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### The Consent Decree in Antitrust Enforcement—Analysis and Criticism

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# COMMENTS

## The Consent Decree In Antitrust Enforcement--Analysis and Criticism

### INTRODUCTION

This comment will, in a general manner, attempt to set forth the position and importance of the consent decree in current antitrust enforcement procedures. No attempt will be made to discuss the settlement procedure in the Federal Trade Commission proceedings.<sup>1</sup> The definition and enforcement abilities of a consent decree, as set forth by several important Supreme Court decisions, will be discussed. This topic will include the legal effectiveness of the decree as an enforcement procedure, as a binding agreement upon the parties involved, and as a judicial precedent. The reasons for the use of the consent decree by the various parties thereto will be explained, setting forth the viewpoints of both the government attorneys and private counsel. This comment will then conclude with a discussion of recent criticisms concerning the use of the consent decree procedure and suggestions for more effective implementation of it in the future.

#### I. DEFINITION OF THE CONSENT DECREE AND ITS LEGAL EFFECTIVENESS

##### A. *Nature of the consent decree.*

A consent decree is, basically, a voluntary settlement of issues concerning violation of the antitrust laws which are raised by the Antitrust Division of the Department of Justice.<sup>2</sup> This settlement is incorporated into a document and approved in a routine manner by a federal district court.<sup>3</sup>

The federal antitrust laws do not contain an express provision

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1. For a good discussion of recent developments in this field, see Horsky, *Settlement*, in AN ANTITRUST HANDBOOK 507 (1958). It appears that the Federal Trade Commission amended its Rules of Practice in 1954 and adopted a new consent procedure which makes settlement much more attractive to a defendant. Horsky lists the three major changes as follows: (1) the requirement that FTC consent settlements contain findings of fact was eliminated, thereby decreasing defendant's fear of treble damage possibilities; (2) consent orders are now permitted which dispose of only some of the issues, or which affect only some of the defendants; (3) settlement is now possible at any stage of the proceedings.

2. Hereinafter referred to as "the Government."

3. Although the trial court does have the discretion to reject or alter the decree, in actual practice it never does so. The defendant has consented to the decree, leaving no one to point out its defects to the court. Also, it is often a settlement of very difficult economic questions, yet there are no findings of fact or reasons behind the provisions set out in the decree. The trial judge therefore has nothing to go on. See Isenbergh and Rubin, *Antitrust Enforcement Through Consent Decrees*, 53 HARV. L. REV. 386 (1940).

for consent decrees. Instead, the legal effectiveness of consent decrees is implied from several sources:<sup>4</sup> the power of the federal district courts sitting as courts of equity to enter decrees in antitrust actions;<sup>5</sup> the general authority delegated to officials charged with administration and enforcement of the antitrust laws;<sup>6</sup> and from the language of Section 5 of the Clayton Act.<sup>7</sup>

A consent decree is a hybrid procedural device. It is not treated as a contract, although the terms are reached entirely by negotiation between the parties,<sup>8</sup> and it does not resemble a decree resulting from litigation.<sup>9</sup> It is actually a judicially enforceable negotiation of economic questions between government and business.

The main advantage of a consent decree lies in its informality and flexibility. The difficulties in pleading and proving questions of economics by the usual legal process are eliminated. The atmosphere of the bargaining table is present, rather than the spirit of advocacy before an open court. These characteristics tend to make the consent decree a very useful device in the enforcement of the somewhat nebulous antitrust laws.<sup>10</sup>

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4. This information is obtained from Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139 (1952).

5. The Government brings their actions under Section 4 of the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. § 4 (1958). This section reads in part as follows:

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of Sections 1-7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations....

The consent decree procedure emerges out of this process of litigation, as settlement out of court is one of the oldest of legal usages. See HAMILTON & TILL, *ANTITRUST IN ACTION* 88-97 (TNEC Monograph No. 16, 1940).

6. Timberg, *Recent Developments in Antitrust Consent Judgments*, 10 FED. B.J. 351 (1949).

7. 38 Stat. 731 (1914), 15 U.S.C. § 16 (1958). This section specifically exempts consent judgments or decrees from the statutory rule that final decrees against defendants shall be prima facie evidence of violation in later suits against them.

8. This is because of the judicial elements involved (court approval and supervision) and the fact that a consent decree is subject to unilateral change, which a contract is not.

9. There is no presentation of evidence, findings of fact, or conclusions of law, as there is in a litigated decree. As a result, there is no real judicial scrutiny in a consent decree. See Note, *The Modification of Antitrust Consent Decrees*, 63 HARV. L. REV. 320 (1949).

10. The advantages of a consent decree are ably set forth by HAMILTON & TILL, *ANTITRUST IN ACTION* 88-89 (TNEC Monograph No. 16, 1940), as follows:

The consent decree permits a direct attack upon problems in industrial government. Questions do not have to be transmitted in the alien language of the law; the proceedings ordained for ordinary courtroom use do not obtrude with their distractions. The parties meet in informal conference; no weight of intent and harm hangs heavy overhead; fact and value do not have to trickle into the discussion through the conventional rules of evidence. An opportunity is presented to a group of men, sitting around a table, to reach a settlement grounded in industrial reality and the demands of public policy.

B. *Legal Effectiveness of the Consent Decree.*

1. *Binding effect of the consent decree upon the parties involved.*

a. *Upon the private party to the decree.*

The private corporation which is considering settlement through a consent decree may wish to know the extent to which they are bound by this decree, and whether a change in conditions will allow them to obtain a modification thereof. Five leading meat packers supplied the answers to these questions in 1928 and 1932 when they attempted to challenge first the validity of a consent decree (and failed), and then attempted to get their decree modified (and failed).<sup>11</sup> The challenge made by the packers was very extensive; as a result, the Supreme Court decisions which followed have established the legal effectiveness of the consent decree in a very comprehensive manner. As the following case history of the packers will show, it is almost impossible to have a consent decree declared void, and extremely difficult to obtain modification.<sup>12</sup>

The original consent decree obtained against the packers was very stringent.<sup>13</sup> Why they even consented to it is an interesting question. The packers initially attacked the decree as void, alleging first that the effect of the recital in the decree that no findings of fact need be made, and that the decree should not be considered as an admission or adjudication of guilt,<sup>14</sup> was to conclude the

In addition, the instrument has a sweep which no process of law could ever impart. It can go beyond sheer prohibition; it can attempt to shape remedies to the requirements of industrial order. . . . It can reach beyond the persons in legal combat to comprehend all the parties to the industry. It can accord some protection to weaker groups and safeguard to some extent the rights of the public. It can, unlike a decree emerging from litigation, take into account the potential consequences of its terms. It can make its attack upon the sources, rather than the manifestations, of restraint; give consideration to activities that would never be aired in open court; probe into matters which the prosecution could never prove; explore conduct just outside of restraint; follow wherever the trial leads. It can amend usage, create new trade practices, provide safeguards against unintended harm.

11. *Swift & Co. v. United States*, 276 U.S. 311 (1928); *United States v. Swift & Co.*, 286 U.S. 106 (1932).

12. The following detailed discussion of the packer's decree is taken largely from Donovan and McAllister, *Consent Decrees in the Enforcement of Federal Antitrust Laws*, 46 HARV. L. REV. 885 (1933).

13. The decree is discussed in detail in Donovan and McAllister, *supra* note 12. The action of the attorney general was preceded by an extensive investigation of the meat packing industry by the Federal Trade Commission, in response to a request of President Wilson in 1917. The resulting decree enjoined the defendants from: (1) holding any interest in public stockyard companies, stockyard terminal railroads or market newspapers; (2) engaging in, or holding any interest in, manufacturing, selling or transporting 114 different food products; (3) permitting others to use their facilities for handling these articles; (4) selling meat at retail; (5) holding any interest in any public cold storage plant; (6) selling fresh milk or cream. The decree therefore divested the defendants of certain facilities owned by them, and prevented their expansion into other lines of business.

14. These are typical boilerplate provisions found in all consent decrees.

controversy that existed. From this they contended that at the time of entry of the decree there was no case or controversy before the court within the meaning of Section 2 of Article III of the United States Constitution. Justice Brandeis, who wrote the 1928 decision, said that, on a motion to vacate, the determination by the trial court that a case or controversy existed is not open to attack. He went on to emasculate the argument by saying that a suit for an injunction deals with threatened future violations; and an injunction may issue to prevent future wrong although no right has yet been violated.

The packers then argued that ownership of the prohibited facilities and businesses was lawful, and could not be enjoined unless connected with a general conspiracy by a finding of fact. Brandeis replied: "The court had jurisdiction of the subject matter of the parties and even gross error in the decree would not render it void."<sup>15</sup>

The packers next argued that the decree was not limited to interstate commerce, and covered acts susceptible of being carried on in intrastate commerce. Brandeis replied, in a now famous statement: "The argument fails to distinguish an error in decision from the want of power to decide. . . . The power to enjoin includes the power to enjoin too much."<sup>16</sup> The Court listed the following as the questions reviewable on appeal: clerical errors in the decree, lack of actual consent to the decree, fraud in its procurement, and lack of federal jurisdiction because of the citizenship of the parties.<sup>17</sup> The actions taken by the trial court (for example, enjoining "too much") are waived by consenting to the decree, and only the questions enumerated above, going to the jurisdiction or power of the court to act, may be reviewed on appeal.

As a practical matter, this leaves the disappointed defendant with only one alternative: attempt to modify the decree.<sup>18</sup> This is what the packers next attempted to do. Their proposed modifications were so extensive as to, in effect, dissipate the original decree. The main contention of the packers was that their entry into the retail meat and grocery business would stimulate rather than impede competition, because of the recent growth of large chain stores. The trial court and the dissenters of the Supreme Court agreed with them and favored modification. However, the majority of the Court, speaking through Justice Cardozo, treated the issue from a legal rather than on economic viewpoint, and stated the limits of proper inquiry into a consent decree as follows:

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15. 276 U.S. at 330.

16. *Id.* at 330-31.

17. As listed by Mr. Justice Brandeis on p. 324 of 276 U.S.

18. Power to later modify the decree is almost always expressly reserved in the decree. Even if it is not expressly reserved, it is still there by force of the principles inherent in equity jurisdiction. Kramer, *Modification of Consent Decrees: A Proposal to the Antitrust Division*, 56 MICH. L. REV. 1051 (1958).

The inquiry for us is whether the changes (since the decree) are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. *Nothing less than a clear showing of greivous wrong evoked by new and unforeseen conditions should lead us to change what was decreed . . . with the consent of all concerned.*<sup>19</sup> (Emphasis added.)

This well known test evolved by the Court is stringent, but just. It provides for unforeseen occurrences and yet holds the parties to their agreement. The two packers' cases gave legal strength to the consent decree, which laid the groundwork for useful implementation of this enforcement device.

b. *The binding effect of the consent decree upon the Government.*

The packers' cases dealt with the binding effect of a consent decree upon a private party. However, the Government has been treated in much the same manner. Their application for modification failed in the *International Harvester* case,<sup>20</sup> and the *Ford* case,<sup>21</sup> which seem to be the leading authorities in this area. The one exception to the strict modification rule is the *Chrysler* case,<sup>22</sup> where the Government was allowed to obtain modification of a contingency provision in a consent decree obtained against Ford Company and Chrysler Company. This provision provided that certain sections of the consent decree were to lapse if the Government failed to obtain similar relief against General Motors (who had abstained from consenting to the decree) within a certain time. The time limit passed and the Government, although prosecuting diligently, had failed to end the litigation with General Motors. The Supreme Court permitted a two year extension of the time, noting

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19. 286 U.S. at 119.

20. *United States v. International Harvester Co.*, 274 U.S. 693 (1927). In this case the original consent decree stated that its object was to restore competitive conditions in the business. The deadline set for this was 18 months. If competitive conditions were not restored by that time, the decree provided that the Government may petition for further relief. The Government did petition at the end of that time, asking that the court break the *International Harvester* Company into three independent corporations. The Supreme Court denied modification, saying that the defendant had observed the conditions of the decree (providing, in part, for the sale of certain harvesting machine lines and enjoining the defendant from having more than one dealer in any town) and to go beyond those conditions would be going against the decree. So it appears that the consent decree is also strictly binding on the Government.

21. *Ford Motor Co. v. United States*, 335 U.S. 303 (1948). The Government was unable to secure a modification of the Ford automobile finance decree which would, in effect, extend for ten years the time in which the Government was to obtain similar relief against General Motors. This case will be discussed in the text *infra*.

22. *Chrysler Corp. v. United States*, 316 U.S. 556 (1942).

that Chrysler failed to show any competitive disadvantage by further extension of the decree.<sup>23</sup> The inquiry of the Court was whether the change thwarted the basic purpose of the original consent decree.<sup>24</sup> However, the *Ford* case<sup>25</sup> rendered the somewhat ambiguous rule of the *Chrysler* case practically meaningless, when the Court held that the Government had failed to show good cause why a court of equity should grant relief contrary to the express provisions of the decree. The Court said the crucial fact was not competitive disadvantage, but rather the persistence of an inequality (GM remaining untouched) against which protection had been secured in the original decree. The "basic purpose" test of the *Chrysler* case was not reiterated nor relied upon, with the result that the *Chrysler* case has not been an important factor in subsequent litigation.<sup>26</sup>

It is therefore patent that unilateral modification is extremely difficult to obtain. The courts are reluctant to overturn a decree rendered by a court in accordance with the consent of the parties. The other relief remaining for the Government—a new and separate proceeding—will be discussed in Section III-B *infra*.

## 2. *Legal effectiveness of the consent decree through judicial enforcement.*

The Government, if it finds the decree satisfactory, may assure compliance of the defendant by using the judicial process of contempt proceedings.<sup>27</sup> This is easy when the decree contains a specific, mandatory injunction. However, enforcement through contempt is extremely difficult when the decree contains general injunctive provisions which merely restate the law.<sup>28</sup> This is because enforcement would amount to a regular trial and proof of antitrust violations, just as in an original suit. The only practical result of a broad

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23. At the time of the case the war had brought about complete cessation of all new car manufacturing. A showing of competitive disadvantage was therefore impossible.

24. This is the "basic purpose" or "of the essence" test. It would be extremely difficult to apply, as there is no record showing findings of fact and conclusions of law. Also, a consent decree rarely states its objectives or purposes. This type of ruling would seem to have the result of inspiring endless litigation attempting to determine the "basic purpose" of a decree.

25. See note 21 *supra*. In this case the Government was attempting to extend even further the time limit set up in the original consent decree of Chrysler Company and Ford Company.

26. Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?*, 68 YALE L.J. 1391 (1959), notes that the *Chrysler* case has been rarely cited, and then only for general propositions in conjunction with other early Supreme Court modification decisions.

27. Enforcement through contempt proceedings is, of course, an inherent power of a court of equity.

28. This is where a decree merely restates prohibitions clearly established by judicial interpretation of the antitrust laws; for example, prohibitions against market allocation or price fixing. See Peterson, *Consent Decrees: A Weapon of Anti-Trust Enforcement*, 18 U. KAN. CITY L. REV. 34 (1950).



injunctive provision (for example, prohibiting monopolizing) might be to keep the defendant in a law-abiding state of mind.<sup>29</sup>

It is therefore the specific mandatory provisions (for example, a divestiture order, or an order directing the defendant to sell, lease, or give away certain patent rights) that make the consent decree an important enforcement procedure. This type of provision is clear, specific, and susceptible to ready proof in case of a violation.

### 3. *Legal effectiveness of the consent decree as a judicial precedent.*

The consent decree is not an effective judicial precedent because of the fact that there is no record containing facts or conclusions. It is instead determined entirely by the bargaining of the parties.<sup>30</sup> However, it has sometimes led the case law, as in the area of discouraging abuse of state resale price maintenance statutes.<sup>31</sup> Also, it assists in declaring what legally may be done, which is very helpful in so vague a field as antitrust law.<sup>32</sup> Although the decree is not a judicial guarantee that the approved conduct is lawful, as a practical matter it is doubtful if the Government would ever attack the conduct and destroy the attractiveness of the consent decree to a defendant.

## II. USE OF THE CONSENT DECREE

Approximately 75 to 78 per cent of all antitrust suits are settled by the consent procedure.<sup>33</sup> This topic will discuss why the Government and private corporations find this procedure such an important one to use.

### A. *The policy of the Government.*

The Government finds settlement by consent useful for the following reasons: (1) It offers a means to accomplish results the Government deems desirable without the time<sup>34</sup> and expense<sup>35</sup>

29. *Ibid.*

30. Barnes, *Settlement by Consent Judgment*, 4 ABA ANTITRUST SECTION PROCEEDINGS 8 (April, 1954); Timberg, *Recent Development in Antitrust Consent Judgments*, 10 FED. B.J. 351 (1949).

31. Peterson, *supra* note 28 at 46.

32. Isenbergh and Rubin, *Antitrust Enforcement Through Consent Decrees*, 53 HARV. L. REV. 386 (1940). The authors list the cases which declare what legally may be done on pages 393 and 394 of their article.

33. SUBCOMM. NO. 5, HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEP'T OF JUSTICE 7, 8 (Comm. Print 1959).

34. The average litigated case takes 59.27 months from the time of filing the complaint to entry of final judgment. The average consent decree takes 32.86 months from the time of either initial negotiation or filing a complaint until it is entered. *Id.* at 9. It therefore takes on the average two more years to try a case than to obtain relief by a consent judgment.

35. "Since savings in time generally spell savings of men and resources, consent settlements mean lower costs to the Antitrust Division per judgment entered." *Id.* at 10. This is undoubtedly a weighty factor, as government litigation expenses have been estimated at \$100,000 to \$150,000 per case. See Note, *Modification of Antitrust Consent Decrees*, 31 IND. L.J. 357 (1956).

necessary to secure a litigated decree. (2) Specific measures of relief can be obtained which might be difficult to get in a litigated case.<sup>36</sup> (3) There is no uncertainty of result.<sup>37</sup> (4) The Government is not required to produce and prove a factual basis for its complaint. (5) The procedure is informal, which assists immensely in solving the non-legal economic problems. All of these advantages must make the consent procedure very tempting to the often undermanned and under financed Antitrust Department. However, their policy in regard to the consent decree seems to be that they will settle only when it is in the public interest, and not merely to save time and money.<sup>38</sup>

#### B. *Views of the Private Corporations.*

Almost all corporate defendants look favorably upon the consent decree. The reasons for this approval are as follows.<sup>39</sup> (1) The time between the filing of the complaint and the termination of litigation is always uncertain and often of a long duration. The defendant may be paralyzed during this time so far as future plans are concerned. (2) The costs of antitrust litigation upon a defendant are enormous, not only in dollars but also as a drain on important executives' time. There is also present the imponderable costs of the adverse publicity continuing throughout a long trial. (3) There is almost always a good chance that the defendants will lose. Pure self-interest dictates that a government enforcement agency will only bring a suit when it believes it can win it. (4) The fear of treble damage suits is ever present. The defendant realizes that the ultimate cost of deciding to litigate may be many times the cost of the original government suit.

All of the above factors tend to make settlement by consent decree very attractive to a corporate defendant. By consenting, he saves time, expense, uncertainty and unfavorable publicity.<sup>40</sup>

#### C. *Relative bargaining power of the parties.*

The question as to which party has the better bargaining position in the negotiation for a consent decree is an important one because

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36. This topic will be discussed in section III-A *infra*.

37. In addition to the uncertainties during the trial, often the Government will win a case in the trial court and be disappointed on appeal. See HAMILTON & TILL, ANTITRUST IN ACTION 88-97 (TNEC Monograph No. 16, 1940), for some examples.

38. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 360-61 (1955).

39. This list of reasons was taken from Horsky, *Settlement*, in AN ANTITRUST HANDBOOK 507 (1958). Horsky is a well-known defense lawyer.

40. Horsky, *supra* note 39, believes that these reasons make the impetus to negotiate so strong that only unusual circumstances render consent impossible. These circumstances are as follows: if the Government is definitely contemplating criminal proceedings; if it is seeking adjudication of an important issue of law; or if the defendant is facing a challenge to a legal position he regards as vital, or a challenge to his very existence.

of the binding effect of the decree. The above list of reasons, showing why each party desires a consent decree over litigation, would seem to indicate that the corporate defendant is in a somewhat more precarious position and would therefore have less bargaining power. Some authors agree with this.<sup>41</sup> Others argue that the Government is also forced to make concessions, as they are often unaware of the intricacies of the business, and must get their evidence from hostile witnesses.<sup>42</sup> The only definite answer to this is that the bargaining power of the parties is necessarily a case by case situation. Public opinion, the current resources of the parties, and the importance to the parties of the issues raised will necessarily vary with each case. In the overall picture, it would seem that the government is in a better bargaining position, as its mode of existence, unlike that of a corporate defendant, does not depend upon the result of a litigated decree.

### III. PROBLEMS CONCERNING THE CONSENT DECREE

#### A. *Does it sanction enforcement procedures which go beyond the bounds of judicial approval? If so, is this necessarily harmful?*

The Government has frequently been accused of exacting remedial provisions which go beyond the bounds of existing law.<sup>43</sup> The provision which inspires the most comment, and which shall be the center of discussion in this topic, is that providing for compulsory licensing of patents royalty free.<sup>44</sup> Most commentators, who declare that compulsory licensing without royalty is going too far, rely upon the case of *Hartford Empire Co. v. United States*,<sup>45</sup> which involved appeal of a litigated case containing this type of provision. The Supreme Court, declaring that a patent is property, held that the provision was confiscatory and not justified by the circumstances of

41. Segal and Mullinix, *Administration and Enforcement*, 104 U. PA. L. REV. 285 (1955), are quite emphatic about this, and suggest that the Government be more lenient and yielding in their negotiations.

42. Isenbergh and Rubin, *Antitrust Enforcement Through Consent Decrees*, 53 HARV. L. REV. 386 (1940); HAMILTON & TILL, *ANTITRUST IN ACTION* 88-97 (TNEC Monograph No. 16, 1940).

43. Comment, *Regulation of Business—Sherman Act—Administration and Enforcement—A Re-analysis of Consent Decrees*, 55 MICH. L. REV. 92 (1956); Peterson, *Consent Decrees: A Weapon of Anti-Trust Enforcement*, 18 U. KAN. CITY L. REV. 34 (1950).

44. Some of the less commented upon provisions, which are also accused of going beyond the bounds of judicial approval, are where the defendant was ordered to increase its customers by a specified percentage, or where individual defendants were forbidden to vote shares of corporate defendants. Both of these provisions are found in *United States v. Libbey-Owens-Ford Glass Co.*, TRADE REG. REP. (1948-49 Trade Cas.) ¶ 62323 (N.D. Ohio 1948), and are found by Peterson, *Consent Decrees: A Weapon of Anti-Trust Enforcement*, 18 U. KAN. CITY L. REV. 34, 49 (1949), to be beyond existing law.

45. 323 U.S. 386 (1945).

the case.<sup>46</sup> The subsequent case of *United States v. National Lead Co.*<sup>47</sup> affirmed a district court decision disallowing a royalty free patent provision, but said that they were not deciding the constitutionality of such a provision.

The objectors to this provision therefore rest their case on the fact that it has not been approved by the Supreme Court. But is the effect of including this provision in a decree necessarily harmful? This is a provision which two parties at arms length have agreed upon and which has, at least, not been declared illegal by the Supreme Court. The basis for the arguments against allowing whatever provisions the parties may agree upon must be that the Government has such a superior bargaining position that it is asking for more than it should. However, there are two flaws in this type of reasoning:

(1) The Government is not actually in the strong bargaining position which would be necessary in order to force unjust concessions. This is because they too are working on a budget, have limited manpower, and face the possibility of losing the case in court if they push too far. However, even if the defendant is in as bad a bargaining position as the opponents of these provisions would seem to indicate, one might ask how he got there. To be placed in a position where one is susceptible to abuse, he must have been clearly violating the law. There have been sixty-some years of interpretation of the admittedly vague antitrust laws, so surely he had some idea of what he was doing. Also, if the defendant feels he is being abused, he always has the option of litigating the issues instead of consenting to the decree.

(2) Even assuming that the Government does have this superior bargaining position, what would be gained from abusing it? The objective of the Government is merely to stop illegal activities or prevent legal activities from becoming illegal.<sup>48</sup> To misuse the consent procedure by making confiscatory and unreasonable demands would be senseless. It would deprive the Government of one of their most effective enforcement procedures, as defendants would soon be prone to litigate rather than consent.

Horsky, a defense counsel, has said that abstract criticism of the provisions in a consent decree cannot be meaningful, as the decrees are molded by underlying facts.<sup>49</sup> He seems to feel that in

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46. This qualification added by the Court—that the provision was not justified by the circumstances of the case—rebutts the argument that the Court emphatically declared this type of provision illegal.

47. 332 U.S. 319 (1947).

48. Isenbergh and Rubin, *Antitrust Enforcement Through Consent Decrees*, 53 HARV. L. REV. 386 (1940).

49. Horsky, *supra* note 39. He says, at page 507: "If a company has five worthless patents, and can dedicate them in order to achieve an advantage elsewhere

actual practice nothing is arbitrarily forced upon the private corporations.

It is conceded that some provisions in consent decrees do go beyond the bounds of current judicial approval. However, in view of the uniqueness of the situation and the lack of motive to abuse, it is submitted that there is no cause to complain of any unwilling loss of rights.

B. *Are the requirements for modification or termination too stringent?*

The subject of modification and termination of a consent decree has been discussed in Section I-B (1) *supra*. It was there determined that unilateral modification is extremely difficult to obtain, requiring, in essence, a substantial and unforeseen change in conditions since the date of the original decree.<sup>50</sup> Is this requirement too restricting? It would seem not, as the real need for modification, a change of conditions, is provided for. Except for that circumstance, it is hard to see why the parties should not be held to the decree they agreed upon. This type of standard wisely discourages recurring litigation by defendants who wish to avoid the provisions of their decree. The other alternative available, termination of the consent decree, is impossible to get once the time for appeal has passed, and is allowed only upon basic jurisdictional mistakes.<sup>51</sup>

This dispenses with the remedies available to the defendant. The Government has one other alternative to pursue if the decree is ineffective and modification impossible to achieve. They may initiate a new and separate proceeding, alleging a different cause of action. The primary question involved here is the extent to which a consent decree is *res judicata* to a new action.<sup>52</sup> The answer would seem to be, legally, that the Government would have no difficulty in pursuing a new cause of action. This is because of the amorphous nature of an antitrust cause of action,<sup>53</sup> the variety of proceedings open to the Government, and the fact that business

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in the decree, there is little point in a charge that dedication of patents is an unfortunate yielding to a confiscatory demand."

50. The other ground upon which one could obtain modification is that the change sought is relatively insubstantial and within the purpose of the original decree. However, the difficulties in application of this rule were mentioned in section I-B (1) (b) *supra*.

51. See section I-B (1) (a) *supra*.

52. For an excellent article on the *res judicata* effects of the earlier consent decree, see Dabney, *Antitrust Consent Decrees: How Protective An Umbrella?*, 68 *YALE L.J.* 1391 (1959).

53. This makes it possible for the Government to place a different label upon a subsequent suit, and call it a different cause of action. The Government, of course, cannot sue on the same cause of action, as the prior decree acts as an absolute bar to a subsequent action. *Id.* at 1398.

relations do not remain static.<sup>54</sup> However, although the Government probably will not be prevented from instituting a new proceeding, it may have some difficulty admitting proof which extends back into the period covered by the earlier decree.<sup>55</sup> This is because of the lack of a record showing what facts the decree was decided upon, and the fact that a consent decree is often framed in general terms, which leads to the conclusion that all prior acts were covered by the decree. As a practical matter, the defendant may be assured of at least a few years of comparative safety under the decree, as the Government would hesitate to immediately attack a decree and thereby destroy its attractiveness to corporate defendants.

C. *Is enforcement through this type of proceeding effective and desirable?*

1. *Some recent criticisms of the consent decree.*

The most recent criticism of the consent procedure comes from the report of a subcommittee of the House Committee on the Judiciary.<sup>56</sup> This report was the result of hearings held in 1957 and 1958.<sup>57</sup> The committee decided to investigate after receiving numerous complaints about the consent procedure.<sup>58</sup> The following are the principal criticisms of the majority of the committee, and were largely patterned upon the complaints received:

(1) Consent decrees have eliminated the judiciary from enforcement of the antitrust laws. The Antitrust Division has ceased to be a prosecutor and has, instead, become enmeshed in industrial regulation, for which it is inadequately equipped.

(2) Competitors of the defendants have been denied the treble damage benefits which result from the Government winning a litigated suit; and they are often unable to undertake this type of protracted litigation by themselves.

(3) The consent procedure is too secret. Competitors may be

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54. This fluidity of business dealings makes it possible for the Government to find some violation subsequent to the original decree, which it probably already has or it would not be complaining of the ineffectiveness of the consent decree.

55. Kramer, *Modification of Consent Decrees: A Proposal to the Antitrust Division*, 50 MICH. L. REV. 1051 (1958). This limitation may make it exceedingly difficult to prove a violation, as often violations must be proved by showing conduct over a number of years.

56. SUBCOMM. NO. 5, HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEP'T OF JUSTICE (Comm. Print 1959).

57. *Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Committee on the Judiciary*, 85th Cong., 1st Sess., ser. 9, pt. 1 (1957), and 85th Cong., 2d Sess., ser. 9, pt. 2 (1958).

58. The stated objective of the committee was ". . . to examine into the procedures and actions that surround negotiation and entry of consent settlements and their effectiveness in the realization of antitrust policies so as to afford a basis for administrative and legislative recommendations." REPORT, *supra* note 56, at xiv.

indirectly damaged by the decree, yet there is no opportunity for them to present their views prior to its entry. Also, the defendants can escape unfavorable publicity, which is a major deterring factor for most defendants.

(4) Consent decrees arrest the growth of judicial precedent because they cut down the number of litigated decrees. This, therefore, deprives business and the bar of the opportunity to ascertain if the practices attacked in the complaint are actually illegal.

(5) Once a decree has been entered, the Department of Justice turns to other business, and fails to enforce it.

The committee centered their investigation and based their conclusions upon two consent decrees: the A.T. & T. decree<sup>59</sup> and the oil pipelines decree.<sup>60</sup> This in itself would seem to be much too narrow a basis for such a study,<sup>61</sup> albeit the committee's investigation of these two decrees was painstakingly thorough.<sup>62</sup> Nevertheless, the committee does seem to voice the basic criticisms of the consent procedure which have been set forth by other authors.<sup>63</sup>

2. *Is there available within the ambit of present antitrust law any procedure that might more effectively accomplish the desired result?*

This discussion will center upon some relatively minor suggestions for improvement of the consent procedure which may be innovated without any major change in the antitrust laws.

Despite an apparently basic defect in the scope of their investigation, some of the suggestions made by the aforementioned committee seem very sound. They note the extreme shortage of manpower

59. *United States v. Western Elec. Co. and Am. Tel. & Tel. Co.*, TRADE REG. REP. (1956 Trade Cas.) ¶ 68246 (D.N.J. Jan. 24, 1956).

60. *United States v. Atlantic Ref. Co.*, Civil Action No. 14060, D.D.C., Dec. 23, 1941. For a detailed discussion of the provisions and effect of this decree, see 1957 *Hearings*, *supra* note 57, at 27.

61. Both of the decrees were susceptible to criticism. The A.T. & T. decree failed to achieve the objective of the Government as it was stated in their initial complaint (divestiture of A.T. & T. and Western Electric), and the oil pipelines decree was evidently ignored by the defendants once it was final. Consequently, a study of just these decrees would tend to induce severe criticism (which it did) and lead to a one-sided view of the problem. One may wonder what other suggestions might have appeared had a comprehensive study been made.

62. The committee held twenty-one days of hearings at which thirty-three principal witnesses testified, with the printed hearings totaling 4,492 pages in five volumes. The report of the committee consists of 357 pages which, according to the minority, is "much chaff with very little wheat." REPORT, *supra* note 56, at 327.

63. Rogers, *Is it Trust Busting or Window Dressing?* The Reporter, Nov. 1, 1956, p. 21. Mr. Rogers believes that the Government must conduct prosecution in the courts or they are undermining the basic spirit of the antitrust laws. He says the Republicans are merely tabulating, through consent decrees, an impressive list of prosecutions they claim that they have concluded, but they are not protecting the public interest by this process of "gentlemanly treatymaking." HAMILTON & TILL, ANTITRUST IN ACTION 88-97 (TNEC Monograph No. 16, 1940), are particularly critical of the lack of enforcement of consent decrees.

available within the Antitrust Division when enforcement is necessary,<sup>64</sup> and suggest that the Attorney General take advantage of his his power to require the Federal Trade Commission to investigate possible infractions.<sup>65</sup> This would seem to alleviate the ever-present problem of budget limitations. They also suggest that the consent procedure provide for public notice of the terms of the decree and establish a waiting period after agreement on the terms and prior to court approval. This would allow the private parties who may be affected by the decree an opportunity to intervene and present objections to the court. Both of these suggestions seem very practical, and do not appear to have any adverse effect upon the established process of settlement.

Another suggestion of the committee which seems useful is to require the Government, upon presenting the decree to the court, to accompany it with an opinion setting forth the facts involved, defendant's position, meaning of the terms, and the reasons why the Government accepted it. This change of procedure would enhance the role of the trial judge in accepting or rejecting the decree, as he would have some knowledge of the workings behind it. This may eliminate the present routine approval of consent decrees.

Another suggestion which has been made is to provide in the decree for arbitration of provisions and questions of modification upon which the parties may later disagree.<sup>66</sup> If arbitration would result in conflict as a process in itself, the parties could, as an alternative, provide that they will submit the controlling facts to a court for a decision of the law. This type of procedure would help resolve the unsettled disputes and questions which arise in the process of carrying out a consent decree.

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64. The Judgments and Judgment Enforcement Section of the Antitrust Division is responsible for the negotiation of consent judgments. This section also supervises the investigations made to enforce compliance with the provisions of both the consent judgments and the litigated judgments. There are only twenty attorneys in this section, and they are responsible for the supervision and enforcement of a total of 554 civil antitrust judgments which, as of December 17, 1958, included 454 consent decrees. REPORT, *supra* note 56, at 7.

65. The Attorney General has the power to require the FTC to investigate violations of any final antitrust decrees and to conduct initial investigations and make recommendations prior to bringing an antitrust suit. These powers are given the Attorney General under Sections 6(c) and 6(e) of the Federal Trade Commission Act, 38 Stat. 717 (1914), 15 U.S.C. § 46 (1958). However, it appears that the Attorney General has only once invoked the aid of the FTC when investigating violations of final decrees. This is highly criticized by the majority of the committee, who point out that the FTC is a repository of vast information about business practices in numerous industries, and has general investigatory powers, including subpoena authority, that are not available to the Antitrust Division. REPORT, *supra* note 56, at 18.

66. Donovan and McAllister, *Consent Decrees in the Enforcement of the Federal Anti-Trust Laws*, 46 HARV. L. REV. 885 (1933). The authors also suggest that the consent decree should more frequently spell out what can as well as what cannot be done, and thereby let the businessman know where he stands. However, this may produce some problems in itself because of the fluid nature of business dealings. What can be done today often cannot be done tomorrow.



One author argues that an important improvement in consent decree procedure would be to set a time limit (for example, twenty years) on the decrees.<sup>67</sup> At that time the Government, if it wishes to keep the decree in force, must petition the court and explain why. A hearing would then be given the parties to see if continuation of the decree is necessary. The reasoning behind this is that a consent judgment which has already been in effect for twenty years has probably been ineffective if its injunctions are still necessary. This procedure would allow a reassessment of the market conditions at that time to see if the provisions of the decree are still important, and at the same time would eliminate from the record any decrees which are no longer necessary to the enforcement of the antitrust laws.<sup>68</sup>

All of these suggestions seem worthy of debate and possible implementation into the consent procedure. In particular the provisions calling for use of the FTC investigatory powers, public notice and a time period prior to approval, and setting a time limit upon the decrees would seem to be very helpful in rectifying certain defects in the consent procedure. They have the further appealing factor of not seriously upsetting the present methods of settlement.

#### CONCLUSION

In general, it would appear that the consent decree is at present a highly flexible and useful enforcement device for the Government. The decree avoids one of the greatest difficulties the Government has encountered in enforcing the antitrust laws—that of attempting to resolve economic questions through the use of court procedure. Although it has its faults, most of them can be remedied through implementation of the suggestions enumerated above. Perhaps the greatest shortcoming of the consent decree is its complete dependence upon an aggressive and intelligent Antitrust Division, something which, regretfully, cannot always be guaranteed. However, until a complete revision of the antitrust laws has come about, this time-saving and effective device is certain to continue to play an important part in antitrust enforcement.

J. DENNIS HYNES\*

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67. Kramer, *Modification of Consent Decrees: A Proposal to the Antitrust Division*, 56 MICH. L. REV. 1051 (1958).

68. Kramer, *supra* note 67, also suggests that the Government should be allowed to present evidence of violations occurring prior to the original decree if the decree is terminated after twenty years. This could be done by simply including a provision in the first decree allowing the court to dismiss the original complaint without prejudice.

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