

arbitrarily imposing price levels on private industry. This further proves the claim that the government's antitrust prosecutions of doctors are motivated by a desire to ultimately protect Medicaid and Medicare from potentially cost-raising actions by physicians asserting their economic rights.

D. Conclusions Based on Recent Cases

While the Court cannot reexamine the government's actions in the prior cases discussed above, it is essential that the Court take judicial notice of how the government conducted these cases, and how their policy judgments are affecting the administration of justice. The cases CVT participated in gave us a clear sense that the government is not acting in good faith when they pursue physician networks and their consultants in antitrust proceedings. Quite the opposite, government ethics seem to go the way of the Spanish Inquisition when it comes to health care policy and antitrust.

Comparisons to the Inquisition may seem overwrought, but in fact the parallels are ominous. The government, much like Torquemada, is on a persistent quest to pursue and punish heresy against doctrine, despite the fact that the underlying dogma is grounded in the complete absence of fact. Much of the antitrust consent decree process is shielded from public view in secret proceedings where the public (and generally the defendants) are unable to obtain a complete understanding of the facts and arguments. The minute the government's policy is called into question, they immediately hide behind dogma or some similarly irrational pronouncement of faith in antitrust doctrine.

This has certainly been CVT's experience in submitting comment letters. Despite repeated, comprehensive, and respectful attempts to gain some insight into the government's antitrust policies and consent decree process, the DOJ and FTC offer little more than token consideration and general platitudes. Both agencies hide behind the Constitution, claiming our arguments amount to nothing more than a constitutional challenge to the Sherman Act itself. While it's true that the Sherman Act is unconstitutional in CVT's judgment, the issue in these cases, and before this Court today, is whether the government's application of the Sherman Act to the exercise of individual rights by physicians is legal and constitutional. This question has never been substantively addressed by a federal court, because if it were, CVT maintains these prosecutions would

immediately cease. No rational judge would uphold the government's nonsensical and unconstitutional efforts to impose the will of a handful of bureaucrats on the nation's health care system.

At a minimum, the government should demonstrate some accountability by answering CVT's comments in a careful, rational, and thoughtful manner. This would only benefit the public by providing insight into both the government's enforcement policies as well as the consent order process. As things currently stand, however, the government comes off as an arrogant entity that can't be bothered to explain basic facets of policies that impact a significant sector of the American economy.

Part IV: Analysis of the Proposed Final Judgment

A. The Competitive Impact Statement

Turning to the Competitive Impact Statement, the government makes little effort to actually enhance the public's understanding of the complaint or the proposed judgment. Instead, the CIS largely repeats the unproven and unfounded allegations of the complaint. This approach is not surprising. Even supporters of the government's antitrust policies, such as American Antitrust Institute president Albert Foer, have expressed dismay at the DOJ's lack of candor in past cases: "The [Justice] Department has traditionally been reluctant to say a great deal in its CIS disclosures, presumably because it risks disclosure of confidential information, adds to the staff's workload, and opens up the door to additional inquiry."⁴⁸ While this may explain the lack of insight from the CIS in this case, it does not justify or excuse the government's failure to uphold their public interest mandate under Tunney Act.

As we noted with the complaint, the CIS makes no serious or credible effort to describe the marketplace Mountain competes in, or how specific customers and individuals within that market were affected by alleged Sherman Act violations. The CIS repeats the complaint's key thesis: "The physician reimbursement rates that have resulted from Mountain Health Care's negotiations with managed care purchasers are higher than those which would have resulted from individual negotiations with each competing independent physician or medical practice that participates with Mountain

Health Care."⁴⁹ Yet once again, there is nothing in the CIS that proves this statement. The DOJ could have presented a complaint from a managed care purchaser, a comparison of fees between Mountain and non-Mountain contracts, or even a basic economic analysis of the marketplace. The DOJ provided none of this. As a result, it is impossible to credibly show the complaint's allegations possess even a basic level of credibility.

The DOJ will likely take the position, in response to this criticism, that they need not prove any basic facts regarding their case, because to do so would amount to a trial, something which the proposed Final Judgment seeks to avoid. Certainly we can understand the interests of judicial economy require the Court not waste its time proving allegations that both parties have stipulated to. But at the same time, the Tunney Act requires a finding that the proposed Final Judgment is in the "public interest." This should mean the defendant's mere acquiescence to the government's position need not be the final word. Indeed, given that Mountain openly questioned the government's recitation of the facts, we suggest the court has an obligation to conduct some proceedings in order to show the government advanced their complaint and CIS in good faith.

For example, the DOJ asserts in the CIS that no "determinative materials or documents" considered by the government in "formulating the proposed Final Judgment."⁵⁰ Under the Tunney Act, such documents must be released if they exist. Curiously, in almost all antitrust settlements, the DOJ claims no such "determinative" documents exist. This is yet again proof that the government seeks to avoid any genuine scrutiny or accountability for their actions. In 1982, just a few years after the Tunney Act's passage, a federal judge concluded the DOJ was not doing its best to act in good faith where "determinative" documents were concerned:

The Court simply cannot accept an interpretation of legislation that permits the government to assert in 172 out of 188 cases that it considered neither documents nor any other materials determinative in reaching its conclusion to enter into a consent decree.⁵¹

The Tunney Act does not require full disclosure of the DOJ's files, but it does require a good faith review. Only action by the Court can effectively remedy the government's failure to disclose

⁴⁸ Letter from Albert A. Foer to Roger W. Fones 2 (Dec. 27, 2002) (available at <http://antitrustinstitute.org/recent2/223a.pdf>).

⁴⁹ CIS, 68 FR 1,478, 1,480 (Jan. 10, 2003).

⁵⁰ CIS, 68 FR at 1,481.

⁵¹ *U.S. v. Central Contracting Co.*, 537 F. Supp. 571, 577 (E.D. Va. 1982).