner, while benefiting the general public by eliminating the expense, delay and uncertainty of taking a case to trial.

Generally, the negotiation of a consent decree is initiated by the defendants, who must file a first draft of a judgment that is a good faith offer of settlement. Members of the Antitrust Division trial staff litigating the matter conduct further negotiations. Once the trial staff and the defendants agree to a proposed decree, it is forwarded through the Antitrust Division's Office of Operations to the Assistant Attorney General for Antitrust for approval.

Under the Tunney Act, sixty days before a proposed consent order is to become effective it must be filed with the court, along with a "competitive impact statement" ("CIS") developed by the Department and copies of any materials the Department considered "determinative" in agreeing to the order. The CIS must contain an explanation of:

1. the nature and purpose of the proceeding;
2. the practices or events giving rise to the alleged violation of the antitrust laws;
3. the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on

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2 Antitrust Division Manual IV-64 (1979).
competition of such relief;
(4) the remedies available to potential private plaintiffs
damaged by the alleged violation in the event that such
proposal for the consent judgment is entered in such
proceeding;
(5) the procedures available for modification of such pro-
posal; and
(6) the alternatives to such proposal actually considered
by the United States.⁵

The proposed order and the CIS must also be published in the
Federal Register no later than sixty days before the order’s effec-
tive date.⁶ In addition, the Department is required to run an-
ouncements of the proposed decree in at least two newspapers of
general circulation.⁷ During this period, interested parties have the
opportunity to review the proposed decree and submit comments
to the Department.⁸ After considering the comments filed with it,
the Department develops a written response thereto, which is then
filed with the court and published in the Federal Register.⁹

The court is then directed to determine whether the entry of
the consent decree is in the “public interest.”¹⁰ The court may con-
sider in this regard:

(1) the competitive impact of such judgment, including
termination of alleged violations, provisions for enforce-
ment and modification, duration or relief sought, antici-
pated effects of alternative remedies actually considered,
and any other considerations bearing upon the adequacy
of such judgment; [and]
(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 considera-
tion of the public benefit, if any, to be derived from a

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⁵ Id.
⁶ Id.
⁸ 15 U.S.C. § 16(d). As a result of provisions in the Tunney Act, and the Department's
internal policies for third-party comment and participation in the consent decree process,
antitrust does not appear to raise those questions of fairness that attend consent decree
practice in other areas of the law. See Douglas Laycock, Consent Decrees without Consent:
The Rights of Nonconsenting Third Parties, 1987 U. Chi. Legal F. 103 (discussing problems
arising from the use of consent decrees in employment discrimination cases).
determination of the issues at trial.\textsuperscript{11}

In making this decision, the court has available to it a fairly wide range of additional procedures—including the hearing of additional testimony, appointment of a special master or other outside consultants, and authorization of full or limited participation by interested persons.\textsuperscript{12}

The overall impact of the Tunney Act is open to debate.\textsuperscript{13} It is unclear whether the Act provides any powers to judges reviewing consent decrees beyond the equitable powers they already possess.\textsuperscript{14} Moreover, the Act’s notice and comment procedures are very similar to the procedures followed by the Department for about thirteen years prior to the adoption of the Act.\textsuperscript{15} At any rate, the Department has long since become accustomed to the operation of the Act, and has a nearly perfect record in demonstrating that its decision to accept a decree in any given case is in the public interest.

The Department does not regard the Tunney Act’s procedural requirements as applicable to the modification or termination of outstanding decrees.\textsuperscript{16} Instead, the Department follows its own

\textsuperscript{11} Id.

\textsuperscript{12} 15 U.S.C. § 16(f).

\textsuperscript{13} For surveys of the operation of the Act, see Janet L. McDavid, William A. Sankbeil, Edward C. Schmidt and Barry J. Brett, Antitrust Consent Decrees: Ten Years of Experience Under the Tunney Act, 52 Antitrust L.J. 883, 915 (1984) (study by Tunney Act Task Force of the ABA Section of Antitrust Law Committee on Civil Practice and Procedure, concluding that there is “little evidence that Tunney Act procedures have been abused or have imposed undue burdens on the parties,” and that the Act has not adversely affected the consent decree process; Note, The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974, 82 Mich. L. Rev. 153, 158-60 (1983) (criticizing courts’ deference to judgment of the Department and supporting of the “intense review” approach used by Judge Greene in the AT&T case); and Branfman, 27 Antitrust Bull. at 354 (cited in note 1) (reviewing 190 consent decrees subject to the Act filed between December 21, 1974 and July 25, 1981 and concluding that the Act “has had no substantive effect in the majority of cases”).


\textsuperscript{15} In 1961 the Department established notice and comment procedures in antitrust cases to be settled by consent decree. 26 Fed. Reg. 6026 (July 6, 1961), codified at 28 C.F.R. § 50.1 (1978). This policy was revoked after passage of the Tunney Act. Revision of Regulations Concerning Consent Judgments, 44 Fed. Reg. 57926-27 (October 9, 1979).

\textsuperscript{16} See Note, Modifications of Antitrust Consent Decrees: Over a Double Barrel, 84 Mich. L. Rev. 134, 141 (1985) (concluding that application of the Tunney Act to modifica-
procedures to ensure that third parties have the opportunity to comment and that the decree court is otherwise fully informed.\footnote{In a memorandum filed in 1982, tentatively agreeing to the termination of the consent decree in U.S. v. United Engineering and Foundry Co., 1952 Trade Cases \$67,378 (W.D. Pa.), the Department set forth the procedures followed with regard to terminations of consent decrees, reprinted in [1969-83 Current Comments Transfer Binder] Trade Reg. Rep. (CCH) \$50,443.} The initiative for such action may come from the Departmental attorneys enforcing the decree or from the defendant. Thereafter each defendant is questioned with respect to the possible termination or modification of the decree. After receipt of their responses, the staff may seek authority from the Assistant Attorney General to conduct a preliminary investigation to determine whether the proposed change is in the public interest. After the investigation is completed, the staff makes a recommendation to the Assistant Attorney General.

If modification or termination is approved by the Assistant Attorney General, the Department and the defendants file the necessary papers with the decree court. As a matter of policy, the Department requires the defendants to announce, at their expense, the proposed change in the \textit{Wall Street Journal} and the principal trade periodicals serving the affected industry, and solicit comments on the proposed change. Additionally, the Department publishes a notice in the Federal Register of the proposed change, also soliciting comments. The Department forwards copies of all comments received during the sixty-day comment period to the court, and generally responds to questions raised by the comments. The decree court is thus fully informed in making its final determination as to the modification or termination of the decree.

\section{Problems Arising from the Use of Consent Decrees}

\subsection{Obsolescence of Long-Term Decrees}

While both sides in most of the government's civil antitrust cases view settlement by consent decree as preferable to litigation, the use of the decree mechanism is not without potential drawbacks. The drawbacks are largely a function of the scope and duration of a given decree. Potential obsolescence is an obvious problem. A decree which made sense at the time it was entered may
simply be overtaken by changes in the affected industry and rendered a nullity or worse may have adverse effects on competitive vigor.

A decree may also be rendered obsolete by changes in our understanding of the way markets work and, as a result, changes in the law. For example, the Department long followed the policy of seeking perpetual decrees in cases against per se violations of the antitrust laws.\textsuperscript{18} However, scrutiny of several types of anti-competitive behavior recently has been changed from per se to "rule of reason" treatment.\textsuperscript{19} One notable example of this change is in the area of nonprice vertical restraints. The upshot is that firms bound by perpetual decrees based on an outmoded, per se view of non-price vertical restraints are thus prevented from adopting policies that, if adopted by rival firms, would now be analyzed under the rule of reason and most probably found lawful. Such a constraint on the methods of interfirm rivalry obviously denies consumers the benefits of market competition.

The Department has taken several steps to deal with the problem of obsolescence. In 1979, the Department adopted a policy generally limiting the life of any consent decree it enters into to no more than ten years.\textsuperscript{20} In addition, the Department attempts to tailor each decree to the facts of the particular case, bearing in mind the problems inherent in long-term decrees.

Perhaps more dramatically, over roughly the last six years the Department has actively sought to root out anticompetitive decrees. In 1981 Assistant Attorney General William F. Baxter cre-

\textsuperscript{18} In antitrust cases involving allegations of a per se illegal offense, the fact finder is required to undertake only "a limited inquiry to determine whether the alleged conduct was engaged in and, if so, whether it fell within the definition of conduct proscribed as per se unlawful. Once this determination is made, such restraints are presumed to be unreasonable under the per se rule . . . 'without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" ABA Antitrust Section, Antitrust L. Dev. 22 (2d ed. 1984), quoting Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). The most familiar example of per se illegal business behavior is a conspiracy among horizontal competitors to fix prices.

\textsuperscript{19} In contrast to the limited inquiry undertaken in cases of per se violations, trial of an alleged "rule of reason" antitrust violation requires the fact finder to weigh "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977). The ultimate question in a rule of reason case is whether the alleged restraint "is one that promotes competition or one that suppresses competition." National Soc. of Professional Engineers v. U.S., 435 U.S. 679, 691 (1978). Rule of reason scrutiny for non-price vertical restraints on competition was announced by the Supreme Court in the \textit{Continental T.V.} decision.

\textsuperscript{20} See ABA Antitrust Section, Antitrust L. Dev. 362 (cited in note 20).
ated the "Judgment Review Project" to begin a systematic review of the more than 1200 existing judgments in the Division's civil cases. In 1984, Assistant Attorney General J. Paul McGrath placed responsibility for decree review at the section level. The Department's goal has been to identify judgments that, because of the passage of time and as a result of changed legal and factual circumstances, are anticompetitive or for other reasons are not in the public interest. In such cases, the Department consents to court applications by defendants to modify or terminate the judgment in question. These efforts have yielded substantial results. By rough count, as of the end of August 1, 1987, approximately ninety judgments—all but five of them consent decrees—had been the targets of motions for modification or termination. The defendants, with the Department's consent, have been successful in all cases but one decided thus far.21

Besides outliving its usefulness, or the theoretical reason for its existence, a decree can generate serious problems if it involves the Department and the court in a long-term supervisory and oversight role. The difficulty here is best understood in contrast to antitrust consent decrees of a type labeled by Judge (then Professor) Richard Posner as "once-for-all" decrees.22 Such a decree "eliminates the violation by a change in the defendant's business that, once effected, permits the Department and the court very largely to wash their hands of the case."23

For example, most of the Department's merger cases are settled by consent decree; twenty-five of the thirty-one merger cases approved for filing under the Reagan Administration—as of November 15, 1986—have been settled in this way. Many of these decrees have been filed with, or shortly after, the complaint under the Department's "fix-it-first" policy. Under this approach, proposed mergers that raise anticompetitive problems are cured by the entry of a consent decree directing the divestiture of the problematic assets. Once the divestiture is complete, the order typically imposes no further burdens on the parties and requires no further action by the Department.24

23 Id.
In contrast to the once-for-all decrees stand the "regulatory" decrees, defined by Posner as those "whose terms are such as to establish a continuing supervisory relationship between the court in which the decree was entered and the defendant; more realistically, perhaps, between the Antitrust Division and the defendant." Examples include decrees that restrict future acquisitions by shifting to the plaintiff the burden of proving that the acquisitions will not restrain trade; that order patent licensing on a "reasonable royalty" or royalty-free basis; that limit the defendant to a stated amount of business; and that prohibit defendants from engaging in certain types of business.

Posner and Judge (then Professor) Easterbrook identified a total of 117 regulatory decrees entered in antitrust cases from 1906 to 1979. Sixty-four of these were "reasonable-royalty" decrees. Further, a large majority—fifty-eight of the sixty-four reasonable royalty decrees, and forty-two of the fifty-three other regulatory decrees—were entered during the period 1940 to 1959. Most attempts at judicial regulation of industry by means of antitrust decrees were thus the product of an earlier era in antitrust thinking.

Because of the problems that regulatory decrees create, the Department’s current policy is strongly to disfavor them. An exception to this policy is the modified final judgment in the AT&T litigation entered in 1982. This decree, however, is the result of

26 See, for example, U.S. v. Suburban Gas, 1962 Trade Cases (CCH) ¶70,439 (S.D. Cal.); U.S. v. National Homes Corp., 1962 Trade Cases (CCH) ¶70,533 (N.D. Ind.). See also discussion of Paramount decrees in text at notes 36-41.
27 See, for example, U.S. v. Chemical Specialties Co., Inc., 1958 Trade Cases (CCH) ¶69,186 (S.D.N.Y.); U.S. v. Borg-Warner Corp., 1962 Trade Cases (CCH) ¶70,461 (S.D. Tex.), vacated 1965-2 Trade Cases (CCH) ¶66,785 (S.D. Tex.).
29 See, for example, U.S. v. Lucky Lager Brewing Co., 209 F. Supp. 665, 667 (D. Utah 1962) (defendant agreed not to sell more than 39 percent of the quantity of beer consumed in the state of Utah); U.S. v. Schine Chain Theatres, Inc., 1948-1949 Trade Cases (CCH) ¶62,447 (W.D.N.Y.) (film distributor agreed not to license more than 60 percent of first run major feature films in certain towns).
32 Id.
33 Id.
the natural monopoly and regulatory elements of the affected markets. These characteristics distinguish this case from earlier cases, involving non-regulated markets, which were the subject of regulatory antitrust decrees.

Many of the older regulatory decrees were simply wrong, as a policy matter, at the time they were entered. Many decrees restricted competition in otherwise open markets, often by favoring rivals of the defendant. This aspect of regulatory decrees has been the subject of harsh criticism, such as Professor John McGee’s 1977 argument that

[i]n spirit and in letter, many decrees seem clearly to hurt consumers. Most of the trouble seems to arise because the Government is preoccupied with the structural and cast-of-characters theories of competition. There seems to be little recognition that consumer benefits are the goal and that competition is a process by which it can be reached. 35

Even if a regulatory decree is substantively correct, well-considered, and well-drafted, it may still create formidable problems. First, there is the limited ability of the parties and the court to see into the future to anticipate changes in the market. To the extent that unanticipated changes occur, the modification or termination machinery must be brought into play. The operation of this machinery is costly. There are direct outlays—e.g., attorneys’ time and publication costs—as well as indirect costs arising from the delay inherent in seeking changes in a decree. Indirect costs imposed by the need to seek decree modification or termination include the impairment of the defendant’s ability to respond quickly to marketplace changes, and thus its ability to be a robust competitor. Finally, there are costs generated by the process because of the limited knowledge and resources of the Department and the court in dealing with requests for termination or modification. Particularly where unregulated competitors are able to do the things the defendant seeks to do, it is probably wise to let market forces determine whether the defendant’s use of the practice is in the interest of the consumer. The alternative of attempting to make a

regulation-like judgment that the practice is reasonable or otherwise beneficial typically would be ill-advised.

The Department has agreed to the termination of several older regulatory decrees. Two of the most famous of the regulatory decrees, and their fate following Department of Justice review, are discussed next.

B. Cases in Point

1. The Paramount Decrees. During the late 1940s and early 1950s, eight major motion picture companies settled antitrust charges against them by agreeing to extensive regulatory consent decrees. These decrees, known as the “Paramount decrees,” changed the structure of the motion picture industry and imposed a variety of restrictions on the industry’s methods of licensing films for theatrical exhibitions. The decrees were targeted primarily at vertical integration. Five of the major motion picture exhibition companies were required to be divested from their parent distribution companies, and the new exhibition companies themselves were further required to divest about 1200 of their 3000 theaters. Further, the newly created exhibition companies were enjoined from acquiring a beneficial interest in any theater unless they could “show to the satisfaction of the Court . . . that the acquisition will not unduly restrain competition.” In the course of enforcing this provision, the decree court conducted approximately 500 hearings on proposed theater acquisitions between 1954 and 1980. This process obviously benefited owners of existing theaters in areas which the decree firms wished to enter, by raising the costs of entry and, in some instances, prohibiting entry altogether.

Distributor defendants were prohibited from entering into franchise agreements—agreements in which the distributor offers an exhibitor his entire output—in excess of one year, or entering into formula or master agreements. The decrees also provided for

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37 See U.S. v. Paramount Pictures, Inc., 1980-2 Trade Cases (CCH) 63,553 (S.D.N.Y.) (“a succinct accounting” by Judge Palmieri of his court’s “many years of labor under these decrees,” id. at 76,951).
38 Id.
39 Id. at 76,953.
40 Formula agreements require exhibitors to pay for a picture on the basis of how much
a number of licensing controls. Among these was a bar against price fixing and a requirement that the distributors license films on a non-discriminatory theater-by-theater basis. The decrees also prohibited block booking, in which the right to show a film is conditioned on an agreement to exhibit one or more other films.

The decrees have been strongly criticized. One commentator concluded that the decrees had “themselves become instruments for the restraint of trade,” primarily in their protection of owners of existing theaters, and should be discontinued.\(^1\)

The Paramount decrees were among the first targeted by the Judgment Review Project for scrutiny. After study, the Department concluded that it would support motions by the defendants for termination of the decrees. The Department then set about determining whether the defendants were in fact prepared to incur the costs involved in filing such motions, and found that most of the defendants were not willing to make this effort. This may have been the result of the 1980 modification of several of the decrees to provide for their termination in 1990. Accordingly, the Department concluded that it was not advisable to expend its resources in seeking on its own to terminate the decrees.

2. The Meat-Packers Decrees. A more successful review was conducted with respect to the so-called “Meat Packers” decrees.\(^2\) These decrees enjoined the five leading meat packers in the United States from holding direct or indirect interests in any public stockyard company, cold storage plant, stockyard terminal railroad or market newspaper. Defendants were prohibited from engaging in or acquiring any interest in the business of manufacturing, buying, selling or handling any of 114 enumerated food products or thirty other named articles of commerce. Defendants were also enjoined from selling meat at retail; from selling milk or cream; from using their distribution systems to handle any of the above articles; and from having more than a 50 percent interest in or control of any business engaged in handling any of these articles. Professor McGee characterized the decrees as animated by the belief that “low-

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\(^1\) Note, An Experiment in Preventive Anti-trust: Judicial Regulation of the Motion Picture Exhibition Market Under the Paramount Decrees, 74 Yale L.J. 1041, 1102 (1965) (arguing generally that the effectiveness of the distribution and divestiture clauses, as well as changes in the industry have "rendered the acquisitions clauses unnecessary," id. at 1103).

ering costs and prices, and increasing entry into new fields, are ‘anti-competitive’, because they may hurt some competitors. The consumer interest is ignored, or worse."

In this case, the defendants were interested in seeking termination of the decrees, which had been modified in 1980 to provide for termination in 1985. With the Department’s consent, the defendants were successful in arguing to the decree court that early termination was in the public interest. The decrees were thus terminated three years early, to the benefit of competition in the affected markets.

III. The AT&T Decree

It is difficult to overstate the scope and importance of the AT&T decree. Signed over five years ago, the decree required AT&T to divest its regulated local operating companies by January 1, 1984. AT&T did so by dividing its twenty-two Bell Operating Companies (“BOCs”) into seven regional holding companies (“RBOCs”). The decree allowed AT&T to keep the potentially competitive manufacturing and long distance businesses, as well as most of Bell Labs, to AT&T. The RBOCs received the local plant and facilities, as well as sufficient assets to establish a joint research and development organization. The decree was designed to foster competition in long distance by requiring the RBOCs’ local operating companies to provide, for all long distance companies, access to the BOCs’ local exchange networks that is equal to the access provided to AT&T.

The decree also limits the BOCs generally to providing local exchange telecommunications and exchange access services unless a waiver is obtained from the court. It is principally in this sense that the decree is correctly characterized as regulatory. The line-of-business restrictions in the AT&T decree and the related waiver process basically require the decree court—with the Department’s help—to regulate the RBOCs’ entry into new businesses. Under these provisions, waivers subject to conditions have been granted to allow the RBOCs into practically every business that they have sought to enter, other than information services, interexchange (i.e., long-distance) service, and telecommunications equipment.

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44 U.S. v. American Tel. and Tel. Co., 552 F. Supp. 131 (D.D.C. 1982). On Sept. 10, 1987, the AT&T court granted in part and denied in part motions by the Department and the BOC’s to modify the decree. An analysis of this lengthy ruling is well beyond the scope of this article.
manufacturing.

The decree's regulation by line-of-business was thought necessary because of two competitive dangers that may arise when firms that control natural monopolies and that are rate-regulated, such as the BOCs, participate in related competitive markets. The first danger arises when, in order to compete in adjacent markets, rivals require access to the rate-regulated, natural monopoly facilities—such as a BOC's local exchange network. Under such circumstances, the rate-regulated monopolist has the incentive (because its profit on monopoly facility is constrained by regulation), and may have the ability (because it owns the facility), to limit access to its monopoly facilities or to provide access only on discriminatory terms that disadvantage its rivals in the competitive market.

The second concern involves the potential for anticompetitive cross-subsidization. Under rate-of-return regulation, a monopolist may earn up to a set return on its investment in facilities used to provide the regulated service. The monopolist has an incentive, therefore, to include in its regulated rate base any investments or current expenses it may make in order to participate in a competitive market. In such circumstances, the monopolist can reduce the price it charges consumers in the competitive market and recoup the loss of income from customers of its monopoly services. Where this occurs, consumer welfare is harmed in two ways: (1) the monopolist drives more efficient rivals out of the competitive market and may ultimately obtain the power to raise prices in that market; and (2) consumers of the regulated monopoly service are charged more than the cost of those services.

The AT&T decree's equal access requirements are designed to foster competition in the interexchange and information services markets among companies other than the RBOCs. At the same time, by imposing limitations on the RBOCs' entry into non-telephone markets, the decree seeks to remove the RBOCs' incentive to retard competition in nonregulated markets.

The Department strongly believes that the decree has conferred significant benefits on American consumers. Since divestiture, the major aspects of the telecommunications industry have become more competitive. Innovative new products and services have been introduced at an unprecedented pace, often coupled with dramatic price reductions. On balance, both residential customers and business customers are paying less for their telephone service than they were prior to divestiture, by taking advantage of the new competitive environment.

The current decree regime has, however, resulted in a substan-
tial regulatory burden on the Department and the court. Between January 1984 and January 1987, the Department received approximately 160 BOC requests for waivers of the decree’s line-of-business restrictions. Analyzing many of these requests requires a major commitment of the Department’s staff and supervisory resources, and almost all of the requests require lengthy periods for third-party comments, Department decisions on whether to support the request and on what conditions, and court action on the waiver request.

Neither the Department nor the court sought or expected such a result when the decree was entered. Unfortunately, however, the complexities of the decree and the conflicting interests of AT&T, the BOCs, and other telecommunications firms have brought us to the point where the Department is, in effect, a regulatory body necessary for the administration of the decree.

A viable legislative solution to this problem was proposed in the 99th Congress, but was not acted upon. On June 19, 1986, Senator Robert Dole introduced S. 2565, the “Federal Telecommunications Policy Act of 1986,” to consolidate federal regulatory authority over the telecommunications industry in the Federal Communications Commission (“FCC”). The Act, which the Administration supported, would (a) require the FCC to promulgate a detailed set of regulations identical in substance to the consent decrees entered in the AT&T and GTE cases, (b) empower the FCC to remedy violations of the regulations, (c) empower the FCC to modify or rescind, and to grant exemptions and waivers from, the regulations at a later date, and (d) provide that conduct permitted by the FCC shall not be deemed to constitute a violation of any existing antitrust decree. The expectation was that after the Act passed, motions would be filed with the court to vacate the AT&T and GTE decrees, on the grounds that the continued existence of the decrees would be inconsistent with the regulatory authority given to the FCC by the Act.

The Department argued that a transfer of regulatory authority to the FCC would be desirable for a number of reasons. First, the FCC, unlike the Department, is a regulatory agency, possessed of a broad regulatory mandate from Congress, administrative expertise, procedural and remedial flexibility, and a staff capacity devoted to telecommunications regulation that is necessarily greater than the Department’s.

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Second, it is very difficult to coordinate the FCC’s enforcement of its statutory responsibilities with the Department’s and the court’s enforcement of the decrees. A unitary regulatory system can better ensure consistency between the decrees and all other telecommunications-related regulations, thus improving the ability of the U.S. telecommunications industry to grow and to compete successfully in world markets.

Indeed, the Act would allow the FCC to consider important factors in carrying out the decrees’ regulatory scheme that cannot now be addressed by the decree court itself, such as national security interests, the interests of local telephone users, and the significant role of telecommunications in international trade. Because the decrees were entered in order to settle antitrust lawsuits, which have the sole purpose of protecting competition, the court in drafting the waiver standard and the Department in enforcing the decrees have of necessity focused on competitive concerns.

The Department concluded that the proposed legislation was plainly constitutional and did not improperly intrude on the province of the courts to administer judicial decrees. This was not a “court-stripping” bill. Rather, Congress clearly has the power under the Commerce Clause to impose regulations such as those contained in the decrees, and a court, through an injunction or consent decree, cannot oust Congress from the exercise of powers that the Constitution assigns to the legislature. Indeed, the law is clear that if Congress changes the substantive law while a court order either is on appeal or has become final but remains executory—as these decrees are—then the courts must enforce the new substantive law as Congress has declared it. Congress could not, without raising separation of powers questions, enact legislation that operates directly on the AT&T and GTE decrees by vacating or modifying them statutorily, or that explicitly directs the outcome of future proceedings under the decrees. The proposed legislation would not have had this effect. Rather, the courts would have had an opportunity to decide whether the decrees should be vacated in whole or in part in order to reflect the changed legal circumstances and to avoid frustrating the comprehensive new regulatory scheme established by Congress.

Moreover, the proposed legislation would not change any operative provision of either decree. This was important in the Department’s decision to support the legislation because at the time the Department was not prepared to conclude that any particular changes in the decrees were justified.
Conclusion

Consent decrees have long been an important element of the federal government's enforcement of the antitrust laws. The frequent use of consent decrees to conclude government antitrust litigation does not appear to raise the same questions of fairness that arise in other areas of consent decree practice. This fact is largely the result of the operation of the Tunney Act and the Department of Justice's own policies that provide for third-party notice and comment in antitrust consent decree practice.

The Department's experience with consent decrees has been mixed, as a substantive matter. In the past, the Department too often sought and obtained decree provisions that hindered, rather than promoted, competition. In short, earlier attempts at judicial regulation of industry via consent decree often had perverse results. In the last few years, the Department has reviewed many of its outstanding consent decrees, and has worked with affected parties to seek termination of those decrees that were obsolete or otherwise anticompetitive in effect.

Under the AT&T decree, the Department continues to play an active role in the restructuring of the U.S. telecommunications industry. A number of problems exist with respect to the implementation and monitoring of the decree, however. A legislative response to these problems is probably preferable to the continued regulation of the industry by the Department and the decree court.