Washington and Lee Law Review

Volume 78 | Issue 2 Article 8

Spring 2021

Leaving Judicial Review with the Judiciary: The Misplaced Role of Agency Deference in Tunney Act Public Interest Review

Alexandra P. Clark
Washington and Lee University School of Law, clark.a21@law.wlu.edu

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Abstract

This Note explores the Tunney Act's mechanism for judicial review of consent decrees negotiated by the U.S. Department of Justice and merging parties to remedy alleged antitrust issues. The Tunney Act requires that the reviewing court only approve a consent decree if it is "in the public interest." This Note argues, however, that courts have improperly circumscribed their review by affording too much deference to the Department of Justice when reviewing these consent decrees. This deference subverts Congress's intent in imposing judicial review and allows the government and merging parties the opportunity to skirt meaningful judicial review. As such, this Note concludes that courts should reanimate their role in reviewing consent decrees under the Tunney Act by affording a lower degree of deference to the Department of Justice. It is the correct reading of both the statute and the legislative history, it does not pose an unconstitutional imbalance between the judicial and executive branches, and it is critical to containing the harmful effects of anticompetitive mergers.

* J.D. Candidate, May 2021, Washington and Lee University School of Law. Thank you to Professor Russell Miller for his advice and mentorship, and to the editors of the *Washington and Lee Law Review* for making this Note possible. Finally, thank you to my family, whose love and encouragement inspire me to make my goals a reality.

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INTRODUCTION

In July 2019, the Department of Justice (DOJ) approved a megamerger between two of the largest wireless carriers in the United States: Sprint and T-Mobile.[1] The merging companies received the DOJ's blessing by negotiating a consent decree,[2] containing terms with which Sprint and T-Mobile must comply to proceed as a merged entity.[3] Many, however, questioned the DOJ's wisdom in allowing further consolidation of the telecommunications market by negotiating this consent decree.[4] In fact, only five states signed on to the DOJ's settlement agreement with the companies.[5] Eighteen other states instead pursued litigation to enjoin the transaction.[6] Fourteen states

1. *See Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish*, U.S. DEP'T OF JUST. (July 26, 2019), https://perma.cc/C5XV-RUPL (last updated July 30, 2019) [hereinafter *DOJ Press Release*] (announcing the terms under which the DOJ and the companies agreed to settle in order to receive the government's approval of the deal).

2. Consent decrees are negotiated settlements between the enforcing agency and defendant(s), in which the defendant agrees to specific restraints on its future behavior in exchange for the government's agreement to terminate the case. C. PAUL ROGERS III ET AL., ANTITRUST LAW: POLICY AND PRACTICE 42 (4th ed. 2008).

3. *See id.* (stating that the consent decree requires that Sprint and T-Mobile divest Sprint's prepaid business to Dish Network and make certain accommodations to Dish so that it can emerge as a viable competitor to the combined firm); *see also infra* Part II (describing the DOJ's use of consent decrees for antitrust enforcement).

4. *See, e.g.*, The Editorial Board, *If You Own a Cellphone, You Should Worry About the T-Mobile-Sprint Deal*, N.Y. TIMES (July 26, 2019), https://perma.cc/P5EH-TRMQ ("[The DOJ's] contortions to approve the merger demonstrate once again that the federal government has lost interest in preventing corporate consolidation. Even the most obviously anti-competitive deals, like this union of two companies that have long been bitter rivals, are able to obtain the government's consent.").

5. *See DOJ Press Release*, *supra* note 1 (listing the participation of five state Attorneys General: Nebraska, Kansas, Ohio, Oklahoma, and South Dakota).

6. *See* Lauren Hirsch, *Texas and Nevada Are the Latest States to Defect from the Lawsuit Against Sprint/T-Mobile Deal*, CNBC (Nov. 25, 2019, 4:47 PM), https://perma.cc/SK2W-B9P5 (detailing the number of states that continued to pursue injunction of the merger in court, though four states have recently dropped their suits).

ultimately pursued an action against the parties in federal district court, alleging that the merger would substantially lessen competition in the relevant market.[7]

Criticisms of the DOJ's approval of the proposed merger centered around then-Assistant Attorney General Makan Delrahim, who managed the DOJ's antitrust arm.[8] Attention focused on Mr. Delrahim was appropriate given the DOJ's structure: the DOJ's antitrust head makes all final decisions within the division regarding whether to prosecute or settle major antitrust transactions.[9] The nature of this consolidated decision-making power, accompanied by the fact that Mr. Delrahim's position and the position's direct superior—the United States Attorney General—are appointed directly by the President, means that antitrust decision-making at the DOJ carries risk of political influence.[10] In the T-Mobile-Sprint deal, commentators accused Mr. Delrahim of succumbing to such influence: he worked to defend corporate interests over that of the public in shepherding the merger through the DOJ approval process.[11]

This is the point at which Congress envisioned the judiciary to intervene by enacting the Antitrust Procedures and Penalties

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7. *See* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 186 (S.D.N.Y. 2020) (listing the state plaintiffs in the action). Following a bench trial, the court denied the states' request to enjoin the merger. *See id.* at 189 (denying the injunction request because it disagreed with the states' case on predicted anticompetitive effects and the state of the market going forward).

8. *See* Katie Benner & Cecilia Kang, *How a Top Antitrust Official Helped T-Mobile and Sprint Merge*, N.Y. TIMES (Dec. 19, 2019), https://perma.cc/5EAJ-5NF7 (last updated Feb. 11, 2020) ("As the $26 billion blockbuster merger between T-Mobile and Sprint teetered, . . . Makan Delrahim . . . labored to rescue it behind the scenes . . . .").

9. *See infra* Part IV.A.

10. *See* Cass R. Sunstein, *Imagine That Donald Trump Has Almost No Control Over Justice*, N.Y. TIMES (Feb. 20, 2020), https://perma.cc/8PVB-KGNT (proposing that Congress transform the DOJ "into an independent agency, legally immunized from the president's day-to-day control").

11. *See* The Editorial Board, *Why Is the Justice Department Treating T-Mobile Like a Client?*, N.Y. TIMES (Dec. 20, 2019), https://perma.cc/HNC3-S9L4 ("Rather than defending the public interest, [Delrahim] was working to defend T-Mobile's interests.").

Act (the Tunney Act).[12] The Tunney Act requires that the DOJ— after having negotiated a consent decree with merging parties to settle the government's antitrust concerns—seek enforcement of the decree in a United States district court.[13] When deciding whether to enter a proposed consent decree into force under the Tunney Act, the court must determine whether the decree is "in the public interest."[14]

Congress enacted the Tunney Act to charge the judiciary with conducting an "independent"[15] review of the DOJ's decision to settle a merger inquiry, and, in so doing, ensure that the court does not dilute its review to mere "rubber stamping."[16] Courts, however, interpret their Tunney Act duty as one that requires a high degree of deference to the DOJ's "prosecutorial discretion."[17] Courts also interpret the Tunney Act review as one

12. *See* Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16(e) ("Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest."); United States v. Microsoft Corp., 56 F.3d 1448, 1451 (D.C. Cir. 1995) (referring to the statute as the "Tunney Act").

13. *See* 15 U.S.C. § 16(b) (stating that any proposed consent decree by the United States must be filed with the district court for review).

14. *See id.* § 16(e)(1) (providing that judicial approval is conditioned on the court's determination that entry of the decree is in the public interest). The Tunney Act applies to negotiated consent decrees that arise out of any alleged violations of the federal antitrust laws, not just those arising from anticompetitive mergers. *See id.* § 16(b) (mandating that "[a]ny proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws" is subject to the procedural requirements promulgated by the Tunney Act). Because most of the important caselaw developed under the Tunney Act has been specific to consent decrees regarding mergers, that will be the focus of this Note.

15. *The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary*, 93d Cong. 452 (1973) [hereinafter *1973 Tunney Act Hearings*] (remarks by Sen. John V. Tunney and Sen. Edward Gurney).

16. *See id.* at 196 ("[W]e want the courts to do more than they have done in the past. We want them to do more than just simply rubberstamp a decree.").

17. *See Microsoft*, 56 F.3d at 1459–60 ("The court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place."); *see also* United States v. SBC Commc'ns, 489 F. Supp. 2d 1, 39 (D.D.C. 2007) (stating that the *Microsoft* court "based its decision on constitutional concerns that overriding prosecutorial

that is narrow in scope—limited to the claims contained in the DOJ's complaint.[18] As a result, the DOJ often negotiates the consent decree prior to writing the complaint.[19] This allows it to game the review process: negotiate the settlement first and then craft a complaint tailored to the specific concerns addressed in the consent decree, ensuring a court's easy approval.[20] In so doing, the DOJ retrofits the complaint and skirts meaningful judicial review.[21]

The DOJ employed this strategy in its settlement in the T-Mobile-Sprint deal.[22] The DOJ filed an antitrust complaint against the merging parties to enjoin the transaction and simultaneously submitted a motion for court approval of the DOJ's proposed consent decree to settle the action and allow the merger to proceed.[23] By taking advantage of the court-created rule that judicial review is limited only to the claims that the DOJ resolved in the proposed consent decree, the government deprives the reviewing court of the opportunity to scrutinize the settlement in light of the public interest.[24]

The merger, which is now complete,[25] illustrates the problem with the judiciary's restrained interpretation of its role

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discretion to initiate antitrust suits infringes on the proper separation of powers"). The DOJ is the federal government's prosecuting body. *See* ROGERS ET AL., *supra* note 2, at 36–37 (explaining the federal antitrust law enforcement framework). Thus, courts speak of agency deference in this context as "prosecutorial discretion." *See* Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 372 (2010) (explaining that prosecutorial discretion is "a kind of *Chevron* inquiry").

18. *See infra* notes 123–125 and accompanying text.

19. *See infra* notes 124–125 and accompanying text.

20. *See infra* notes 126–128 and accompanying text.

21. *See infra* notes 126–128 and accompanying text.

22. *See DOJ Press Release*, *supra* note 1 (stating that the DOJ filed both the complaint and the proposed consent decree with the court on July 26, 2019).

23. *See id.* (noting that the DOJ sought to block the proposed transaction and, "[a]t the same time," filed a proposed settlement to resolve the government's concerns).

24. *See infra* notes 126–128 and accompanying text.

25. *See T-Mobile Completes Merger with Sprint to Create the New T-Mobile*, T-MOBILE USA (Apr. 1, 2020), https://perma.cc/5MGT-9UL6 ("[T-Mobile] announced today that it has officially completed its merger with Sprint Corporation to create the New T-Mobile, a supercharged Un-carrier

under the Tunney Act:[26] it allows the DOJ to retrofit complaints to match the consent decree and circumvent meaningful "public interest" review.[27] Thus, the court's continual abdication of its statutory duty to substantively engage in Tunney Act review deprives the public of assurance that only those settlements that are in the public interest are enforced.[28]

This Note, therefore, focuses on determining the appropriate level of agency deference that the judiciary should afford the DOJ when administering the Tunney Act's public interest review. Following this introduction, Part I of this Note describes the importance of the consent decree in government enforcement of the federal antitrust laws and the Tunney Act's role in that process. Part II identifies the judiciary's early interpretations of the Tunney Act's public interest standard, which produced caselaw prescribing a high level of deference to the DOJ during the review. Part III examines Congress's attempt to rectify this deferential review through its 2004 amendments to the Tunney Act. Part III details important legislative history that reveals the legislature's effort to double down on mandating exacting judicial review. Part III then proceeds by summarizing the negligible effect of the 2004 amendments on Tunney Act jurisprudence—where the caselaw stands today.

Part IV argues that courts have erroneously afforded too much deference to the DOJ in applying Tunney Act review. Part V supports the argument using these three sources: Congress, the U.S. Constitution, and antitrust policy. Part V offers the recent *United States v. CVS Health*[29] as evidence of a potential shift among the courts with regard to their role under the Tunney Act. This Note proposes that *CVS Health* sets forth a jurisprudential framework that future reviewing courts should

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that will deliver a transformative 5G network."). The district court approved the consent decree on April 14, 2020. *See* United States v. Deutsche Telekom AG, No. 19-2232, 2020 U.S. Dist. LEXIS 65096, at *24–25 (D.D.C. Apr. 14, 2020) (concluding that the consent decree was in the public interest).

26. *See infra* notes 123–125 and accompanying text.

27. *See infra* notes 126–128 and accompanying text.

28. *See infra* Part IV.

29. 407 F. Supp. 3d 45 (D.D.C. 2019).

adopt.[30] Finally, this Note concludes by proposing that courts reevaluate their role under the Tunney Act and apply an exacting review of the DOJ's proposed consent decrees. A scrutinizing Tunney Act review provides a meaningful check on the DOJ to ensure that the agency—acting under the country's executive authority[31]—is serving the public interest by "faithfully execut[ing]"[32] the federal antitrust laws.[33]

I. THE CONSENT DECREE AND THE TUNNEY ACT

The consent decree plays a critical role in the government's effective enforcement of federal antitrust laws.[34] The Tunney Act administers the procedures under which the DOJ must comply when seeking entry of these consent decrees.[35] Thus, in proposing changes to the interpretation of the Tunney Act's role in the consent decree process, this Note first assesses the power of the consent decree, the risks inherent to "cheap decrees,"[36] and the role of the judiciary in ensuring that only decrees advancing the public interest are entered into force.

A. *Federal Antitrust Enforcement: The DOJ and FTC's Concurrent Jurisdiction*

The Federal Trade Commission (FTC) and DOJ both enforce the federal antitrust laws, and each do so in part through the use of the consent decree.[37] Consent decrees are a frequently used, important method of enforcing the federal antitrust laws for both agencies.[38] However, their enforcement,

30. *See infra* Part V.
31. *See infra* notes 210–220 and accompanying text.
32. U.S. CONST. art. II, § 3, cl. 5.
33. *See infra* Part IV.A.2.
34. *See infra* Part I.A.2.
35. *See* 15 U.S.C. § 16(b) (listing the procedural requirements).
36. *See infra* Part I.B.1.
37. *See infra* Part IV.A.2.
38. *See infra* note 60 and accompanying text.

jurisdiction, and the procedure under which each agency must adhere when enforcing a consent decree are distinct.[39]

The FTC and DOJ share government enforcement responsibilities of federal antitrust laws.[40] Private plaintiffs also have standing to bring federal antitrust suits,[41] and state governments may sue under federal antitrust laws either alleging injury to the government or through *parens patriae* litigation.[42]

The federal antitrust enforcement scheme features overlapping—but not identical—authority by the FTC and DOJ.[43] Both the FTC and DOJ have jurisdiction to enforce the Clayton Act[44]—a civil statute that, among other things, prohibits anticompetitive mergers.[45] The DOJ has exclusive federal jurisdiction over the Sherman Act,[46] which contains both civil and criminal enforcement provisions, and the FTC has

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39. *See infra* Part IV.A.2 (explaining that the Tunney Act dictates consent decree procedures for the DOJ only).

40. *See* ROGERS ET AL., *supra* note 2, at 36–37 (stating that the DOJ and FTC share the federal responsibility for antitrust enforcement).

41. *See* Clayton Act of 1914 § 4, 15 U.S.C. § 15(a) (providing that any private party "injured in business or property by reason of anything forbidden in the antitrust laws may sue").

42. *See* ROGERS ET AL., *supra* note 2, at 36 (explaining that state governments have the option of either suing to enforce their own state antitrust laws or bringing federal antitrust lawsuits on behalf of state residents).

43. *See id.* (distinguishing FTC and DOJ jurisdiction).

44. Clayton Act of 1914, 15 U.S.C. §§ 12–27.

45. *See* ROGERS ET AL., *supra* note 2, at 36 ("Responsibility for Clayton Act . . . enforcement is shared by the [DOJ] and the Federal Trade Commission."); Clayton Act of 1914, 15 U.S.C. § 18

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

46. *See* 15 U.S.C. § 4 (stating the Attorney General's authority to "institute proceedings in equity to prevent and restrain" violations under the Sherman Act).

exclusive jurisdiction to enforce the Federal Trade Commission Act,[47] a purely civil statute.[48] Congress enacted the Federal Trade Commission Act to mirror the civil jurisdiction that the DOJ already retained through the Sherman and Clayton Acts "as well as to cover any loopholes in those statutes."[49] The statutory scheme only grants the FTC with the authority to enforce statutes that provide civil remedies; the FTC does not have authority to prosecute criminal antitrust violations.[50]

Thus, the FTC and DOJ both play an important role in enforcing the federal antitrust laws and both employ consent decrees as part of their strategy of effective enforcement.[51] Their diverging authority to administer the provisions of the statutes, principally the DOJ's civil and criminal jurisdiction versus the FTC's purely civil jurisdiction, is critical to Tunney Act jurisprudence.[52] Also telling, as explained in more detail in Part IV.A.2, *infra*, is that the Tunney Act only dictates the process by which the DOJ enforces its consent decrees, not the FTC.

B. *The Role of the Consent Decree*

The Hart-Scott-Rodino Act[53] provides the FTC and DOJ with a thirty-day window to review large corporate mergers before the transaction's closing.[54] During this period, either the

47. *Id.* §§ 41–58.

48. *See id.* § 45(a) ("The Commission is hereby empowered and directed to prevent [parties] from using unfair methods of competition in or affecting commerce . . . ."); *see also* ROGERS ET AL., *supra* note 2, at 36 (explaining the exclusive jurisdiction of the Federal Trade Commission Act).

49. *See* ROGERS ET AL., *supra* note 2, at 36–37 (explaining the role of the Federal Trade Commission Act in federal antitrust enforcement). *But see* FTC v. R.F. Keppel & Bros., Inc., 291 U.S. 304, 310–12 (1934) (characterizing the FTC's ability to pursue antitrust violations that "fall short of a Sherman Act violation").

50. *See* ROGERS ET AL., *supra* note 2, at 43 ("The FTC has no Sherman Act and no criminal jurisdiction . . . .").

51. *See supra* note 40 and accompanying text.

52. *See infra* Part IV.A.2.

53. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

54. *See id.* § 18a(b) (prescribing the procedure for the mandatory "waiting period").

DOJ or the FTC[55] determines whether the merger implicates antitrust concerns and then, based on that determination, either allows the transaction to consummate or decides that the merger warrants further investigation.[56] If the merger proceeds to the investigation phase—and the DOJ or FTC begin identifying anticompetitive issues with the merger—the merging parties and the agency often discuss opportunities for settlement.[57] A settlement culminates in a negotiated consent decree, where the merging parties agree to divest certain assets to a competitor or agree to certain behavior in order to alleviate the government's concerns.[58]

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55. *See id.* § 18a(b)(1)(A) (stating that the thirty-day window begins "on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice"). Importantly, though the FTC and DOJ both receive the premerger notification and the materials that accompany it, only one of the agencies will review it. *See Premerger Notification and the Merger Review Process*, FED. TRADE COMM'N, https://perma.cc/BR38-4PKJ [hereinafter *Merger Review Process*] ("Parties proposing a deal file with both the FTC and DOJ, but only one antitrust agency will review the proposed merger."). The FTC and DOJ engage in a "clearance process" for each merger, during which the two agencies consult to decide which should be "cleared" to review the merger. *See id.* (explaining the clearance process).

56. *See* 15 U.S.C. § 18(e)(1)–(2) (explaining that the agencies may request additional information from the parties and extend the waiting period for the time it takes the parties to comply with the request, and an additional thirty days after they complied for the agencies to review the information). The agencies call this request for additional information a "second request." *See* FED. TRADE COMM'N PREMERGER NOTIFICATION OFF., WHAT IS THE PREMERGER NOTIFICATION PROGRAM? 1 (2009), https://perma.cc/RZT7-NARK (PDF) (describing the procedural timeline of a "second request").

57. *See Merger Review Process*, *supra* note 55 (stating that the length of the investigative phase can "be extended by agreement between the parties and the government in an effort to resolve any remaining issues without litigation").

58. *See* U.S. DEP'T OF JUST. ANTITRUST DIV., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 7 (2004), https://perma.cc/3BVD-6A8H (PDF) [hereinafter DOJ MERGER REMEDIES] (explaining that consent decrees take two forms: "one address[ing] the *structure* of the market, the other the *conduct* of the merged firm"); *Merger Review Process*, *supra* note 55 ("In this situation the parties may resolve the concerns about the merger by agreeing to sell off the particular overlapping business unit or assets of one of the merging parties, but then complete the remainder of the merger as proposed."); James Rob Savin, *Tunney Act '96: Two Decades of Judicial Misapplication*, 46 EMORY L.J. 363, 365 (1997) ("Under the purview of a consent decree, the defendant

Consent decrees are common and sometimes the "only realistic" method of achieving effective antitrust enforcement.[59] At least 80 percent of government antitrust cases are settled rather than tried, and such settlements generally occur by way of a consent decree.[60] The enforcing agency and defendants each are motivated to settle by consent decree.[61] The government's motivations to settle stem from efficacy concerns, cost savings, and a "desire to achieve a maximum utilization of the limited staff that is available for antitrust prosecutions."[62]

The merging parties want to settle in lieu of defending the transaction in litigation for three primary reasons: (1) to employ the prima facie evidence exemption in any subsequent litigation under the Clayton Act,[63] (2) to avoid the "heavy burdens" that accompany the uncertainty of a pending merger litigation—which include massive legal fees, distraction of executives, and business operation limbo,[64] and (3) to enjoy the favorable publicity that accompanies a consummated merger (as opposed

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accepts specific limitations on his future conduct, and the government indicates its willingness to terminate the suit on those terms.").

59. *See* Savin, *supra* note 58, at 365–66 ("Given the limited resources of the [DOJ's] Antitrust Division, the only realistic means the government has to provide effective antitrust enforcement is the consent decree."); ROGERS ET AL., *supra* note 2, at 42 (explaining that both the FTC and DOJ employ the consent decree tool).

60. *See* ROGERS ET AL., *supra* note 2, at 42 ("Most government antitrust cases (eighty percent or more) never are tried but rather are settled, generally by a device known as a consent decree.").

61. *See* Savin, *supra* note 58, at 365–66 (summarizing the motivations to settle specific to the government and the merging parties).

62. *See Consent Decree Program of the Dep't of Justice: Hearings Before the Antitrust Subcomm. of the H. Comm. on the Judiciary*, 86th Cong. 2–3 (1957) [hereinafter *1957 Consent Decree Hearings*] (statement of Rep. Emanuel Celler, Chairman, Antitrust Subcomm. of the H. Comm. on the Judiciary) (explaining the various motivations for defendants to settle an antitrust litigation).

63. *See* Savin, *supra* note 58, at 366 (explaining the exemption contained in the Clayton Act that prevents a pre-trial consent decree from being used as prima facie evidence against the defendant in subsequent litigations); *see also supra* note 65 and accompanying text.

64. *See* Savin, *supra* note 58, at 366 (stating that the various costs of litigation "are likely to lead defendants to seek a consent settlement if the challenged practice is not vital to their business or if they feel their case is not a sure winner").

to the negative publicity of a protracted antitrust battle). Consent decrees are also attractive to the merging parties because they do not constitute an admission of guilt and are not an adjudication on the merits of the alleged violations.[65]

C. *The Danger of "Cheap Decrees"*

"Cheap decrees" are decrees that are "questionable because they have been negotiated for reasons other than remedying" the alleged antitrust violations or because they contain "terms that do not substantially advance the public interest."[66] Inappropriate motivations for settling an antitrust concern by consent decree include "reluctance or fear to try the case," "concern about the costs of trial," or worry that further investigation or discovery may reveal a weaker case for the

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65. *See id*. at 365 ("[T]ypically, [the decree] states that the defendant denies the substantive allegations of the complaint and that the decree is entered 'without trial or adjudication . . . .'"). This is especially important with regard to subsequent private enforcement of antitrust laws under the Clayton Act. *See* 15 U.S.C. § 16(a) (discussing judgments obtained through antitrust enforcement); *see also supra* notes 41–42 and accompanying text. A litigated judgment or decree against a defendant may be used as prima facie evidence against that defendant in future litigation, unless the case was settled by consent decree prior to any trial occurring. *See* 15 U.S.C. § 16(a) (stating that the prima facie evidence provision "does not apply to consent judgments or decrees entered before any testimony has been taken"). If a case settles by consent decree prior to trial, therefore, the parties can proceed with any subsequent litigation without fear that the government may use previous litigation against them. This can serve as a major motivating factor for defendants to settle an antitrust litigation prior to trial. *See* Savin, *supra* note 58, at 366 (stating that "[t]he largest inducement for the defendant to settle" is the prima facie evidence exemption for pre-trial consent decrees).

66. *See* J. THOMAS ROSCH, COMM'R, FED. TRADE COMM'N, REMARKS BEFORE THE 18TH ST. GALLEN INTERNATIONAL COMPETITION LAW FORUM: CONSENT DECREES: IS THE PUBLIC GETTING ITS MONEY'S WORTH? 9–10 (Apr. 7, 2011), https://perma.cc/57QJ-6S33 (PDF) (explaining the adverse effects of improperly negotiated decrees). This Note does not assume that these cheap decrees are the norm, nor even that they occur with a certain frequency. *See, e.g.*, DOJ MERGER REMEDIES, *supra* note 58, at 4 (establishing that, as part of DOJ guidance for staff negotiating consent decrees, "restoring competition is the only appropriate goal with respect to crafting merger remedies"). This Note, however, does argue that some consent decrees fail to serve the public interest and Congress sought to solve that failure by imposing a non-deferential Tunney Act review. *See infra* Part IV.A.

government than anticipated.[67] These reasons—though "wholly legitimate" as rationales to settle in the context of litigation between two private parties—do not meet the public interest mandate imposed upon the federal antitrust enforcement agencies.[68]

Cheap decrees fail to serve the public interest in two key ways.[69] First, the government, perhaps motivated by fear of what may occur by pursuing a full adjudicative proceeding on the merits, may agree to a cheap decree that does not properly remedy the alleged antitrust violation by under-settling.[70] In other words, the agency might not aggressively pursue all appropriate remedies because—in an effort to settle—it agreed to more lenient terms than what it could have otherwise been able to achieve in court.[71] Or, the terms are insufficient to address the antitrust violations that would have been fully assessed following discovery and a hearing.[72] Decrees that underdeliver fail to meet the public interest standard because it

67. *See* ROSCH, *supra* note 66, at 10 (summarizing the reasons for which the government may choose to settle a case).

68. *See id.* (stating that "decree[s] that reflect[] the private and personal considerations of those involves in the litigation" should not be entered into force). Despite the distinct processes through which decrees are pursued and entered into force at the DOJ and FTC both are subject to a public interest standard. *Compare* Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16(e)(1) (requiring that a consent decree proposed by the DOJ meet a public interest standard prior to its entry into force), *with* Johnson Prods. Co. v. FTC, 549 F.2d 35, 38 (7th Cir. 1977) (explaining that the FTC, "unlike a private litigant, must act in furtherance of the public interest" in determining whether to enter a consent decree).

69. *See* ROSCH, *supra* note 66, at 9–12 (explaining that an improper consent decree may underdeliver or overdeliver on the remedy's scope).

70. *See 1957 Consent Decree Hearings*, *supra* note 62, at 3 ("[A] consent settlement by its very nature involves the process of compromise in the negotiations by attorneys for each side.").

71. *See 1973 Tunney Act Hearings*, *supra* note 15, at 128 (statement of Harold E. Kohn) ("Even the best intentioned and most competent attorneys employed by the Justice Department may occasionally overlook the full implications of their own acts or be inclined to make a settlement that is less than desirable from the public point of view in order to avoid being overburdened.").

72. *See* ROSCH, *supra* note 66, at 10 (asserting that the agencies should be assured, prior to seeking to enforce a decree, that the "decree appropriately remedies the violations").

does not satisfy the agency's statutory mandate of prosecuting and remedying violations of the federal antitrust laws.[73]

Alternatively, the DOJ may negotiate a cheap decree that *exceeds* what it "would have been able to obtain, had it been forced to litigate the merger case."[74] For example, the relief that the DOJ may procure through the consent decree may be much broader than relief that a court would have crafted in its judgment.[75] This occurs when merging parties feel a sense of urgency to clear the agency's review process and, as a result, agree to relatively small divestitures to alleviate the government's concerns.[76] The sense of urgency may arise from pressure to raise stock prices through news of a successful merger as opposed to a dragging, costly litigation.[77]

A notable example of over-settling is mergers involving innovation markets,[78] an area where antitrust enforcement

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73. *See 1957 Consent Decree Hearings*, *supra* note 62, at 3 ("[A] question frequently arises as to whether . . . the consent decree has resulted in a compromise of the public interest.").

74. *See* ROSCH, *supra* note 66, at 10–11 (explaining the overdelivering that occurs in some cheap decrees); *see also* Savin, *supra* note 58, at 366 ("The government occasionally can secure relief through a consent decree which it could not win at trial.").

75. *See* Savin, *supra* note 58, at 366 n.16 (stating that the consent decree "has been widely criticized as a device that transforms the Justice Department from an adjudicative branch of government into a regulatory agency, because the relief it can obtain is so broad" (citation omitted)).

76. *See* ROSCH, *supra* note 66, at 10–11 (explaining the pressure that merging parties face to consent to divesting assets in order for the merger to clear the agency's review process); Robert B. Bell, *Regulation by Consent Decree*, 26 ANTITRUST 73, 73 (2011) ("Because litigating a merger case entails risk and litigation can delay closing by a year or more even if the private parties prevail, parties have been much more inclined to accept government-demanded settlement terms.").

77. *See* Savin, *supra* note 58, at 366 (asserting that "unfavorable publicity" is among the many burdens that defendants bear when they engage in an antitrust litigation).

78. *See* Richard T. Rapp, *The Misapplication of the Innovation Market Approach to Merger Analysis*, 64 ANTITRUST L.J. 19, 19–20 (1995) (explaining the difficulty in assessing antitrust violations in innovation markets). Innovation markets are those that involve "the research and development directed to particular new or improved goods or processes." *Id.* at 23. The DOJ and FTC face difficulty enforcing the antitrust laws in innovation markets because they do not conform to traditional antitrust analysis. *Id.* at 46 (proposing a new theory for antitrust enforcement in innovation markets); *see*

agencies have faced difficulty seeking remedies when litigating in courts, but are often able to negotiate consent decrees with the merging parties.[79] The agency would not likely receive relief through litigation, but it is instead able to secure a win by settling prior to proceeding to litigation.[80] Like a consent decree that underdelivers, a consent decree that contains remedies that are broader than what the agency would otherwise have been able to achieve through litigation also fails to serve the public interest:[81] remedies that are not tailored to address antitrust concerns do not benefit the public interest.[82]

D. *Judicial Review Under the Tunney Act*

Before the Tunney Act, the DOJ's legal authority to dispose of litigation by consent decree was an implied power—not contained in the antitrust laws—"derived from the historical right of the prosecutor to initiate and conclude legal proceedings."[83] At the time, this implied power was restrained by the Supreme Court's *United States v. Swift & Co.*,[84] which

Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 583 (2012) (summarizing the difficulties that accompany an antitrust analysis of innovation markets).

79. *See* ROSCH, *supra* note 66, at 10–11 (stating that the FTC "has only infrequently brought merger cases based on an innovation market theory, and has never won such a case").

80. *See id.* (describing the FTC's lack of success in challenging innovation market mergers).

81. *See* Savin, *supra* note 58, at 366 n.16 ("[T]he decree has been widely criticized as a device that transforms the Justice Department from an adjudicative branch of government into a regulatory agency, because the relief it can obtain is so broad.").

82. *See* DOJ MERGER REMEDIES, *supra* note 58, at 1 (explaining that the DOJ strives to ensure that "remedies are based on sound legal and economic principles and are closely related to the identified competitive harm").

83. *See* Charles F. Phillips, Jr., *The Consent Decree in Antitrust Enforcement*, 18 WASH. & LEE L. REV. 39, 42–43 (1961) (summarizing the legal authority upon which the DOJ could enter consent decrees as settlements for antitrust allegations).

84. 286 U.S. 106 (1932).

imposed a stringent standard that the consent decree must meet for a court to reject or modify it.[85]

The Tunney Act codified judicial review and, in so doing, imposed several procedural requirements that the DOJ must satisfy when seeking entry of a consent decree:[86] the DOJ must publish its proposed consent decree—along with a "competitive impact statement" that must detail, among other things, the nature of the consent decree[87]—in the Federal Register for at least sixty days to allow for public comment.[88] At the end of the sixty-day notice and comment period, the DOJ must respond to all written comments and publish those responses in the Federal Register.[89] The DOJ must also publish the proposed consent decree and the competitive impact statement in a newspaper for at least seven days.[90] This process is akin to the procedural requirements for agency rulemakings set forth under the Administrative Procedure Act (APA).[91]

The Tunney Act standardizes the process by which the DOJ seeks enforcement of its consent decrees.[92] Acknowledging the value of the consent decree to federal antitrust enforcement, the Tunney Act safeguards against decrees that undermine the efficacy of settlements and cut against the federal antitrust laws as a whole.[93] In interpreting the Tunney Act, however, courts

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85. *See id.* at 119 ("Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.").

86. *See* 15 U.S.C. § 16(b) (listing the procedural requirements with which the DOJ must adhere).

87. *See id.* § 16(b)(1)–(6) (stating the required components of the competitive impact statement).

88. *See id.* § 16(b) (providing that the DOJ must publish the proposed consent decree and the competitive impact statement in the Federal Register for sixty days).

89. *See id.* (setting forth the DOJ's response requirements).

90. *See id.* § 16(c) (listing the requirements for publication in newspapers).

91. 5 U.S.C. § 553 (requiring that agencies publish the proposed rulemaking in the Federal Register, receive comments from the public, and publish responses to those comments).

92. *See* 15 U.S.C. § 16(b)(1)–(6) (stating the required components of the competitive impact statement).

93. *See* ROGERS ET AL., *supra* note 2, at 42 ("Because major antitrust policy can be implemented through consent decrees, Congress enacted the [Tunney

have taken steps to artificially narrow the scope of their public interest review under the Act.[94]

II. JUDICIAL NARROWING OF THE "PUBLIC INTEREST" SCOPE OF REVIEW

The Tunney Act provides that, when deciding whether to enter the DOJ's proposed consent decree, "the court shall determine that the entry of such judgment is in the public interest."[95] Thus, the plain language of the Tunney Act does not require, or even contemplate, deference to the DOJ in mandating the judicial "public interest" review.[96] Despite this, courts consistently place constraints on the scope and depth of their review.[97] In creating the public interest standard, Congress intentionally declined to define "public interest" in the statute.[98] As a result, "courts were left to formulate their own standards for evaluating decrees that fit their own definition of 'public interest.'"[99]

Act] to exact greater judicial and public scrutiny of antitrust settlements in suits brought by the government.").

94. *See* Savin, *supra* note 58, at 379 (explaining that courts have interpreted the Tunney Act in such a way that "may prevent future courts from conducting an effective Tunney Act review of proposed consent decrees").

95. *See* 15 U.S.C. § 16(e) (stating the "public interest" review requirements).

96. *See id.* (stating only that the court must make the determination); *see also* Lloyd C. Anderson, *Mocking the Public Interest: Congress Restores Meaningful Judicial Review of Government Antitrust Consent Decrees*, 31 VT. L. REV. 593, 593–94 (2007) ("The plain language of the Tunney Act appeared to require judges to make a *de novo* determination of whether a proposed antitrust consent decree was in the public interest, without giving deference to the executive branch's view that the public interest would best be served by a proposed settlement.").

97. *See* Anderson, *supra* note 96, at 593–94 (stating that courts declined to adopt a de novo standard and instead concluded that the review involve deference to the DOJ).

98. *See* Savin, *supra* note 58, at 372 ("Congress did not attempt to define 'public interest' as it preferred the courts to adhere to precedent and derive a definition from the purpose of the antitrust laws.").

99. *Id.* at 374; *see* Maryland v. United States, 460 U.S. 1001, 1003 (1983) (Rehnquist, J., dissenting) (stating that the Tunney Act and its legislative history only provide "a paucity of guidance" in determining the public interest

Courts initially adopted a deferential approach.[100] In so doing, they adopted a cursory balancing test, which weighed the benefits to the public against any harms that the consent decree might confer.[101] Remarkably, some courts instead exhibited agency deference by employing a presumption for the DOJ that opponents of a settlement could then rebut.[102] Courts rooted this presumption in the notion that a scrutinizing review of the DOJ's prosecutorial discretion would implicate separation of powers concerns.[103] This concern was born out of the Supreme Court's decision in *Sam Fox Publishing Co. v. United States*,[104] which cautioned against "assessing the wisdom of the [DOJ's] judgment" in negotiating settlements.[105]

Though the Supreme Court decided *Sam Fox* several years before the Tunney Act's promulgation, lower courts applied the deference articulated within it to the Tunney Act's judicial

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standard), *aff'g* United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982).

100. *See* Savin, *supra* note 58, at 374–77 (summarizing the first judicial interpretations of the Act's public interest standard); United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975) ("It is not the court's duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. . . . I must look at the overall picture not hypercritically . . . .").

101. *See Gillette*, 406 F. Supp. at 715 ("Just as the parties are compromising, so in its process of weighing the public interest, must the court.").

102. *See* United States v. Associated Milk Producers, Inc., 394 F. Supp. 29, 41 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir. 1976) (stating that the court "'decline[d] appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the . . . consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting" (citing Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689 (1961))).

103. *See* United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981) ("The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General."); *see infra* Part IV.B.

104. 366 U.S. 683 (1961).

105. *Id.* at 689 (summarizing, as a unanimous Court, the need for a deferential review of actions made pursuant to the DOJ's prosecutorial discretion); *see* Savin, *supra* note 58, at 376 (explaining that the *Sam Fox* dicta led courts to conclude that the Tunney Act did not bestow the courts with heightened review power).

approval process.[106] Pursuant to *Sam Fox*, courts defer to the DOJ's conclusion that the consent decree is in the public interest.[107] That presumption is rebutted only by a finding of "bad faith or malfeasance" on the part of the DOJ in negotiating the decree.[108] Thus, despite evidence in the legislative history indicating non-deferential review,[109] courts' initial interpretations for consent decree review under the Tunney Act relied upon legal reasoning that predated the Tunney Act.[110]

In 1982, however, the D.C. District Court adopted a less deferential (or perhaps even nondeferential)[111] analysis in *United States v. American Telephone & Telegraph Co.* (*AT&T*).[112] In *AT&T*, the trial court required that the company[113] agree to specific modifications to the consent decree

106. *See* United States v. Associated Milk Producers, Inc., 534 F.2d 113, 117 (8th Cir. 1976) (citing *Sam Fox* to affirm the lower court's deferential standard of review under the Tunney Act).

107. *See Sam Fox*, 366 U.S. at 689 (stating that only a showing of "bad faith or malfeasance" would warrant a scrutinizing review of the DOJ's "judgment in negotiating and accepting" a consent decree).

108. *See Associated Milk Producers*, 534 F.2d at 117

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

109. *See infra* Part IV.A.

110. *See Associated Milk Producers*, 534 F.2d at 117 (relying on *Sam Fox*'s pre-Tunney Act reasoning to interpret Tunney Act review).

111. *See* Savin, *supra* note 58, at 378 ("[*AT&T*] introduced the first nondeferential approach to reviewing proposed consent decrees.").

112. 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

113. *AT&T* did not involve a corporate merger. *See id.* at 135–36. Instead, the conduct at issue was AT&T's alleged monopolization of telecommunications services by its attempt to exclude competitors from the market. *See id.* The Tunney Act review and its underlying principles in the case are the same because the Tunney Act makes no distinction on the scope of review for mergers versus other antitrust litigation. *See* 15 U.S.C. § 16(b), (e) (providing that the Tunney Act and its public interest review apply to "any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws"). Thus, this factual distinction does not diminish the significance of *AT&T* for this Note.

prior to it granting approval.[114] Notably, the court did so without finding that the DOJ acted in "bad faith or malfeasance," as *Sam Fox* and its citing precedent prescribe.[115] In reaching its conclusion, the court instead created a new standard for judicial review: "If the decree meets the requirements for an antitrust remedy—that is, if it effectively opens the relevant markets to competition and prevents the recurrence of anticompetitive activity, all without imposing undue and unnecessary burdens upon other aspects of the public interest—it will be approved."[116] This heightened the standard for "public interest" review under the Tunney Act[117] and placed the initial burden of proving that the consent decree was in the public interest on the DOJ.[118]

The *AT&T* court justified its exacting review of the consent decree by citing the magnitude of the litigation (in terms of both the scale of the corporation and the "enormous undertaking" required to facilitate the terms of the consent decree).[119] The Supreme Court declined to engage with the Tunney Act's judicial review standard in this case by summarily affirming the district court's decision without oral argument.[120] The only written opinion in the decision was a dissent from Justice Rehnquist, joined by Chief Justice Burger and Justice White.

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114. *See AT&T*, 552 F. Supp. at 214 ("[I]f the parties accept the Court's modifications, the decree as modified will be approved as being in the public interest . . . .").

115. *See id.* at 153 (stating that the court's decision to impose modifications to the consent decree was based on an "attempt to harmonize competitive values with other legitimate public interest factors").

116. *Id.*

117. *See id.* at 151 ("It does not follow from [Tunney Act precedent] that courts must unquestioningly accept a proffered decree as long as it somehow, and however inadequately, deals with the antitrust and other public policy problems implicated in the lawsuit.").

118. *See* Savin, *supra* note 58, at 379 ("This test places the initial burden on the Justice Department to show that the proposed settlement allows for free competition and prevents the recurrence of anticompetitive activity.").

119. *See AT&T*, 552 F. Supp. at 151–52 (stating that, because AT&T is the "largest corporation in the world" and the proposed decree would have "significant consequences," the court "would be derelict in its duty if it adopted a narrow approach to its public interest review responsibilities").

120. *See* Maryland v. United States, 460 U.S. 1001, 1006 (1983) (Rehnquist, J., dissenting) (noting that the Court issued a summary opinion without hearing arguments).

The dissent questioned the constitutionality of the Tunney Act's judicial review of an executive function—the decision to prosecute or settle a case.[121] *AT&T* is the Supreme Court's only instance of Tunney Act jurisprudence to date.

Perhaps due to the unordinary aspects of the protracted *AT&T* case,[122] a series of D.C. Circuit cases subsequently tightened the public interest review, requiring a high degree of deference to the DOJ.[123] In *United States v. Microsoft Corp.*,[124] the D.C. Circuit concluded that a court's review of a proposed consent decree is limited to the allegations contained within the government's initial complaint—due to the supposed constitutional mandate of deference to prosecutorial discretion—unless the allegations are so narrow that they constitute a "mockery of judicial power."[125]

The D.C. Circuit's reading of the Tunney Act in *Microsoft* created a frictionless process for the DOJ in securing judicial

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121. *See id.* at 1005–06 ("The question assigned to the district courts by the [Tunney] Act is a classic example of a question committed to the Executive."). Justice Rehnquist did not acknowledge that this two-branch process (the executive branch's decision to settle followed by the judicial branch's decision to approve or deny that settlement) is the exact procedure prescribed in the criminal plea agreement setting, the constitutionality of which has not been denied by the Court. *See infra* Part IV.B.

122. *See AT&T*, 552 F. Supp. at 151 (stating that a "rubber stamp" was inappropriate because *AT&T* "is not an ordinary antitrust case").

123. *See* Darren Bush, *The Death of the Tunney Act at the Hands of an Activist D.C. Circuit*, 63(I) ANTITRUST BULL. 113, 117 (2018) ("When district courts sought to reject consent decrees, the D.C. Circuit set them straight to conform with its notion that courts . . . must defer to the DOJ.").

124. 56 F.3d 1448 (D.C. Cir. 1995).

125. *See id.* at 1462

> [A] decree, even entered as a pretrial settlement, is a judicial act, and therefore the district judge is not obliged to accept one that, on its face and even after government explanation, appears to make a mockery of judicial power. Short of that eventuality, the Tunney Act cannot be interpreted as an authorization for a district judge to assume the role of Attorney General.

Microsoft also involved a consent decree related to anticompetitive conduct rather than an anticompetitive merger. *See id.* at 1451 (stating that the DOJ brought the suit against Microsoft alleging that the corporation unlawfully maintained a monopoly of its operating systems). This, again, is insignificant to its precedential value in Tunney Act jurisprudence. *See supra* note 113 and accompanying text.

approval of consent decrees: "Since the [DOJ] routinely drafts the complaint after crafting the proposed order, this standard would very rarely result in rejection of a proposed order."[126] This process is efficient[127] but contrary to the goals of the Tunney Act.[128]

Two years later, in *Massachusetts School of Law at Andover, Inc. v. United States*,[129] the D.C. Circuit built upon its holding in *Microsoft* to further limit its role.[130] The court did so by transforming the deferential "mockery" concept into an entire standard of review.[131] Citing *Microsoft*, the court stated that the reviewing court "should withhold approval [of a consent decree] only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes 'a mockery of judicial power.'"[132] This "mockery" standard limited Tunney Act judicial review even further, granting more power to the DOJ to successfully secure consent decrees.[133]

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126. ROGERS ET AL., *supra* note 2, at 42 (explaining the *Microsoft* decision's effect on the DOJ's ability to seek entry of its consent decrees); Savin, *supra* note 58, at 380 ("If a court may consider only the relationship between the actual allegations and the remedies in the decree, the Department of Justice can secure judicial approval by submitting a complaint tailored to a prenegotiated settlement.").

127. *See* Savin, *supra* note 58, at 365–66 (noting the efficiencies that accompany resolving antitrust concerns by consent decree).

128. *See 1973 Tunney Act Hearings*, *supra* note 15, at 452 (remarks by Sen. John V. Tunney and Sen. Edward Gurney) (explaining that Congress enacted the Tunney Act to eliminate judicial rubberstamping).

129. 118 F.3d 776 (D.C. Cir. 1997).

130. *See id.* at 783 ("In part because of the constitutional questions that would be raised if courts were to subject the government's exercise of its prosecutorial discretion to non-deferential review . . . we have construed the public interest inquiry narrowly." (citing *Microsoft*, 56 F.3d at 1457–59)).

131. *See id.* (holding that the court must examine the decree based on certain factors "or if the decree otherwise makes 'a mockery of judicial power'"); United States v. SBC Commc'ns, 489 F. Supp. 2d 1, 35–36 (explaining that *Massachusetts School of Law*'s "formulation of the 'mockery' concept apparently casts it as a standard of review, to be used unless there are other specific problems with the consent decree").

132. *Mass. Sch. of L. at Andover, Inc.*, 118 F.3d at 783.

133. *See* Bush, *supra* note 123, at 120 (stating that the "mockery" standard "expressly limits intervention in consent decrees to exceptionally rare

Thus, since the Tunney Act's enactment, courts have taken steps to meaningfully restrict its public interest review.[134] The judiciary has done this by interpreting the Tunney Act to require significant agency deference when engaging in public interest review and, relying on pre-Tunney Act dicta, understanding constitutional concerns to profoundly constrain the scope of the district court's review.[135] These developments prompted Congress to take action by amending the Tunney Act in 2004.[136]

III. CONGRESS'S RESPONSE: THE 2004 AMENDMENTS TO THE TUNNEY ACT

Courts' failures to engage in robust, nondeferential review signaled a return to the judicial rubber stamping that Congress sought to prevent.[137] The D.C. Circuit's deferential interpretation of the Tunney Act's judicial review mandate,[138] operating at its peak with *Massachusetts School of Law*'s "mockery" standard, prompted Congress to reevaluate the Tunney Act in the early 2000's and amend the legislation in 2004.[139]

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circumstances" and "further places extreme deference into the hands of the DOJ").

134. *See* Anderson, *supra* note 96, at 594–95 (stating that the D.C. Circuit's jurisprudence on the Tunney Act reduced the court's role to "merely ministerial in nature").

135. *See supra* notes 104–133 and accompanying text.

136. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (codified as amended at 15 U.S.C. § 16(e)(1)) (summarizing the amendments to the Tunney Act); Anderson, *supra* note 96, at 606 (explaining that Congress acted in response to the D.C. Circuit precedents that narrowed the Tunney Act review).

137. *See* Bush, *supra* note 123, at 135 (explaining that the federal court's permissive, deferential application of the Tunney Act created a "return to [pre-Tunney Act] judicial rubber-stamping of consent decrees").

138. *See* Anderson, *supra* note 96, at 594 (noting that the "decades-long consensus" regarding meaningful Tunney Act review "unraveled in the 1990s in a string of decisions by the United States Court of Appeals for the District of Columbia").

139. *See* Bush, *supra* note 123, at 122 ("Displeased with the cases in the D.C. Circuit that suggested that the only route for the courts was to rubber-stamp final judgments proposed by the DOJ, Congress sought to establish more clearly the intended consequences of the Tunney Act.").

A. *The Revised Tunney Act*

Congress addressed the concern that judicial review devolved into pre-Tunney Act rubber stamping[140] by amending the Tunney Act in 2004.[141] In so doing, Congress attempted to clarify the extent to which courts should scrutinize a negotiated consent decree when engaging in Tunney Act review.[142]

Congress's efforts produced two changes.[143] First, Congress made express judicial findings to reinforce the Tunney Act's purpose and scope.[144] Congress achieved this by explicitly superseding the *Massachusetts School of Law* "mockery" standard.[145] Second, Congress altered the language of the statute's public interest review provision.[146] To require a more exacting judicial review, Congress replaced the permissive "may" with "shall" in stating that "the court *shall* consider"

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140. *See* 150 CONG. REC. S3615 (daily ed. Apr. 2, 2004) (remarks by Sen. Herbert Kohl) (introducing a bill to amend the Tunney Act because "many courts seem to have ignored [the] statute and do little more than 'rubber stamp' antitrust settlements").

141. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (codified as amended at 15 U.S.C. § 16(e)(1)) (providing the various textual changes to the public interest standard that a reviewing court will apply).

142. *See* Anderson, *supra* note 96, at 595 ("A bipartisan effort was launched in the U.S. Senate to overturn the D.C. Circuit's 'mockery' standard and restore meaningful judicial oversight."); Bush, *supra* note 123, at 122 (explaining that Congress amended the Tunney Act to "compel[] courts to undertake a meaningful Tunney Act review").

143. *See* Anderson, *supra* note 96, at 595–96 (summarizing the two provisions contained in the Tunney Act amendments).

144. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 668

> Congress finds that the (A) purpose of the Tunney Act was to ensure that the entry of antitrust consent judgments is in the public interest; and (B) it would misconstrue the meaning and Congressional intent in enacting the Tunney Act to limit the discretion of district courts to review antitrust consent judgments solely to determining whether entry of those consent judgment would make a "mockery of the judicial function."

145. *See infra* note 153 and accompanying text.

146. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 668–69 (listing Congress's modifications to the provision of the Tunney Act that instruct courts on the public interest review, 15 U.S.C. § 16(e)).

certain factors in conducting its public interest review.[147] Despite these concrete efforts on the part of Congress, courts interpreted the amendments as having little effect on existing precedent.[148]

B. *Judicial Application of the Revised Tunney Act*

The D.C. District Court was the first to conclude that the amendments were inconsequential to Tunney Act jurisprudence.[149] In *United States v. SBC Communications*,[150] the court determined that "a close reading of the law demonstrates that the 2004 amendments effected minimal changes,"[151] and added that its standard of review "remains sharply proscribed by precedent."[152] The court did, however, hold that the amendments expressly overruled the *Massachusetts School of Law* broadened interpretation of the "mockery" concept, which construed it as an entire standard of review for Tunney Act courts to follow.[153] The *SBC Communications* court ultimately decided that the amendments preserved *Microsoft*'s "mockery" concept as good law because that only applied to the narrowness of the complaint rather than to the scope of judicial review.[154]

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147. *See id*. (stating the statutory changes to the Tunney Act public interest review language); *see also* Anderson, *supra* note 96, at 596 (stating that the amendments "make it mandatory—not merely discretionary—for courts to consider various factors in making the public interest determination").

148. *See* Lawrence M. Frankel, *Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees*, 75 ANTITRUST L.J. 549, 570 (2008) (explaining that the 2004 amendments "may not have represented a change in the law" and that they "did little to solve the Act's underlying problems").

149. *See* United States v. SBC Commc'ns, 489 F. Supp. 2d 1, 11 (D.D.C. 2007) (summarizing the minimal influence of the amendments on Tunney Act caselaw).

150. 489 F. Supp. 2d 1 (D.D.C. 2007).

151. *Id*. at 11.

152. *Id*.

153. *See id.* at 36–37 ("The statutory language appears to overrule *Massachusetts School of Law*'s use of the 'mockery' standard of review.").

154. *See id.* at 38–40 (concluding that "nothing in the text or legislative history of the 2004 amendments undermines [*Microsoft*'s] reasoning").

Therefore, Congress's effort to reanimate an exacting judicial review through the 2004 amendments seems fruitless.[155] As the judiciary's consistently high level of agency deference and limited judicial review of consent decrees persist, "the DOJ can assure merging parties that pre-Tunney hearing consummation is fine because the chances of a court rejecting the consent decree are zero."[156] This eliminates the entire purpose of Tunney Act review.[157]

IV. THE TUNNEY ACT DEMANDS LESS AGENCY DEFERENCE

The consent decree is an effective and commonly employed tool to achieve the goals of federal antitrust enforcement.[158] Motivations specific to both the DOJ and the merging parties, however, create the risk that consent decrees are being agreed upon not for their ability to advance the public interest, but to achieve these other motivations.[159] The Tunney Act demands exacting review by the courts, which is critical to ensuring that only those consent decrees that serve the interests of the public are entered into force.[160]

Until this point, however, the majority of courts have misinterpreted the congressional mandate in the Tunney Act to afford too much deference to the DOJ when engaging in the public interest review. Courts should confer a lower degree of deference to the DOJ when engaging in Tunney Act public

155. *See* Bush, *supra* note 123, at 123 ("Review, or more precisely lack of review, of consent decrees continued as if the Tunney Act amendment had not passed.").

156. *Id.* at 114.

157. *See 1973 Tunney Act Hearings*, *supra* note 15, at 452 (remarks by Sen. John V. Tunney and Sen. Edward Gurney) (explaining that Congress enacted the Tunney Act to charge the judiciary with independent review to ensure that inadequate consent decrees are not entered into force).

158. *See* ROGERS ET AL., *supra* note 2, at 42 (noting that 80 percent of antitrust litigation is settled and most of those settlements are achieved by consent decree).

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

160. *See 1973 Tunney Act Hearings*, *supra* note 15, at 449 (remarks by Sen. John V. Tunney and Sen. Edward Gurney) (stating that the public interest review charges the judiciary with "an independent duty to assure itself that entry of the decree will serve the public generally").

interest review for three reasons: (1) less agency deference is the correct reading of the statute and the statute's legislative history, (2) less agency deference does not pose an unconstitutional imbalance between the judicial and executive branches, and (3) less agency deference is crucial for containing harmful effects of anticompetitive mergers.

A. *Less Agency Deference is the Correct Reading of the Statute and the Legislative History*[161]

Congress drafted the Tunney Act so the judiciary would play an active, nondeferential role in the antitrust settlement process.[162] This arose from concerns regarding the DOJ's settling of major antitrust litigation through consent decrees with little to no judicial oversight.[163] For the purposes of this Note, a comparative analysis of the legislative histories and statutory frameworks of the important antitrust statutes through which the FTC and DOJ operate is beneficial. This subpart compares the FTC and DOJ through two lenses: (1) the DOJ as the prosecutor of antitrust laws versus the FTC's role as an independent, expert adjudicator,[164] and (2) the divergent consent decree procedures between the two agencies.[165] The distinctions that exist between the FTC and DOJ are not accidental on the part of Congress, and they support this Note's conclusion that Congress enacted the Tunney Act to require an exacting judicial review of the DOJ's consent decrees.[166]

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161. *See* Savin, *supra* note 58, at 364 (arguing that the Act's legislative history "reveal[s] a clear mandate for critical and nondeferential judicial review of proposed consent decrees").

162. *See 1973 Tunney Act Hearings*, *supra* note 15, at 449 (remarks by Sen. John V. Tunney and Sen. Edward Gurney) ("The court is not to operate simply as a rubber stamp, placing an imprimatur upon whatever is placed before it by the parties. Rather it has an *independent duty* to assure itself that entry of the decree will serve the public generally." (emphasis added)).

163. *See id.* (stating that "[c]oncern has been renewed about the standards and the safeguards which apply when the stakes are high" and the stakes are high for antitrust).

164. *See infra* Part IV.A.1.

165. *See infra* Part IV.A.2.

166. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (codified as amended at 15 U.S.C.

First, because the DOJ is the federal government's prosecutorial body and is afforded wide jurisdiction to prosecute both civil and criminal laws (including criminal antitrust statutes), courts have misinterpreted the Tunney Act and its legislative history to account for deference in the form of prosecutorial discretion in administering Tunney Act review of *civil* consent decrees.[167]

Second, because the DOJ is a non-expert, executive agency (in contrast to the FTC, which is an expert, independent agency), legislative history reveals understandable skepticism regarding the DOJ's ability to appropriately settle antitrust claims by consent decree.[168] As a result of this skepticism, Congress believed that independent judicial approval (as opposed to the FTC's current process, which allows for internal approval and a mechanism for external judicial review only on appeal) was necessary to ensure that the DOJ's settlement of antitrust litigation by consent decree serves the public interest.[169] Thus, the procedural distinction between the FTC and DOJ reveals a deliberate judicial approval function in protection of the public interest in DOJ consent decrees.

1. The DOJ as Antitrust Prosecutor

Courts restrain their Tunney Act review by invoking the doctrine of prosecutorial discretion.[170] Prosecutorial discretion likely gained traction in Tunney Act jurisprudence because of two DOJ-specific principles: (1) the DOJ is the federal

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§ 16(e)(1)) (publishing a congressional finding that courts should conduct the review to advance the public interest).

167. *See infra* Part IV.A.1.

168. *See 1973 Tunney Act Hearings*, *supra* note 15, at 453 (remarks by Sen. John V. Tunney and Sen. Edward Gurney) (providing that the public interest review is meant to identify the inevitable instances when the DOJ's judgment was unreasonable).

169. *See id.* at 452 (remarks by Sen. John V. Tunney and Sen. Edward Gurney) (stating that independent judicial review of a consent decree is necessary to ensure that the DOJ's judgment in agreeing to the settlement was appropriate).

170. *See supra* note 17 and accompanying text.

government's "prosecutor,"[171] and is therefore associated with the well-established doctrine of deference to "prosecutorial discretion,"[172] and (2) the DOJ enforces antitrust laws in both the civil and criminal contexts,[173] the latter of which allows judges to extend the DOJ's prosecutorial discretion to the realm of federal antitrust enforcement.[174] By contrast, there is no such discussion with regard to deference to the FTC under the doctrine of prosecutorial discretion.[175]

Deference to prosecutorial discretion is well-accepted because it promotes flexibility and adaptability to case-specific factors in prosecutorial decision-making.[176] It is especially well-established in the criminal context, with some sources acknowledging the doctrine exclusively in this setting.[177] Because the DOJ is charged with executing the laws under the constitutional powers vested to the President, courts apply prosecutorial discretion to the agency.[178] Moreover, the DOJ has

171. *See About the Office*, U.S. DEP'T OF JUST., https://perma.cc/S2PM-GNUQ (last updated July 17, 2018) ("The Judiciary Act of 1789 created the Office of the Attorney General which evolved over the years into the head of the Department of Justice and chief law enforcement officer of the Federal Government.").

172. *See* Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 2 (1971) ("Prosecutors in Anglo-American legal systems, both as a matter of theory and in practice, have considerable discretion in making their decisions.").

173. *See* ROGERS ET AL., *supra* note 2, at 42–43 (noting that the DOJ has jurisdiction to prosecute both civil and criminal provisions in antitrust statutes).

174. *See* Donald I. Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405, 408–09 (discussing the DOJ's exercise of prosecutorial discretion in bringing criminal indictments under the Sherman Act).

175. *See* Jacob Siegel Co. v. FTC, 327 U.S. 608, 611–13 (1946) (stating that the FTC has "wide discretion in its choice of a remedy" but making no mention of the doctrine of prosecutorial discretion).

176. *See* Abrams, *supra* note 172, at 2–3 (summarizing the advantages of prosecutorial discretion in the legal system).

177. *See* Review, *Prosecutorial Discretion Part II: Preliminary Proceedings*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 197, 199 (2005) [hereinafter *Prosecutorial Discretion*] ("Courts recognize broad discretion to initiate and conduct criminal prosecutions . . . .").

178. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) ("The Attorney General and United States Attorneys retain 'broad discretion' to

jurisdiction to enforce the antitrust laws by issuing criminal indictments,[179] which reinforces the applicability of prosecutorial discretion to the DOJ.[180]

The applicability of prosecutorial discretion to the DOJ with respect to the Tunney Act fails, however, for two reasons. First, the doctrine of prosecutorial discretion risks inconsistency, uncertainty, and arbitrariness.[181] In the Tunney Act context, those risks produce cheap decrees, which is precisely what the drafters envisioned the statute's judicial review mechanism would protect against.[182] Second, though the DOJ indeed has jurisdiction to enforce the criminal provisions of federal antitrust laws, Tunney Act review is a purely civil inquiry.[183] As such, the judiciary's extension of prosecutorial discretion to the Tunney Act is misplaced.[184]

2. The Distinct Procedural Mechanisms for DOJ and FTC Consent Decrees Reveal Congress's Desire to Impose an Active Judicial Review

Both agencies use consent decrees,[185] but the FTC and DOJ follow different procedures to pursue enforcement of their

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enforce the Nation's criminal laws." (citations omitted)); *infra* note 245 and accompanying text.

179. *See* ROGERS ET AL., *supra* note 2, at 42 (noting that the DOJ has authority to enforce the criminal provisions of the antitrust statutes).

180. *See, e.g.*, United States v. Bonnet-Grullon, 212 F.3d 692, 701 (2d Cir. 2000) ("It is well established that the decision as to what federal charges to bring against any given suspect is within the province of the Executive Branch of the government.").

181. *See id.* at 3 (noting the "competing tension between the need in prosecutorial decision-making for certainty, consistency, and an absence of arbitrariness on the one hand, and the need for flexibility, sensitivity, and adaptability on the other").

182. *See 1973 Tunney Act Hearings*, *supra* note 15, at 449 (remarks by Sen. John V. Tunney and Sen. Edward Gurney) (explaining that the purpose of the public interest judicial review mechanism is to protect against the "bad or inadequate" consent decrees); *see also infra* Part IV.C.

183. *See* 15 U.S.C. § 16(b) (limiting the consent judgment process to only civil proceedings that the DOJ brings).

184. *See infra* Part IV.B (analogizing the DOJ's role in the Tunney Act consent decree process to the criminal plea agreement context, which similarly involves a judicial approval requirement).

185. *See supra* notes 59–60 and accompanying text.

decrees, and the caselaw pertaining to each procedure is distinct.[186] The Tunney Act does not apply to FTC consent decrees.[187] Instead, FTC consent decrees are approved or denied by the commission itself,[188] and it enjoys "wide discretion" in its decision to settle an antitrust violation by consent decree.[189]

DOJ consent decrees, on the other hand, require approval by a federal district court judge pursuant to the Tunney Act.[190] The Tunney Act requires judges to determine whether the DOJ's negotiated consent decree "is in the public interest" prior to approving it.[191] Antitrust scholars note a distinction between the court's role in judicial review (FTC) and judicial approval (DOJ) of a consent decree.[192] Judicial approval is a mandatory part of the Tunney Act procedure, while judicial review is a device by which a party may seek an appeal of an already final consent decree.[193]

This procedural distinction between the two agencies—principally, the FTC's lack of a mandatory judicial approval mechanism—is telling. Recognizing the "specialized,

186. *See* ROGERS ET AL., *supra* note 2, at 42 (describing the distinctions between FTC and DOJ consent decree approval procedure).

187. *See id.* (comparing the approval procedure for DOJ consent decrees and FTC consent decrees).

188. *See id.* ("[T]he Commission both proposes orders and then . . . approves them in final form.").

189. *See* Jacob Siegel Co. v. FTC, 327 U.S. 608, 611–13 (1946) ("The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce.").

190. *See* ROGERS ET AL., *supra* note 2, at 42 (explaining the Tunney Act requirements that the DOJ must satisfy in seeking approval of a consent decree).

191. *See* 15 U.S.C. § 16(e)(1) ("Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest."); *see also supra* notes 98–100 and accompanying text.

192. *See* ROSCH, *supra* note 66, at 3 n.6 (distinguishing "judicial approval," which "requires that a federal district court *approve* a settlement as being in the public interest[,] . . . from 'judicial review,' which merely refers to an appeal or petition for review [of a final FTC settlement] to a federal court of appeals").

193. *See id.* at 3 (stating that the FTC "does *not* have . . . a procedure for judicial approval—unlike consent decrees entered into by the [DOJ]").

experienced judgment"[194] of the FTC, courts repeatedly conclude that the agency retains the "primary responsibility for fashioning orders."[195] Courts must also give "wide discretion"[196] to the FTC in its crafting of the appropriate consent decree.[197]

Congress did not implement this procedural scheme inadvertently.[198] Unlike the DOJ, Congress created the FTC as "the expert body to determine what remedy is necessary to eliminate" the identified antitrust violations.[199] In *FTC v. Cement Institute*,[200] the Supreme Court spoke directly to congressional intent:

> Congress when it passed the [Federal] Trade Commission Act felt that courts needed the assistance of men trained to combat monopolistic practices in the framing of judicial decrees in antitrust litigation. Congress envisioned a commission trained in this type of work by experience in carrying out the functions imposed upon it.[201]

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194. *See* Moog Indus., Inc. v. FTC, 355 U.S. 411, 413 (1958) (stating that "it is ordinarily not for courts to modify ancillary features of a valid Commission order" because the FTC "is called upon to exercise its specialized, experienced judgment").

195. FTC v. Nat'l Lead Co., 352 U.S. 419, 429 (1957).

196. *See Jacob Siegel Co.*, 327 U.S. at 611–13 ("The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce.").

197. *See Nat'l Lead*, 352 U.S. at 428–29 (stating that "Congress had placed the primary responsibility for fashioning orders upon the Commission" in summarizing the U.S. Supreme Court's deferential approach to reviewing FTC consent decrees).

198. *See* FTC v. Cement Inst., 333 U.S. 683, 726 (1948) ("There is a special reason, however, why courts should not lightly modify the Commission's orders made in efforts to safeguard a competitive economy.").

199. *See Jacob Siegel Co.*, 327 U.S. at 612 (explaining the role of the FTC in enforcing antitrust laws); Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935) ("The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative . . . .").

200. 333 U.S. 683 (1948).

201. *Id.* at 726.

Thus, Congress foresaw the FTC filling an expert role in advising on antitrust decree concerns for the courts and, notably, for the DOJ.[202]

The FTC filling such a role is embedded in the text of the Federal Trade Commission Act itself.[203] The Federal Trade Commission Act provides that a court—after the end of testimony in a lawsuit brought by the DOJ under the antitrust laws—may "refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein."[204] The court may adopt or reject the FTC's report as it deems appropriate.[205] Congress viewed this advisory power as an important one: it "will bring both to the Attorney General and to the court the aid of special expert experience and training in matters regarding which neither the Department of Justice nor the courts can be expected to be proficient."[206]

Conversely, Congress implemented a mandatory judicial review function as part of the Tunney Act for the DOJ because of the "major antitrust policy [that] can be implemented through consent decrees."[207] Out of a concern that the DOJ was improperly disposing of antitrust lawsuits by consent decree,[208] Congress deemed the mandatory judicial review function necessary "to exact greater judicial and public scrutiny of antitrust settlements in suits brought by the government."[209]

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202. *See id.* at 726–27 (summarizing the FTC's expert role and the Federal Trade Commission Act's provision that allows for assistance to the DOJ).

203. *See* 15 U.S.C. § 47 (explaining the interaction between the FTC, courts, and the DOJ regarding consent decrees).

204. *Id.*

205. *See id.* ("[T]he court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.").

206. S. REP. NO. 63-597, at 12 (1914) (discussing the legislative proposal to create the FTC).

207. *See* ROGERS ET AL., *supra* note 2, at 42 (explaining the DOJ consent decree process).

208. *See* Savin, *supra* note 58, at 377 ("The elaborate procedures created by the Tunney Act are designed to provide an opportunity to correct the errors of the Justice Department, an opportunity wasted by a deferential court.").

209. *See id.* at 366 (explaining why the judicial review was imposed).

The DOJ is firmly rooted in the executive branch.[210] The Attorney General heads the DOJ[211] and serves as "the hand of the President;"[212] the Attorney General aids the President in executing the laws under the Take Care Clause.[213] The Attorney General is appointed by the President,[214] serves as a member of the President's cabinet and, as a result, may be removed at will and without cause by the President.[215] The DOJ Antitrust Division's Assistant Attorney General, who is also appointed by the President,[216] reports directly to the Attorney General.[217] The Assistant Attorney General determines DOJ antitrust policy and internal prosecutorial decision-making.[218] As a result, the Assistant Attorney General's opinions on antitrust enforcement play a major role in determining which antitrust cases the agency pursues.[219] Though the Assistant Attorney General is often well-qualified in the field of antitrust,[220] she operates as a

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210. *See* 28 U.S.C. § 501 ("The Department of Justice is an executive department of the United States at the seat of Government.").

211. *See id.* § 503 ("The Attorney General is the head of the Department of Justice.").

212. United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) ("The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed.").

213. *See* U.S. CONST. art. II, § 3, cl. 5 ("[The President] shall take care that the laws be faithfully executed . . . .").

214. *See* 28 U.S.C. § 503 ("The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States.").

215. *See* Myers v. United States, 272 U.S. 52, 163 (1926) (concluding that executive officers that are "appoint[ed] by the President with the consent of the Senate . . . are subject to removal by the President alone, and any legislation to the contrary must fall as in conflict with the Constitution").

216. 28 U.S.C. § 506 ("The President shall appoint, by and with the advice and consent of the Senate, 11 Assistant Attorneys General, who shall assist the Attorney General in the performance of his duties.").

217. *See* ROGERS ET AL., *supra* note 2, at 39 (describing the leadership structure of the DOJ's antitrust arm).

218. *See id.* ("Division policy and prosecutorial discretion are set by the Assistant Attorney General . . . .").

219. *See id.* at 39–40 (summarizing the drastically different approaches to antitrust enforcement depending on who held the position of Assistant Attorney General at the time); *see also supra* notes 1–5 and accompanying text.

220. For example, William Baer, Assistant Attorney General under the Obama Administration, "is a leader of the antitrust bar" and was previously

single decision-making authority and is directly accountable to the political motivations of the President.[221]

A recent example of potential political influence was the DOJ's uncharacteristic efforts to block a vertical merger: the now-consummated AT&T-Time Warner merger in 2017.[222] Neither the DOJ nor the FTC had brought a lawsuit to enjoin a vertical merger in over forty years.[223] Nonetheless, the DOJ proceeded with litigation to enjoin the AT&T-Time Warner deal.[224] The DOJ was unable to cite to any recent caselaw to support its position.[225] The D.C. District Court, ruling against the DOJ, concluded that the merger could proceed as planned, and the D.C. Circuit affirmed.[226] Reports indicate that Donald Trump's outspoken opposition to the merger influenced the DOJ's decision to challenge the deal.[227]

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the Director of the Bureau of Competition at the FTC. *See* STACEY ANNE MAHONEY, ANTITRUST ENFORCEMENT UNDER PRESIDENT OBAMA: WHERE HAVE WE BEEN AND WHERE ARE WE GOING? 2–3 (2013), https://perma.cc/3HSW-VQMZ (PDF) (referring to Baer as "extremely well regarded" and stating that he has enjoyed an "exceptionally successful career"). Christine Varney, Baer's predecessor, is a leading US antitrust lawyer and the only person to have served both as Assistant Attorney General and as a Commissioner at the FTC. *Lawyers: Christine A. Varney*, CRAVATH, SWAINE & MOORE LLP, https://perma.cc/2HJZ-G95T (summarizing Christine Varney's antitrust expertise).

221. *See* Burton Raffel, *Presidential Removal Power: The Role of the Supreme Court*, 13 U. MIAMI L. REV. 69, 75 (1958) ("The principal tool left to the President for securing the loyalty, responsibility and control of the officers of the government is discretionary removal power.").

222. *See* James B. Stewart, *AT&T-Time Warner Decision Shows Need to Rethink Antitrust Laws*, N.Y. TIMES (June 13, 2018), https://perma.cc/VR82-TMTT (detailing the DOJ's decision to sue to enjoin the merger between AT&T and Time Warner).

223. *See id.* ("The last time the government brought such a case was in 1979.").

224. *See* Complaint at 2, United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. 2018), No. 1:17-cv-02511, ECF No. 1 (stating that the United States brought a civil action to enjoin the merger because it would substantially lessen competition).

225. *See* Stewart, *supra* note 221 ("[T]he Justice Department, which sued to prevent the deal, could not cite a single recent precedent for blocking it.").

226. *See* United States v. AT&T Inc., 310 F. Supp. 3d 161, 254 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019) (denying the DOJ's request to enjoin the proposed merger).

227. *See* Jane Mayer, *The Making of the Fox News White House*, NEW YORKER (Mar. 4, 2019), https://perma.cc/ZG58-KVDD (reporting that "Trump

By contrast, Congress structured the FTC to exist as an independent agency, insulated from politics in the executive branch.[228] Thus, the FTC's consent decrees require public interest review by the commission itself, which is composed of a five-member panel of bipartisan, antitrust experts.[229] The DOJ's unilateral authority differs greatly from a bipartisan panel of expert commissioners, who, for example, are not subject to the President's at will removal powers.[230] Congress, therefore, was understandably concerned that the consolidated power structure inherent to the DOJ faces a greater risk of creating outcomes contrary to the public interest.[231]

B. *Less Agency Deference Does Not Pose an Unconstitutional Imbalance Between the Judicial and Executive Branches*

Courts consistently cite constitutional separation of powers concerns in support of narrowing Tunney Act judicial review.[232] Judicial deference owed to government agencies is part of a larger discussion regarding its constitutionality—namely, the debate surrounding *Chevron*[233] deference and the caselaw that espouses similar principles.[234] Independent of the outcome of

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ordered Gary Cohn, then the director of the National Economic Council, to pressure the [DOJ] to intervene"); *see also* Hadas Gold, *Report: Trump Asked Gary Cohn to Block AT&T-Time Warner Merger*, CNN, https://perma.cc/3KQA-73B7 (last updated Mar. 4, 2019, 4:53 PM) (stating that "Trump's animosity towards the merger is no secret," as he "repeatedly talked about wanting to block it on the campaign trail and in office").

228. *See* Sunstein, *supra* note 10 (explaining that there are two types of government agencies—executive and independent—and noting that the DOJ is executive and the FTC is independent).

229. Federal Trade Commission Act, 15 U.S.C. § 41 (stating that the commission is composed of five commissioners, with no more than three of the commissioners being members of the same political party).

230. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 632 (1935) (holding that the president cannot remove an FTC commissioner "during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute").

231. *See supra* notes 206–209 and accompanying text.

232. *See supra* notes 102–105 and accompanying text.

233. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

234. *See id.* at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory

that debate,[235] courts' use of a lower degree of agency deference does not implicate constitutional concerns. This conclusion is supported by analogy: it is not a constitutional concern in the federal criminal plea agreement context, which involves a similar process.[236]

The procedural requirements to which the DOJ must adhere when entering a federal criminal plea agreement and the requirements to seek entry of a proposed consent decree remedying an antitrust violation are remarkably similar.[237] While the Tunney Act mandates the procedure that the government must follow to enforce civil consent decrees,[238] Rule 11 of the Federal Rules of Criminal Procedure (the "Rules") governs the process by which the government may enter a federal criminal plea agreement.[239]

The plea agreement and consent decree both come after the agency has already exercised its "prosecutorial discretion" in bringing the complaint or indictment and after its subsequent

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scheme it is entrusted to administer . . . ."); *see also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 613 (1996) (noting that "*Chevron* deference has preoccupied administrative law scholarship in a way few issues ever have").

235. *See* Manning, *supra* note 234, at 613 ("Exhaustive academic commentary has scrutinized *Chevron*'s legitimacy, and explored the seemingly innumerable questions that arise from its application.").

236. *See* Bush, *supra* note 123, at 114 ("[T]his setting is no different than the countless thousands of plea bargains that are handled in the criminal context. In those instances, courts have broad discretion to reject plea bargains. . . . Prosecutorial discretion is preserved, as are the powers of Article III courts.").

237. *Compare* FED. R. CRIM. P. 11(c)(3) (providing that the court must accept a plea agreement before it is entered), *with* 15 U.S.C. § 16(e)(1) (requiring that the court make a public interest determination in deciding whether to enter the consent decree). In addition, scholars note the similarity between the Tunney Act's judicial approval requirement and the judicial approval requirement for shareholder derivative suits in Federal Rule of Civil Procedure 23.1. *See* Savin, *supra* note 58, at 380–82 ("Neither the Tunney Act nor Rule 23 intended for the reviewing court merely to rubber-stamp whatever settlement was proposed by the parties.").

238. 15 U.S.C. § 16 (requiring that the DOJ follow certain steps when seeking enforcement of a consent decree).

239. *See* FED. R. CRIM. P. 11 (providing the procedural rules regarding the negotiation and entry of a plea agreement).

decision not to continue prosecuting the charge or litigating the claim.[240] The three phases of the plea agreement process are analogous to consent decree approval under the Tunney Act: (1) the plea agreement negotiation that occurs between the parties,[241] (2) the submission of the proposed plea agreement to the court,[242] and (3) the court's review and ultimate judgment.[243]

The negotiation stage—the first phase of the plea agreement process—involves the government's exercise of prosecutorial discretion.[244] The court's absence from this phase is appropriate; courts routinely conclude that judicial review is inappropriate where the executive branch is exercising its discretion in determining whether to pursue, dismiss, or settle charges.[245] Such interference *would* constitute a violation of separation of powers and an infringement upon the government's prosecutorial discretion.[246] This notion is expressly codified in the Rules: a court cannot participate in plea agreement negotiations that occur between the defendant and the government.[247] This is also captured by the Tunney Act: the

240. *See* Bush, *supra* note 123, at 128 (describing the point at which plea agreements and consent decrees come into play).

241. *See* FED. R. CRIM. P. 11(c)(1) (discussing the procedure for plea agreement negotiations).

242. *See* FED. R. CRIM. P. 11(c)(2) (mandating disclosure of the proposed plea agreement to the court).

243. *See* FED. R. CRIM. P. 11(c)(4) (providing the structure for judicial review and approval of the plea agreement).

244. *See Prosecutorial Discretion*, *supra* note 177, at 199 (explaining that prosecutorial discretion involves the prosecutor's "far-reaching authority to decide whether to investigate, grant immunity, negotiate a plea bargain, or dismiss charges").

245. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) ("The Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws." (citations omitted)); Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) (stating that "few subjects" are less suited for judicial review than the executive branch exercising its prosecutorial discretion).

246. *See* United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) ("[A]s an incident of the constitutional separation of powers, . . . the courts are not to interfere with the free exercise of the discretionary power of the attorneys of the United States in their control over criminal prosecutions.").

247. *See* FED. R. CRIM. P. 11(c)(1) ("An attorney for the government and the defendant's attorney . . . may discuss and reach a plea agreement. The court must not participate in these discussions.").

parties only submit a proposed consent decree to the court once the terms within it have been agreed upon.[248]

Once the negotiations result in a plea agreement, the government must then offer it in open court—the second phase of the process.[249] At this point, the court's involvement is permissible because this phase triggers a judicial function; the government has exercised its prosecutorial discretion in deciding to reach a plea agreement with the defendant, and then submits it to the court for approval.[250] The Tunney Act mandates a similar procedure: the government must file the consent decree with the court and publish it in the Federal Register "at least sixty days prior to the effective date of such judgment."[251] This phase explicitly marks the point at which prosecutorial discretion ends and judicial review begins.[252]

In the final stage of the plea agreement process, responsibility shifts to the court to review the plea agreement as part of its judicial function and render a decision on it.[253] The court in the criminal plea agreement context, like in the Tunney

248. *See* 15 U.S.C. § 16(b) (explaining that the court's involvement in the consent decree does not begin until the parties submit a proposed consent decree to the court).

249. *See* FED. R. CRIM. P. 11(c)(2) ("The parties must disclose the plea agreement in open court when the plea is offered . . . ."). This rule also seems to implicate the entrenched notion that criminal justice should be adjudicated in the public eye. *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 580 (holding that "the right to attend criminal trials is implicit in the guarantees of the First Amendment"). Interestingly, the same concern arose in the legislative debate surrounding the Tunney Act procedures. *See 1957 Consent Decree Hearings*, *supra* note 62, at 3 (stating that criticisms of the consent decree process prior to Tunney Act enactment stem from "the fact that the entire process is surrounded by secrecy").

250. *See Prosecutorial Discretion*, *supra* note 177, at 197–99 (explaining that prosecutorial discretion involves the government's power to determine how to proceed with a case).

251. 15 U.S.C. § 16(b).

252. *See* Bush, *supra* note 123, at 128 ("Although the DOJ certainly has the right to dismiss a civil or criminal antitrust complaint or negotiate a settlement with any party, the right of prosecutorial discretion ends when a court is asked to exercise its power to enter a consent decree.").

253. *See* FED. R. CRIM. P. 11(c)(3)(A) ("[T]he court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.").

Act,[254] must approve the parties' settlement proposal prior to it taking effect.[255] This is a "judicial function"[256] and does not implicate separation of powers concerns.[257] The same principles apply in the Tunney Act context.[258] Responsibility shifts from the executive branch to the court to review the consent decree and render a decision on it.[259]

This analogy reveals that—in conferring an inappropriate amount of deference to the DOJ—courts are failing to distinguish between the executive's role in negotiating a proposed settlement and the court's subsequent role in reviewing the consent decree and granting its entry.[260] The Tunney Act prescribes a two-step process that involves the participation of two branches of government performing their distinct roles.[261]

In fact, the Constitution's separation of powers system demands this distinct role for the judiciary.[262] The judiciary's

254. *See* 15 U.S.C. § 16(e)(1) (requiring that the court make a public interest determination in deciding whether to enter the consent decree).

255. *See* FED. R. CRIM. P. 11(c)(4) ("If the court rejects the plea agreement, . . . the agreed disposition will be included in the judgment.").

256. *See* Savin, *supra* note 58, at 377–78 ("Although negotiations involve administrative decisions by the Justice Department, a court's entry of a consent decree is a judicial function.").

257. *See* Bush, *supra* note 123, at 114 (explaining that both prosecutorial discretion and the power of the courts are preserved during the plea agreement process).

258. *See id.* ("[The Tunney Act] setting is no different than the countless thousands of plea bargains that are handled in the criminal context.").

259. *See id.* at 127 (stating that "the act of deciding to enter a decree" is a judicial function and not an executive branch function "entrusted solely to the discretion of the DOJ"); United States v. Swift & Co., 286 U.S. 106, 115 (1932) ("We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act."). The entry of a consent decree as a judicial act is a long-held principle that predates the Tunney Act. *See* Phillips, Jr., *supra* note 83, at 44 (explaining that by 1928 the U.S. Supreme Court had established that the entry of a consent decree is a judicial act).

260. *See supra* notes 249–259 and accompanying text.

261. *See* Savin, *supra* note 58, at 377–78 ("Entry of a consent decree is a judicial act, and therefore the decree is subject to the court's inherent equitable power to refuse to enter any judgment not in the public interest.").

262. *See* Bush, *supra* note 123, at 129 ("Because the entry of a decree is an inherently judicial function, it cannot be the case that the Court should be obligated to defer to the DOJ . . . .").

abdication of an exacting review through deference to the DOJ, therefore, "could itself represent an unconstitutional infringement on judicial power."[263] Moreover, if this Note were to extend the concept of the DOJ's prosecutorial discretion in Tunney Act review and frame it as a *Chevron* inquiry, this too would fail by analogy to the criminal plea agreement context.[264] The U.S. Supreme Court concludes that agency deference is inapt for criminal statutes.[265]

Therefore, analogy to the criminal plea agreement process reveals a process of judicial review that is consistent with the requirements set forth in the Constitution.[266] Courts should eliminate the artificial restraints that it has imposed on its Tunney Act review by acknowledging that deference to the DOJ is inappropriate when the court is charged by statute with an independent duty to approve or deny a settlement.

C. *Less Agency Deference is Crucial to Containing Harmful Effects of Anticompetitive Mergers*

When a reviewing court affords too much deference to the DOJ, it removes the procedural protections Congress designed to ensure that only those antitrust settlements that are in the public interest are approved.[267] Only a scrutinizing,

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263. *See* Savin, *supra* note 58, at 377 n.102 ("Such a denial would arguably prevent the court from accomplishing its constitutionally assigned function of enforcing the laws of the United States as a court of equity.").

264. *See supra* note 234 and accompanying text.

265. *See* Abramski v. United States, 573 U.S. 169, 191 (2014) ("[C]riminal laws are for courts, not for the Government, to construe."); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) (citing *Abramski*, 573 U.S. at 191)

> The Supreme Court has expressly instructed us not to apply *Chevron* deference when an agency seeks to interpret a criminal statute. Why? Because, we are seemingly told, doing so would violate the Constitution by forcing the judiciary to abdicate the job of saying what the law is and preventing courts from exercising independent judgment in the interpretation of statutes.

266. *See supra* notes 249–259 and accompanying text.

267. *See 1973 Tunney Act Hearings*, *supra* note 15, at 449 (remarks by Sen. John V. Tunney and Sen. Edward Gurney) (explaining that the purpose of the independent judicial review is to protect against the "bad or inadequate" consent decrees).

non-deferential review can decipher between settlements that advance the public interest versus those that were agreed upon based on objectionable motivations—cheap decrees.[268]

Cheap decrees[269] undercut the entire utility of enforcement by settlement and serve as a primary example of why the Tunney Act warrants independent, non-deferential review.[270] Congress imposed a mandatory judicial approval mechanism in the Tunney Act to prevent cheap decrees like those described above,[271] and robust judicial review prevents those cheap decrees.[272] Therefore, it is incumbent upon courts to reanimate their role in Tunney Act review to thoroughly assess the merits of consent decrees prior to their entry into force.

V. A PATH FORWARD

In one of the most recent examples of Tunney Act jurisprudence, the D.C. District Court rejected the notion of "rubber stamp" review in CVS's acquisition of Aetna.[273] Highlighting the importance of an exacting review, the *CVS Health* court stated, "Indeed, if the Tunney Act is to mean anything, it surely must mean that no court should rubberstamp a consent decree approving the merger of one of the largest companies in the United States and the nation's third-largest health-insurance company, simply because the Government requests it!"[274]

Because of the merger's far-reaching effects,[275] the court conducted hearings and received extensive briefings to address

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268. *See supra* Part I.B.1.

269. *See supra* notes 64–69.

270. *See* ROSCH, *supra* note 66, at 10 (stating the negative effects of cheap decrees).

271. *See supra* Part IV.A.

272. *See* ROSCH, *supra* note 66, at 9–11 (explaining the concept of "cheap decrees" and their detrimental effects).

273. *See* United States v. CVS Health Corp., 407 F. Supp. 3d 45, 48 (D.D.C. 2019) (stating that "with so much at stake, the congressionally mandated public interest inquiry must be thorough").

274. *Id.* at 48 (citation omitted).

275. *See id.* ("Its effects, for better or for worse, will be felt by millions of consumers.").

the concerns voiced by industry participants.[276] In the opinion, the court noted particular concerns with the DOJ's "perfunctory" response to the large volume of comments that the DOJ received during the mandatory notice and comment period and the unsubstantiated confidence with which the DOJ defended the consent decree in the responses.[277]

Notably, the court clarified—and, in so doing, potentially broadened—the D.C. Circuit's holding in *Microsoft*, which provided that the reviewing court's inquiry under the Tunney Act is limited to the claims contained in the DOJ's complaint.[278] Criticizing the DOJ's attempt to use *Microsoft* to limit the scope of the review, Judge Leon stated that the arguments "severely understate the permissible scope of a Tunney Act review."[279] The court distinguished between *claims* and *harms*: *Microsoft* stands for the proposition that the reviewing court cannot "evaluate claims that the government did not make,"[280] but the D.C. Circuit never suggested that "allegations in the complaint are the *only harms* courts may consider in a Tunney Act review."[281]

276. *See id.* (stating that the record was "meaningfully supplemented by the briefs and testimony presented by the parties and *amici curiae*"); Brent Kendall, *Judge Approves Settlement Allowing CVS-Aetna Merger*, WALL ST. J. (Sept. 4, 2019, 7:30 PM), https://perma.cc/ZQ8G-3FWK (explaining that, "in a first for a court review of a government merger settlement," Judge Leon heard live testimony from third parties).

277. *See CVS Health*, 407 F. Supp. 3d at 50 ("To say the least, [the DOJ's] response left much to be desired. It is rife with conclusory assertions that merely reiterate the Government's confidence in its proposed remedy, but shed little light on the reasons for that confidence."). These steps are part of the procedural requirements set forth under the Tunney Act. *See supra* notes 86– 91 and accompanying text.

278. *See supra* notes 124–128 and accompanying text.

279. *See CVS Health*, 407 F. Supp. 3d at 52–53 (stating that the DOJ relied on *Microsoft* to attempt to persuade the court that it should disregard the criticisms posed by the *amici curiae* as outside the review's scope).

280. *Id.* at 53 (citing United States v. Microsoft Corp., 56 F.3d 1448, 1451 (D.C. Cir. 1995)).

281. *See id.* (stating that "such a holding would have contradicted the Tunney Act itself"); *id.* at 53–54 ("The Government's suggestion here—that by narrowly drafting a complaint it can effectively force the Court to shut its eyes to the real-world impact of a proposed judgment—thus misconstrues *Microsoft*.").

Judge Leon explained that such a holding would "strike[] at the heart of the Tunney Act's very purpose."[282]

After a thorough review, the court ultimately approved the consent decree.[283] A signal of change or an outlier among deferential precedent, Judge Leon's hands-on review in *United States v. CVS Health* is a needed reanimation of the Tunney Act's congressional mandate. As such, the D.C. Circuit should adopt Judge Leon's *claims* versus *harms* distinction for the Tunney Act's scope of review and clarify its holding from *Microsoft* to reflect such language.[284] In doing so, the D.C. Circuit should make clear that courts are not prevented from engaging in a meaningful review of a proposed consent decree with respect to the harms that may accrue with the public as a result of the merger.[285] As the court states, "Neither the statute, nor *Microsoft*, supports such a meaning."[286]

CONCLUSION

A court's deferential review of proposed consent decrees under the Tunney Act dilutes the independent judicial review mechanism designed by Congress to a mere "rubber stamp" process.[287] By simply deferring to the DOJ and imposing artificial constraints on its scope of review, courts are unable to conduct a meaningful review of the effects of a proposed merger on the public. Less agency deference, therefore, is critical to ensuring that the goals of the Tunney Act are met. Without such

282. *Id.* at 54.

283. *See id.* (granting the government's motion to enter the proposed consent decree because the settlement satisfied public interest review under the Tunney Act).

284. *See* United States v. CVS Health Corp., 407 F. Supp. 3d 45, 52–53 (D.D.C. 2019) (summarizing the court's clarification of the *Microsoft* reasoning).

285. *See id.* at 54 (stating that "judicial evaluation of . . . alleged harms raises no constitutional issue").

286. *See id.* (explaining that the DOJ has misinterpreted the D.C. Circuit precedent).

287. *See 1973 Tunney Act Hearings*, *supra* note 15, at 452 (remarks by Sen. John V. Tunney and Sen. Edward Gurney) (fearing that, absent the Tunney Act, the court "operate[s] simply as a rubber stamp").

review, the goals embedded in the Tunney Act's public interest provision are lost.[288]

Courts should afford less deference to the DOJ when engaging in the Tunney Act's public interest review and reanimate their statutorily mandated duty to independently determine whether allowing a merger to go forward on the terms contained within the decree is in the public interest.

288. *See supra* note 274 and accompanying text.