Exhibit A-11

Comments of Former Professional Employees of the Antitrust Division Regarding the Proposed Final Judgment in US v HPE and Juniper Networks, Inc.

After he was fired for "insubordination" the second-highest official in the Antitrust Division of the U.S. Department of Justice, Roger Alford, said that his superiors who negotiated the proposed settlement of this case

> perverted justice and acted inconsistent with the rule of law. I am not given to hyperbole, and I do not say that lightly. As part of the forthcoming Tunney Act proceedings, it would be helpful for the court to clarify the substance and the process by which the settlement was reached. Although the Tunney Act has rarely served its intended purpose, this time the court may demand extensive discovery and examine the surprising truth of what happened. I hope the court blocks the HPE/Juniper merger. If you knew what I knew, you would hope so too. Someday I may have the opportunity to say more.[1]

Mr. Alford should be given that opportunity in these proceedings.

But even without the benefit of his testimony, the record as it stands today provides no basis for a finding that the proposed Final Judgment in *U.S. v. HPE and Juniper Networks, Inc.*, is in the public interest. The Tunney Act requires the Defendants to describe certain settlement communications between their representatives and the government in a formal statement to the Court. The Defendants have utterly failed to provide the requisite information about those communications. The Tunney Act requires the government to explain how the proposed Final Judgment will remedy the anticompetitive effects of the acquisition challenged in the government's Complaint. The government has utterly failed to provide such an explanation, which is not surprising because, on the current record, the proposed Final Judgment clearly will ***not*** address those anticompetitive effects. Rather, according to multiple press reports, the proposed settlement resulted from political back-scratching untethered by considerations of its (ineffectual) impact on competition.

These Comments are submitted on behalf of former professional employees of the Antitrust Division of the United States Department of Justice who, collectively, have decades of experience enforcing the antitrust laws.[2] We proudly assert that in our personal experience, the Antitrust Division's resolutions of antitrust cases have been guided at all times by consideration

[1] Roger Alford, The Rule of Law Versus the Rule of Lobbyists at 3-4, *Tech Policy Institute Aspen Forum* (August 18, 2025), https://techpolicyinstitute.org/wp-content/uploads/2025/08/TPI-Aspen-Final.pdf ("Alford speech"). Alford also said, "I am speaking out now because it is still early days . . . and I think correcting the problems at the DOJ is still possible, either by political will or judicial decree."

[2] None of the signatories has any personal, financial, commercial, or professional interest in this matter except as described in these Comments.

of the public interest in competitive markets. Good-faith disagreements about what might best serve the public interest were commonplace; any suggestion that the competitive merits should be set aside because of political considerations was unheard of. That proud tradition seems to have been abandoned in this case.

In Part I of these Comments, we address the deficiencies in Defendants' Tunney Act disclosures. In Part II, we explain the nature of the negotiations that led to the proposed Final Judgment and the reasons for suspicion that those negotiations reflected, in Mr. Alford's words, the "Rule of Lobbyists" not the "Rule of Law." In Part III, we explain why the proposed Final Judgment fails to provide a meaningful remedy for the competitive harm alleged in the government's Complaint. Finally, in Part IV, we describe some of the additional information which the government should voluntarily provide to the Court and, failing that, which the Court should demand in its Tunney Act proceedings.

I. The Defendants Have Not Complied With The Tunney Act's Disclosure Requirements

The Tunney Act requires the Defendants to submit to the Court a "description of any and all written or oral communications" between representatives of the Defendants and any "officer or employee of the United States," excepting only communications by Defendants' counsel of record either alone with the Attorney General or alone with other employees of the Justice Department. Communications between representatives of the Justice Department and counsel not of record for the Defendants must be described. Communications between any representatives of the Defendant and United States government officials outside of the Justice Department must also be described. 15 U.S.C. § 16(g).

The Defendants' disclosures do not come close to satisfying those requirements. Their disclosures merely identify certain representatives of the Defendants who met with named representatives of the Department of Justice, and five dates on which such meetings occurred.[3] Defendants do not assert that these representatives comprise all of the participants in those discussions, or that those five discussions were the only communications reportable under the Act.[4] Defendants have not even disclosed which individuals participated in which meetings. Defendants have identified two consultants who have been named in media reports, Michael

[3] Description and Certification of Written or Oral Communications by Hewlett Packard Enterprise Co. and Juniper Networks, Inc., Concerning the Proposed Final Judgment I, *U.S. v. Hewlett Packard Enterprise Co.,* No. 5:25-cv-00951-PCP (N.D. Cal. July 7, 2025), https://appliedantitrust.com/14_merger_litigation/cases_doj/hpe_juniper2025/02_ndcalif/settlement/hpe_ndcalif_settlement_comm_def2025_07_07.pdf. ("Defendants' Tunney Disclosures").

[4] Defendants' Tunney Disclosures I, https://appliedantitrust.com/14_merger_litigation/cases_doj/hpe_juniper2025/02_ndcalif/settlement/hpe_ndcalif_settlement_comm_def2025_07_07.pdf.

Davis and William Levi, but failed to identify another who has also been named, Arthur Schwartz, or others reported but unnamed by the press.[5]

Even worse, the Defendants provide no information about the substance of any of the communications, save for a single cryptic reference to "national security" concerns. Defendants have not described the substance of any communications concerning the terms of the proposed decree, the rationale for adopting the decree, whether (or how) the proposed decree would address the anticompetitive effects alleged in the government's Complaint, or any alternative remedies that were discussed. The Tunney Act was intended to shine a light on the negotiations that led to the proposed decree. The Defendants' "description" of their communications instead casts a murky haze over the entire backroom operation.

II. The Settlement Negotiations Were Highly Unusual

Where there is uncertainty about the integrity of the negotiation process that led to a proposed Final Judgment, the Tunney Act directs the Court to review that process and assess its legitimacy as part of its public-interest determination. In this case, the negotiation process was highly unusual in several respects. The lead negotiators for the Defendants reportedly were not their attorneys of record but rather consultants with close political ties to the Trump Administration[6] who were hired after the Department filed its lawsuit.[7] One reported consultant, Arthur Schwartz, has been described as a "close confidante of Vice President J. D. Vance."[8] Another of the Defendants' consultants, Michael Davis, has been described as a "MAGA-aligned antitrust thought leader."[9] He publicly expressed support for the government's challenge to the

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[5] Defendants' Tunney Disclosures I, https://appliedantitrust.com/14_merger_litigation/cases_doj/hpe_juniper2025/02_ndcalif/settlement/hpe_ndcalif_settlement_comm_def2025_07_07.pdf.

[6] HPE/Juniper: As Fight Between DOJ Leadership and Antitrust Division Broils, Tunney Act Proceeding Looms, Capitol Forum (July 24, 2025), https://thecapitolforum.com/hpe-juniper-as-fight-between-doj-leadership-and-antitrust-division-broils/ ("Capitol Forum article");
David Dayen, The Law That Could Blow Open Trump Antitrust Corruption, *American Prospect* (7/29/2025), https://prospect.org/power/2025-07-29-law-could-blow-open-trump-antitrust-corruption/. ("Dayen article").

[7] Dayen article, https://prospect.org/power/2025-07-29-law-could-blow-open-trump-antitrust-corruption/.

[8] Capitol Forum article, https://thecapitolforum.com/hpe-juniper-as-fight-between-doj-leadership-and-antitrust-division-broils/.

[9] Capitol Forum article, https://thecapitolforum.com/hpe-juniper-as-fight-between-doj-leadership-and-antitrust-division-broils/.

HPE acquisition when it was filed,[10] but after being hired by HPE for a reported seven-figure fee apparently advocated for the proposed decree.[11]

For the Justice Department, negotiations apparently were largely handled by the Acting Associate Attorney General, Chad Mizelle.[12] One observer suggested that Mizelle became interested in the case because he hoped to impress the White House and thereby improve the chances that his wife, currently a federal District Court judge, would be elevated to the Eleventh Circuit.[13] Mr. Alford later offered an alternative interpretation of Mizelle's dealings with HPE representatives, saying that some "in government consider some parties, counsel, and lobbyists to be on the 'same MAGA team' and worthy of special solicitude. . . . In my opinion based on regular meetings with him, Chad Mizelle accepts party meetings and makes key decisions depending on whether the request or information comes from a MAGA friend."[14] HPE's newly retained "MAGA-aligned" representative was just the sort of person likely to be viewed by Mizelle as a "friend." Also reportedly involved in the negotiations on behalf of the Antitrust Division was Stanley Woodward, currently a top aide to the Attorney General and nominated to become the Justice Department's Associate Attorney General, its third-ranking official.[15] The career Antitrust Division staff who had been investigating the acquisition for months and were preparing for an imminent trial do not appear to have participated in the settlement discussions.

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[10] "The Trump 47 Justice Department's Antitrust Division is already off to a strong start. 3 into 2? You must sue." X Posting by Mike Davis (Jan. 30, 2025), https://x.com/mrddmia/status/1885042892026069019.

[11] Dayen article, https://prospect.org/power/2025-07-29-law-could-blow-open-trump-antitrust-corruption/.

[12] Dayen article, https://prospect.org/power/2025-07-29-law-could-blow-open-trump-antitrust-corruption/; *see also* Capitol Forum article, https://thecapitolforum.com/hpe-juniper-as-fight-between-doj-leadership-and-antitrust-division-broils/.

[13] Dayen article, https://prospect.org/power/2025-07-29-law-could-blow-open-trump-antitrust-corruption/; *see also* Reposted Laura Loomer Tweet, since deleted, https://x.com/matthewstoller/status/1949995374606745741 ("[Mizelle] turned a blind eye to the influence peddling because he wants his wife Kat Mizelle to be appointed to the 11th Circuit . . .").

[14] Alford speech at 4, https://techpolicyinstitute.org/wp-content/uploads/2025/08/TPI-Aspen-Final.pdf.

[15] Dave Michaels, Bondi Aides Corrupted Antitrust Enforcement, Ousted DOJ Official Says, *Wall Street Journal* (Aug. 18, 2025) (Attachment A).

According to reports, the Assistant Attorney General for the Antitrust Division opposed the proposed settlement,[16] as did Mr. Alford (the Principal Deputy Assistant Attorney General and the second highest ranking Antitrust Division official) and William Rinner (the Deputy Assistant Attorney General overseeing the Division's merger enforcement).[17] Both Mr. Alford and Mr. Rinner were fired soon after the settlement for "insubordination."[18] In an unusual development, none of the career staff who had investigated the acquisition signed the government's Competitive Impact Statement, which is supposed to explain and defend the competitive effectiveness of the proposed Final Judgment.[19]

III. The Settlement Does Not Address The Harm To Competition Alleged in the Complaint

The Complaint alleges that HPE's acquisition of Juniper would illegally "lessen competition in … the market for enterprise grade WLAN solutions in the United States…."[20] The "solutions" in that market consist of bundles of products and software that provide networks to customers and monitor and manage those networks.[21] Customers in the relevant market allegedly include businesses, universities, and other very large organizations that require a network to serve many users, sometimes over diverse geographic areas.[22] According to the Complaint, the market was dominated by three firms: HPE, Juniper, and Cisco Systems, Inc. The combined market share of these three companies allegedly exceeded 70 percent.[23]

According to the Complaint, market entry or expansion that could present a competitive challenge to the post-acquisition duopoly would be unlikely. An entrant would have to overcome

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[16] Capitol Forum article, https://thecapitolforum.com/hpe-juniper-as-fight-beteen-doj-leadership-and-antitrust-division-broils/.

[17] Dave Michaels and Annie Linskey, MAGA Antitrust Agenda Under Siege by Lobbyists Close to Trump, *Wall Street Journal* (Aug. 6, 2025) (Attachment B) ("Michaels, Linskey WSJ article"). Mr. Alford later described the negotiation process as a "pay-to-play approach." Alford speech, https://techpolicyinstitute.org/wp-content/uploads/2025/08/TPI-Aspen-Final.pdf.

[18] Jody Godoy and Sarah Lynch, Two US Justice Dept antitrust officials fired over merger controversy, source says, *Reuters* (July 30, 2025), https://www.reuters.com/legal/litigation/two-us-justice-dept-antitrust-officials-fired-over-merger-controversy-source-2025-07-29/.

[19] Competitive Impact Statement. *U.S. v. HPE and Juniper Networks, Inc*., No. 5:25-cv-00951-PCP (N.D. Cal. June 27, 2025), https://www.justice.gov/atr/media/1406601/dl?inline. ("Competitive Impact Statement").

[20] Complaint ¶ 61, *U.S. v. HPE and Juniper Networks, Inc*., No. 5:25-cv-00951-PCP (N.D. Cal. Jan. 30, 2025), https://www.justice.gov/atr/media/1406591/dl?inline. ("Complaint").

[21] Complaint ¶¶ 13-15, https://www.justice.gov/atr/media/1406591/dl?inline.

[22] Complaint ¶ 34, https://www.justice.gov/atr/media/1406591/dl?inline.

[23] Complaint ¶ 26, https://www.justice.gov/atr/media/1406591/dl?inline.

a variety of expensive, difficult, and time-consuming obstacles. These impediments to entry and expansion would include the development of name recognition and a reputation for reliable service; growing an adequate sales force and support capabilities; and recruiting resellers and other distribution partners.[24]

The proposed Final Judgment purports to address those competitive concerns through two remedies: (1) the divestiture of HPE's "Instant On" business and (2) an auction of the rights to use the source code for Juniper's "AI Ops for Mist" software. DOJ consent decrees ordinarily not only name all assets to be transferred pursuant to the decree, but also describe them, often in considerable detail.[25] But the proposed decree in this case defines "AI Ops for Mist Source Code" only as "the source code for Juniper's AI Ops for Mist software used in Juniper's WLAN products."[26] Beyond identifying the software as source code, the decree does not describe the functions of the software or indicate anything about its metes and bounds. Further, while the government's Competitive Impact Statement claims that the software must be licensed "in such a way as to satisfy the United States, in its sole discretion, that the operations can and will be operated by the Licensee as a viable, ongoing business that can compete effectively in the relevant market,"[27] the proposed Final Judgment contains no such language. Nor does the Final Judgment (unlike the unenforceable Competitive Impact Statement) contain any other language to ensure that the software licensee could or would use the software to compete in the relevant market.

As for the Instant On business to be divested, neither the Competitive Impact Statement nor the proposed Final Judgment contains any language that would require sale to a purchaser that could and would use that asset to compete in the relevant market. Such a requirement has been a boilerplate component of virtually all of the Antitrust Division's merger remedies until now.[28]

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[24] Complaint ¶¶ 52-54, https://www.justice.gov/atr/media/1406591/dl?inline.
[25] *See, e.g.,* Proposed Final Judgment II.B., *U.S. v. Keysight Technologies, Inc*., No. 1:25-cv-01734 (D.D.C. June 2, 2025, https://www.justice.gov/atr/media/1402406/dl. *See also*, the definition of "HPE Divestiture Assets" in the Proposed Final Judgment II.J., *U.S.v. HPE and Juniper Networks, Inc.,* No. 5:25-cv-00951-PCP (N.D. Cal. June 27, 2025), https://www.justice.gov/atr/media/1406596/dl?inline. ("proposed Final Judgment" or "proposed consent decree").
[26] Proposed Final Judgment II.F., https://www.justice.gov/atr/media/1406596/dl?inline.
[27] Competitive Impact Statement at 8-9, https://www.justice.gov/atr/media/1406601/dl?inline.
[28] For example, proposed consent decrees filed by the Antitrust Division in August and June of this year both provide that the required divestiture "must include the entire Divestiture Assets and must be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by Acquirer as part of a viable, ongoing business . . ." Proposed Final Judgment IV.G., *U.S. v. UnitedHealth Group Inc*., No. 1:24-cv-03267-JKB (D. Md. Aug. 7, 2025), https://www.justice.gov/opa/media/1410291/dl; Proposed Final Judgment

The reason for this departure from long-established practice can be easily explained. The Instant On business apparently does not compete in the relevant market. In a call with investors, HPE's CEO Antonio Neri explained that the product to be divested is "a distinct offering separate from the" products involved in the acquisition and is "specifically designed to serve the small business segment, . . ."[29] Instant On is a product for managing smaller networks, not the larger enterprise-grade networks that are the focus of the relevant antitrust market. Media reports have cited industry experts who agree with the CEO. One said, "[i]t's ridiculous. I have no idea what the DOJ was thinking – Instant On had nothing to do with the enterprise business. . . . It makes zero sense. Everybody that knows anything about the industry is scratching their heads. The whole terms of the settlement were absurd."[30]

The proposed Final Judgment also requires the post-acquisition HPE to sell by auction a license to use the source code for Juniper's AI Ops for Mist software.[31] This license, according to the Competitive Impact Statement, will strengthen one or more existing competitors or facilitate the entry of a new competitor for enterprise-grade WLAN solutions.[32] But the competitive significance of this software is doubtful at best. A former Juniper executive who is now at HPE said, "We now have over 10 years of learning from real-world deployments, and that is extremely difficult, license or not, to replicate . . ."[33] Indeed, the proposed Final Judgment implies that the parties were unsure if the value of the license would exceed $8 ***million*** dollars,[34] while the competitor that has been eliminated by the acquisition – Juniper – has a market value in excess of $14 ***billion*** dollars.

IV.D, *U.S.v. Keysight Technologies, Inc*., No. 1-25-cv-01734 (D.D.C. June 2, 2025), https://www.justice.gov/opa/media/1402311/dl.

[29] HPE Closes Juniper Neworks acquisition, Transcript of investor call at 4, (July 10, 2025), https://investors.hpe.com/~/media/Files/H/HP-Enterprise-IR/documents/07-10-2025-hpe-closes-juniper-networks-acquisition-transcript.pdf; *see also* Capitol Forum article, https://thecapitolforum.com/hpe-juniper-as-fight-between-doj-leadership-and-antitrust-division-broils/.

[30] Capitol Forum article, https://thecapitolforum.com/hpe-juniper-as-fight-between-doj-leadership-and-antitrust-division-broils/.

[31] Proposed Final Judgment V., https://www.justice.gov/atr/media/1406596/dl?inline.

[32] Competitive Impact Statement at 7, https://www.justice.gov/atr/media/1406601/dl?inline.

[33] Dan Meyer, Is HPE Juniper Safe From Tunney Act Review?, *SDX Central* (Aug. 6, 2025), https://www.sdxcentral.com/news/is-hpe-juniper-safe-from-tunney-act-review/.

[34] Proposed Final Judgment V.1.C.4., https://www.justice.gov/atr/media/1406596/dl?inline.

The proposed Final Judgment also grants the Defendants an unusually long period of time to complete the divestiture – at least 180 days[35] rather than the maximum of at least 90 days specified in the Antitrust Division's Merger Remedies Manual.[36] Again, the Competitive Impact Statement does not explain the departure from ordinary practice, especially in this case, where the acquisition was permitted to close on July 2, 2025.[37] To state the obvious, even if the proposed remedy could somehow mitigate the competitive harm resulting from the acquisition, it can provide no such benefit during the lengthy period before the remedy is actually implemented.

Finally, neither the proposed Final Judgment nor the Competitive Impact Statement discloses the existence of a reported additional element of the agreement between the parties. According to the *Wall Street Journal*, the Defendants agreed that HPE would create new jobs at a facility located in the United States.[38] Reportedly this provision was intended to further the Trump administration's goal of creating more domestic jobs. According to the *Journal*, the provision was omitted from the proposed decree because of uncertainty about whether it can legally be incorporated into a government antitrust decree; the *Journal* reported that this issue is currently being reviewed by the Justice Department's Office of Legal Counsel.[39] A spokesman for HPE has denied that the settlement included a commitment to create jobs.[40]

IV. The Government Should Offer, Or The Court Should Demand, Additional Evidence

To achieve its goal of ensuring that entry of a proposed Final Judgment is in the public interest, the Tunney Act expressly directs the Court to evaluate the "competitive impact" of the proposed judgment, including the "termination of alleged violations," the "anticipated effects of alternative remedies actually considered . . . and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest." 15 U.S.C. § 16(e)(1)(A). The Act also directs the Court to consider "the impact of entry of such judgment upon competition in the

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[35] Proposed Final Judgment IV.1.A. The proposed decree also specifies an alternative deadline, 5 days after the Court's entry of the Final Judgment. Whichever date occurs later is to govern. Proposed Final Judgment IV.1.A, https://www.justice.gov/atr/media/1406596/dl?inline.
[36] Antitrust Division of the Department of Justice, Merger Remedies Manual at 27 (Sept. 2020), https://www.justice.gov/atr/page/file/1312416/dl.
[37] Hewlett Packard Enterprise closes acquisition of Juniper Networks, HPE Newsroom (July 2, 2025), https://www.hpe.com/us/en/newsroom/press-release/2025/07/hewlett-packard-enterprise-closes-acquisition-of-juniper-networks-to-offer-industry-leading-comprehensive-cloud-native-ai-driven-portfolio.html.
[38] Michaels, Linskey WSJ article (Attachment B).
[39] Michaels, Linskey WSJ article (Attachment B).
[40] Michaels, Linskey WSJ article (Attachment B).

relevant market or markets." 15 U.S.C. § 16(e)(1)(B). Interpreting this language, the D.C. Court of Appeals wrote in a leading Tunney Act appellate decision, "the court can and should inquire, . . . into the purpose, meaning, and efficacy of the decree" in addressing the harm alleged in the Complaint.[41]

Review of the negotiation process that leads to a proposed consent decree informs analysis of the competitive effectiveness of that decree. The Act directs the Court to inquire into the integrity of the negotiation process when circumstances warrant. After a district court failed, in the eyes of Congress, to conduct a thorough enough inquiry into a proposed Antitrust Division decree in 2001,[42] Congress amended the Tunney Act to provide that the court "shall consider" certain factors in determining whether entry of a proposed decree is in the public interest. 15 U.S.C.§ 16 (e)(1). The statute as initially passed had said only that a court "may consider" those factors.[43]

Among other things, the Tunney Act specifically authorizes the District Court to:

Take testimony of government officials or experts, or other expert witnesses, on motion of any party or on the Court's own motion. 15 U.S.C. § 16(f)(1);

Appoint a special master and such outside consultants or expert witnesses as the Court may deem appropriate. 15 U.S.C. § 16(f)(2);

Authorize participation in proceedings before the Court by interested persons or agencies. 15 U.S.C. § 16(f)(3);

Review comments and objections filed with the United States regarding the proposed decree and related filings. 15 U.S.C. § 16(f)(4); and

Take such other action in the public interest as the court may deem appropriate. 15 U.S.C. § 16(f)(5).

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[41] *U.S. v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995).
[42] John Wilke, A Tenacious Microsoft Emerges From Suit With Its Software Monopoly Largely Intact, *Wall Street Journal* (Nov. 9, 2001) (Attachment C).
[43] July 28, 2025 Letter to The Honorable P. Casey Pitts from Senators Elizabeth Warren, Amy Klobuchar, Cory Booker, and Richard Blumenthal at 5, https://www.warren.senate.gov/imo/media/doc/letter_from_senator_warren_to_judge_pitts_on_hpe-juniper_merger_and_tunney_act.pdf (Senators' letter").

This authority has been exercised in the recent past. In 2019, a judge held a two-day hearing with six live witnesses about the proposed settlement in *U.S. v. CVS Health Corp.*[44]

We urge the government (and/or the Defendants) to supplement the Competitive Impact Statement to address the concerns raised in these comments. To the extent the government fails to do so, the Court should exercise its authority under the Tunney Act to demand answers. The Court should not reach any public interest finding until it has answers to these, and other, questions:

(1) Have the Defendants disclosed ***all*** communications concerning the proposed settlement (save for those specifically excepted by the Tunney Act)? Separately for each communication, which individuals participated? And what was the ***substance*** of each communication?

(2) Who were the principal negotiators of the settlement for the government? Why were they selected for this role, and who selected them? What role, if any, did the Assistant Attorney General for Antitrust and her deputies play in the negotiations? What role, if any, did the career Antitrust Division staff play in the negotiations?

(3) Did the parties reach any agreement or make any commitments other than those expressly incorporated in the proposed Final Judgment? If the parties reached any agreement regarding the creation of new jobs by HPE in one of its facilities in the United States, what are its terms? If the parties reached any such agreement, why was it not included in the proposed Final Judgment? How if at all did any such agreement address the competitive harm alleged in the Complaint? If there is such an agreement, is the Office of Legal Counsel reviewing its legality? Has that office reached a decision? If yes, what is it? If no, when is a decision expected?

(4) We presume that the government planned to present the testimony of one or more expert witnesses at trial and that any such expert had already prepared a report (and likely had been deposed) when the settlement was reached shortly before the trial was scheduled to begin. Such expert testimony likely would have addressed matters such as (a) which firms and products do or do not compete in the relevant market, and (b) what obstacles would a potential competitor have to overcome in order to enter and successfully compete in the relevant market. The government should submit, or if necessary the Court should demand, any such expert reports and deposition transcripts.

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[44] Memorandum Opinion, *U.S. v. CVS Health Corp.*, No. 18-2340, (D.D.C. Sept. 4, 2019), https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2018cv02340/200760/135/. *See also*, Capitol Forum article, https://thecapitolforum.com/hpe-juniper-as-fight-beteen-doj-leadership-and-antitrust-division-bro/ils.

(5) What price has HPE projected it will receive for the Instant On business and the AI Ops for Mist software license? Has HPE taken any steps in anticipation of the sale/licensing that would be required under the Final Judgment? Has HPE identified firms that are likely acquirers of those assets?

(6) The Court should take the testimony of Abigail Slater (Assistant Attorney General for Antitrust) and the two Deputy Assistant Attorneys General (Roger Alford and William Rinner) who were fired for "insubordination." They should be asked to provide their assessments of the effects of the settlement on competition in the relevant market and the propriety (or impropriety) of the settlement.

Conclusion

The current record does not support a finding that the proposed Final Judgment is in the public interest.

Respectfully submitted,

The signatories to these Comments are each speaking in their own, individual capacity and not on behalf of any institution or organization with which they are affiliated.

Name	*Highest Title at the Antitrust Division*	*Years at the Division*
William Baer	Assistant Attorney General (Acting Associate Attorney General 2016-2017)	2013-2016
George S. Baranko	Trial Attorney	1987-2020
Anne K. Bingaman	Assistant Attorney General	1993-1996
David A. Blotner	Assistant Chief, Litigation I; Assistant Chief, Litigation II	1979-2012
Laury Bobbish	Chief, Telecommunications & Media Section	1988-2012
Hillary Burchuk	Trial Attorney	1996-2011
Peter C. Carstensen	Trial Attorney	1968-1973
Arnold Celnicker	Trial Attorney	1991-2005
Patricia Chick	Trial Attorney	1976-2004

Rebecca P. Dick	Director, Civil Non-Merger Enforcement	1979-2000
Lawrence M. Frankel	Assistant Chief, Telecommunications & Media Section	1993-2018
Thomas L. Greaney	Assistant Chief, Special Litigation Section	1978-1987
Nina B. Hale	Assistant Chief, Litigation III Section	1994-2021
Burney P. Huber	Senior Trial Attorney	1973-2005
Matthew C. Hammond	Assistant Chief, Media, Entertainment & Communications Section	1998-2024
Donna Kooperstein	Chief, Transportation, Energy & Agriculture Section	1979-2011
Robert E. Litan	Deputy Assistant Attorney General	1993-95
Sanford Litvack	Assistant Attorney General	1979-1981
Phillip Malone	Senior Trial Attorney	1984-2003
Frances Marshall	Assistant Chief, Legal Policy Section; Senior Counsel, Intellectual Property	1994-2020
Mary Beth McGee	Trial Attorney	1981-2016
Michael D. McNeely	Trial Attorney	1976-1988
A. Douglas Melamed	Acting Assistant Attorney General	1996-2001
M.J. Moltenbrey	Director, Civil Enforcement	1985-2002
Rosemary T. Rakas	Trial Attorney	1984-1988
Constance K. Robinson	Director of Operations and Director of Merger Enforcement	1976-2003
Donald J. Russell	Chief, Telecommunications Section	1977-2001
Philip Sauntry	Trial Attorney	1975-2010

Katherine A. Schlech	Assistant Chief Dallas Field Office	1980-2014
Jack Sidorov	Trial Attorney	1978-2014
Yvette Frances Tarlov	Chief, Media, Entertainment & Communications Section	1995-2025
Willard K. Tom	Trial Attorney Counselor to the Assistant Attorney General	1979-1981 1993-1995
David Turetsky	Deputy Assistant Attorney General	1993-1997
Phillip L. Verveer	Trial Attorney	1969-1977

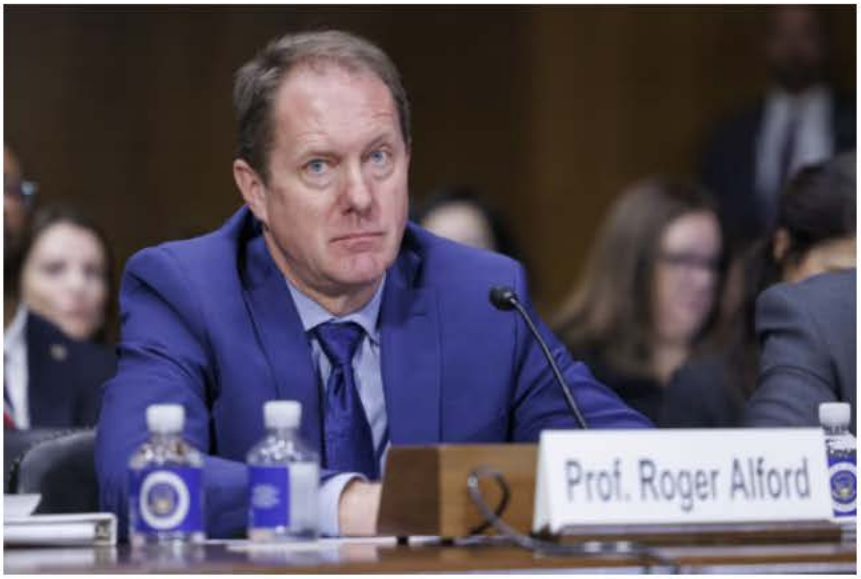
POLITICS | POLICY

Bondi Aides Corrupted Antitrust Enforcement, Ousted DOJ Official Says

Roger Alford, formerly second-in-command of the antitrust division, calls on a court to scrutinize merger case that led to his firing

By Dave Michaels

Updated Aug. 18, 2025 7:55 pm ET



Roger Alford testifying in Washington. PHOTO: AARON SCHWARTZ/SIPA PRESS/REUTERS

Quick Summary

- Roger Alford accuses senior Justice Department officials of favoring lobbyists and undermining antitrust enforcement independence.

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An antitrust lawyer who was dismissed last month from the Justice Department accused senior officials of cutting deals with favored lobbyists and undermining the independence of antitrust enforcement.

Roger Alford, formerly the antitrust division's second-in-command, on Monday said two senior aides to Attorney General Pam Bondi had corrupted the department's typical law-enforcement process for dealing with antitrust lawsuits. The two senior officials were heavily involved in negotiating a proposed settlement in June that allowed Hewlett Packard Enterprise to acquire a competitor, Juniper Networks.

Alford called on a federal court in San Jose, Calif., that is overseeing the Justice Department's proposed resolution to "examine the surprising truth of what happened." Federal courts have authority to look for any backroom dealings that could have influenced the settlement of a merger lawsuit.

"I hope the court blocks the HPE/Juniper merger," Alford said in a speech at the Technology Policy Institute in Aspen, Colo. "If you knew what I knew, you would hope so too."

The Justice Department's antitrust division sued to block HPE's bid for Juniper Networks shortly after President Trump took office. The department said in January that merging the two rivals would harm competition in the market for wireless-networking technology.

HPE hired Trump political allies such as Mike Davis and Arthur Schwartz to fight back and help it reach a settlement that would allow the $14 billion deal to close. HPE agreed to sell a small part of its networking business and provide competitors with limited access to technology it acquired from Juniper.

Alford said Bondi's chief of staff, Chad Mizelle, is prone to favoring outside lawyers and lobbyists with whom he is friends. Mizelle and another top aide to Bondi, Stanley Woodward, played significant roles in how the department settled with HPE and Juniper in June, Alford said. Trump has nominated Woodward to be the Justice Department's third-ranking official.

"Chad Mizelle accepts party meetings and makes key decisions depending on whether the request or information comes from a MAGA friend," Alford said. "Aware of this injustice, companies are hiring lawyers and influence peddlers to bolster their MAGA credentials and pervert traditional law enforcement."

A Justice Department spokesman said the HPE settlement was based on the merits of the merger and considered factors such as national-security concerns raised by the intelligence community. "Roger Alford is the James Comey of antitrust—pursuing blind self-promotion and ego, while ignoring reality," the spokesman said.

HPE said its settlement was in the public interest. "Any suggestion that HPE procured the settlement through unethical or improper means is false and irresponsible," the company said.

Davis declined to comment. Schwartz didn't respond to requests for comment.

Alford and another former senior antitrust enforcer, William Rinner, were fired last month after objecting to the involvement of lobbyists and politically connected lawyers in the HPE-Juniper settlement talks, according to people familiar with the matter. Gail Slater, the department's top antitrust official, also pushed back on the infusion of lobbyists into her world.

Rinner hasn't spoken publicly about the HPE settlement or his dismissal and declined Monday to comment.

HPE's success in dealing with the department has prompted other companies facing antitrust risks to hire lobbyists who are close to the Trump administration, Alford said. The department is "now overwhelmed with lobbyists with little antitrust expertise going above the antitrust division leadership seeking special favors with warm hugs," he said.

Alford, a law professor at the University of Notre Dame, served in the first Trump administration as the Justice Department's top antitrust official for international affairs. "I experienced nothing remotely like this when I served at the DOJ the last time," he said.

Write to Dave Michaels at dave.michaels@wsj.com

Appeared in the August 19, 2025, print edition as 'Ousted Antitrust Lawyer Blasts DOJ Officials'.

Videos

U.S. | LAW

MAGA Antitrust Agenda Under Siege by Lobbyists Close to Trump

Administration's populist promise to be tough on companies is clashing with influence campaigns

By Dave Michaels Follow *and Annie Linskey* Follow

Updated Aug. 6, 2025 6:19 pm ET

Justice Department lawyers and staffers arriving at federal court in Washington, D.C., earlier this year in an antitrust case involving Google's search dominance. PHOTO: AL DRAGO/BLOOMBERG NEWS

Quick Summary

- The Trump administration's antitrust enforcement faces challenges from power brokers with close ties to the president.

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The second Trump administration seemed poised to deliver on MAGA's embrace of aggressive antitrust enforcement. Instead, those efforts have run headlong into power brokers with close ties to President Trump who have snatched up lucrative assignments helping companies facing antitrust threats.

The injection of politically-connected lobbyists and lawyers into antitrust investigations is a shift in an arena that for decades was a niche area dominated by specialized lawyers and economists.

Through these power brokers, companies have also been able to appeal to some of the president's broader economic priorities to limit enforcement. Working through Mike Davis—a longtime Trump ally—and other consultants, Hewlett Packard Enterprise made commitments, not disclosed in court papers, that called for the company to create new jobs at a facility in the U.S., according to people familiar with the matter. The unusual offer was designed to ease the government's opposition to the company's merger with a major rival, Juniper Networks, which would reduce competition in the wireless networking market.

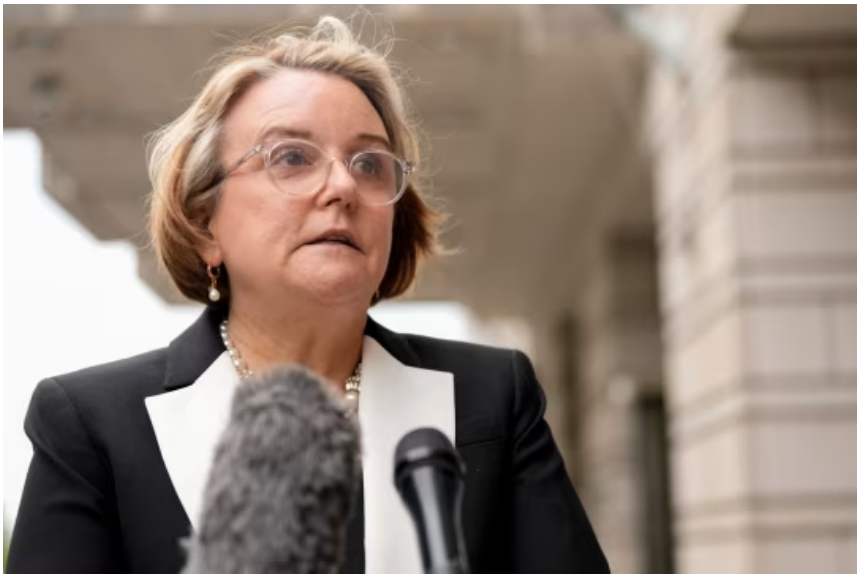
The proposed settlement with the Justice Department allowed HPE to acquire Juniper in a deal that closed last month. HPE agreed to sell a small part of its networking business and provide competitors with limited access to technology it acquired from Juniper. A Justice Department spokesman said the settlement "was based only on the merits of the transaction." Adam Bauer, an HPE spokesman, said the settlement didn't include job commitments.

The settlement still needs final approval from a court. The job-creation promises weren't recorded in HPE's settlement because the Justice Department's Office of Legal Counsel, which provides legal advice to executive-branch agencies, is reviewing whether it can be accepted as part of a settlement, one of the people said. If so, the resolution could be updated to include it.

Gail Slater, the department's top antitrust enforcer, has pushed back on the infusion of lobbyists into her world, but appears under siege by Trump loyalists inside and outside of the administration. Slater, who was picked by Trump for the role, saw her two top deputies fired last week after they challenged the terms of the favorable settlement that HPE negotiated with officials in Attorney General Pam Bondi's office.

Slater and the two fired deputies had objected to HPE's use of Davis and other politically connected lawyers to negotiate the settlement, people familiar with the matter said. Those

comments got back to Davis and others, prompting them to complain about her leadership. Senior officials including Chad Mizelle, Bondi's chief of staff, and Stanley Woodward, who is nominated to be the associate attorney general, are likely to play a bigger role in overseeing Slater's division moving forward, some of the people said.



Assistant Attorney General Gail Slater, the Justice Department's top antitrust enforcer. PHOTO: KENT NISHIMURA/BLOOMBERG NEWS

A Justice Department spokesman said the agency's antitrust work has "secured major wins for American consumers and is working every day to root out anticompetitive and monopolistic practices in business." Taylor Van Kirk, a spokeswoman for Vice President JD Vance, provided a statement after publication of this article that said Slater, who worked as an economic policy adviser in Vance's Senate office, is "whip smart" and "a valuable asset to the Trump administration."

Vance has long attacked Big Tech's power, and Trump embraced a tough stance on antitrust by picking Slater and Federal Trade Commission Chairman Andrew Ferguson. Slater and Ferguson, whose agencies share antitrust authority, have both decried monopolies in the technology industry and said they would be tougher than an earlier generation of Republican enforcers.

Other companies facing antitrust investigations are now looking to hire lawyers or lobbyists close to Trump after witnessing the favorable settlement that HPE reached, according to several defense lawyers who regularly represent merging companies before the Justice Department.

According to people familiar with the matter, Live Nation also has hired Davis. The department

last year sued Live Nation, alleging it has an illegal monopoly in ticketing and concert promotion, and retaliated against venues and other promoters that threatened its dominance. Live Nation spokeswomen didn't respond to repeated messages seeking comment. The company also added to its board of directors Richard Grenell, a confidant to both Trump and first lady Melania Trump.

American Express GBT hired Brian Ballard—a longtime Trump backer, who raised $50 million for his 2024 election—to lobby the Justice Department on antitrust issues for the company, according to lobbying disclosure forms. The Justice Department last week dropped a lawsuit it had filed seeking to block American Express GBT's acquisition of a competitor, CWT Holdings.

Thoma Bravo, a private-equity manager that owns a company facing several antitrust lawsuits, also hired Ballard in March to lobby on competition issues related to the real-estate market, according to filings. The department last year sued Real Page, a Thoma Bravo portfolio company, alleging that RealPage's rent-setting software allowed apartment landlords to illegally coordinate price increases. Ballard hasn't yet actively lobbied for Thoma Bravo, according to a person with knowledge of the arrangement.

HPE hired a slate of politically-active lawyers and advisers including Arthur Schwartz—a political strategist close to Trump's eldest son, Donald J. Trump Jr.—Will Levi, and Nick Iarossi. Levi served in the Justice Department during the first Trump administration. Iarossi is a top Florida-based lobbyist who expanded into Washington after Trump was elected a second time.

No one was more active than Davis, according to people familiar with the matter. He appeared to take it as a personal challenge to get a settlement done after antitrust enforcers questioned his role in the process, some of the people said.

The HPE deal sparked criticism from right-wing activists close to Trump. Laura Loomer, an influential voice in MAGA politics, accused Mizelle of cutting a weak settlement with Davis. Loomer later deleted messages she had written on X.

"Now that @ChadMizelle47 has made it clear that he is open for business at the Justice Department to the highest bidder, other consultants are now putting big price tags on their lobby efforts to influence the Justice Department to settle even more anti-Trust cases," Loomer wrote.

A Justice Department spokesman defended Mizelle, calling Loomer's accusations "baseless."

Four Democratic senators including Elizabeth Warren of Massachusetts have asked the San Jose, Calif., federal court overseeing the settlement to require more disclosure from HPE about the role of the company's consultants, lobbyists and lawyers.

Under U.S. law, courts oversee the department's antitrust settlements. The law, passed during the Nixon administration, aims to expose any backroom dealings that could have influenced the process.

Tying job creation to antitrust enforcement "is fraught with antitrust becoming a political decision instead of a legal one," said David Olson, an antitrust professor at Boston College Law School.

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Corrections & Amplifications

According to people familiar with the matter, Live Nation also has hired Davis. HPE hired a slate of politically-active lawyers and advisers including Arthur Schwartz, Will Levi, and Nick Iarossi. An earlier version of this article incorrectly said that Live Nation had hired Arthur Schwartz, a political strategist close to Trump's eldest son, Donald J. Trump Jr. (Corrected on Aug. 7)

Appeared in the August 7, 2025, print edition as 'Antitrust Agenda Under Siege by Lobbyists Close to Trump'.

Videos

A Tenacious Microsoft Emerges From Suit With Its Software Monopoly Largely Intact

By John WilkeStaff Reporter of The Wall Street Journal

Nov. 9, 2001 12:01 am ET

WASHINGTON -- The breakthrough in settlement talks in the Microsoft Corp. antitrust case came at about 1 p.m. on Oct. 31.

On that day, Charles James, the Justice Department antitrust chief, pressed Microsoft for an important concession. He wanted to limit the software titan's ability to extend its Windows operating-system monopoly from the desktop-computer market to the market for large corporate "server" computers, where it still faces competition. Without such a provision, Mr. James told Microsoft, the 18 states that had sued alongside the Justice Department would walk.

Microsoft had resisted the demand, but a court-imposed deadline loomed. So, with a go-ahead from Chairman Bill Gates, Microsoft's lawyers drafted a paragraph agreeing to disclose additional information about how its desktop software works with its server software. The disclosure was supposed to improve rivals' chances of designing programs that could operate well with the ubiquitous Windows desktop software.

Mr. James was satisfied. But as Microsoft wrote it, the concession was so narrowly drawn that it would disclose little of use to the company's competitors, according to those rivals. And it didn't go far enough for nine of the co-plaintiff states, which ended up refusing to join the settlement.

The pattern repeated itself often in the negotiations that concluded last Friday with Microsoft and the federal government announcing that the historic three-year-old case had been resolved. After an epic battle in one of the biggest antitrust cases ever, the settlement leaves Microsoft's personal-computer software monopoly largely intact and is unlikely to hinder its march into such new markets as online services, music distribution and telecommunications.

Classic Display

In a classic display of Microsoft pugnacity, the company hammered opposing government lawyers on nearly every conceivable point, no matter how small. Eventually exhaustion became a factor, lawyers on the government side acknowledge. "It was a marathon session, and new [settlement] language that had not been there before and that had not been vetted by the staff showed up in new drafts," one government attorney says. "The provisions were weakened at every turn by qualifying exceptions."

The entire legal and political context had shifted since last year, when a federal trial judge here found Microsoft had repeatedly violated antitrust law and, in an extraordinary step, ordered it broken into two companies. The Clinton administration officials who sought that drastic remedy had been replaced by Bush appointees less inclined to use antitrust law aggressively.

And while a federal appeals court in June had affirmed the core of the government's case -- that Microsoft had unlawfully shielded its Windows monopoly from competition -- the court rejected the breakup order. No longer at risk of dismemberment, the company could focus on haggling over the details of licensing agreements and the like.

Herding Antagonists

Adding pressure for some sort of swift truce, a new trial judge invoked the national economic downturn that was exacerbated by the Sept. 11 terror attacks. The judge brought in a professional mediator famous for herding antagonists to common ground.

Now, the terms that Microsoft obtained could shape the future of competition in the computer industry -- to Microsoft's clear advantage. The dissenting nine states, led by California, Connecticut and Iowa, are waging a last-ditch effort to toughen the deal, but they face long odds.

Charles James

The Justice Department's Mr. James says the settlement addresses Microsoft's antitrust violations within the limits of the appeals-court ruling. "We wanted to stop the violations now, not after years of further proceedings and appeals," Mr. James says.

The settlement gives personal-computer makers greater freedom to install non-Microsoft software on new machines and to remove access to competing Microsoft features, such as

Internet browsers. It also bans retaliation against companies that take advantage of these freedoms, prohibits exclusive contracts and requires Microsoft to disclose design information to hardware and software makers so they can build competing products that run smoothly with Windows.

Mr. James says these terms are sufficient. He criticizes Microsoft's competitors for urging the government to impose provisions that would hobble the company and go beyond the violations affirmed by the appeals court.

The deal came together after three settlement attempts over the past two years had failed. U.S. District Judge Colleen Kollar-Kotelly, a Clinton appointee, took over the case in late summer, with responsibility for crafting a less-stringent remedy. She is known as a jurist who in ordinary times pushes litigants to settle. On Sept. 28, she told the parties in the Microsoft case that "the recent tragic events affecting our nation" demanded a prompt end to litigation that had already roiled the stock market and generated economic uncertainty.

That exhortation hit home. After Sept. 11, "the world had changed, with war abroad, threats at home and a deteriorating economy, creating a powerful dynamic to settle," says Richard Blumenthal, Connecticut's attorney general and one of the more-aggressive state officials involved in the case.

As it happens, the company and the federal government had scheduled a new round of secret settlement talks to begin at 2 p.m. on Sept. 11, at the main Justice Department building in Washington. One Justice official involved in the case says, "The last thing I remember doing after someone came into my office to say, 'We're getting out of here, now,' was to call and tell [the Microsoft team] that the meeting would be canceled."

On the Road

With airlines shut down, a group of Microsoft's lawyers, led by William Neukom, senior vice president, drove a rental car most of the way back to Redmond, Wash. They were finally able to get on a plane in Montana. Iowa's attorney general, Tom Miller, took a train to Des Moines. Nothing much happened in the case for two weeks.

Colleen Kollar-Kotelly

Then, Judge Kollar-Kotelly put the talks back on track, ordering the parties to work "seven days a week, around the clock." She threatened to impose a mediator if quick progress wasn't made. Despite the pressure, there was little progress. On Oct. 15, the judge named a Boston University law professor, Eric Green, to step in as mediator.

Mediation in the Microsoft case had already been tried, without success, by Richard Posner, a

nationally known U.S. appeals-court judge in Chicago. Mr. Green, 55 years old, has a reputation as a tireless and skilled mediator. He has settled scores of seemingly intractable cases, from claims over a rash of childhood cancers in a small New Jersey town in the 1990s to an international price-fixing case in the vitamin industry.

Mr. Green concedes that he isn't an expert on antitrust law or computer software. He declines to discuss specifics of the Microsoft mediation. But he says, "It was one of the most challenging mediations I've done, because of the complexity of the case and the technology."

Under his supervision, the parties began spending long hours in tedious debate over each of the conduct restrictions ordered by U.S. District Judge Thomas Penfield Jackson last year and later set aside when the appeals court rejected the breakup in June.

This time around, the government wanted Microsoft to let personal-computer makers choose more easily among competing software that works with Windows, such as media players, instant-messaging programs and Internet software. The appeals court had found in June that Microsoft used its monopoly -- Windows runs more than 90% of PCs -- to coerce PC makers to use Microsoft's own versions of such software for the Internet and other purposes, instead of accommodating programs sold by rivals.

The states and the Justice Department also sought provisions to deter Microsoft from punishing computer makers that don't bow to its demands -- for example, by charging those companies more for Windows if they install non-Microsoft programs in their machines. And the government lawyers wanted clearer disclosure of the inner workings of Windows, so that rival software firms could build products that work well with Windows.

Microsoft wanted any settlement to allow it to pursue its longtime strategy of building new features into Windows -- what the company calls its "freedom to innovate." Microsoft says weaving these features into the Windows system benefits customers. But the Microsoft strategy also has meant that companies selling their own innovations, such as instant-messaging software, were often thwarted. That's because so many PC makers preferred to take the Windows package, as is, and install it on their machines.

The talks came to a head on Halloween. Teams of lawyers representing the Justice Department, the states and Microsoft took over most of the ninth floor of the Washington offices of one of Microsoft's law firms, Fried Frank Harris Shriver & Jacobson.

The Microsoft team included in-house lawyer David Heiner; Charles F. Rule, a Washington lawyer with Fried Frank; and Steven Holley of New York's Sullivan & Cromwell, all veterans of the case. The states, which were represented most of the time by staff lawyers from Ohio and New York, operated cohesively at the outset, although a division would surface later.

The Justice Department team usually included Phil Malone, the San Francisco-based career-government attorney who had helped put the original case together; Mr. Malone's boss, Debbie Majoras, an experienced antitrust lawyer and Bush appointee; and Mr. James, who as the assistant attorney general for antitrust, made most of the critical decisions for the government. Other Justice Department staff members shuttled back and forth from the department's cluttered "war room" a few blocks away.

On the morning of Oct. 31, Mr. James huddled alone with his opponent, Mr. Rule, who in the late 1980s had been antitrust-division chief in the Reagan administration. These occasional private sessions, without Justice Department staff, helped move negotiations along, Mr. James says.

By midafternoon, the two sides had agreed on the provision that supposedly promoted competition in the market for corporate server computers. Microsoft faces competition in that market from International Business Machines Corp. and Sun Microsystems Inc., among others.

The states wanted to force Microsoft to show its competitors certain key functions of the Windows system that would allow Windows PCs to work smoothly with servers such as Sun's and IBM's, not just Windows-equipped machines.

Limited Offer

Mr. James approved of the compromise Microsoft offered. But the original Microsoft language limited the provision to a single type of server. Thus, it wasn't broad enough, according to Sun, IBM and other rivals.

Eric Green

Still, the agreement on this provision triggered a negotiating session on other issues that lasted through the night. Groups of lawyers met in as many as four or five conference rooms at one time, hammering out specific language. Mr. Green, the mediator, ordered a dozen large pizzas, then moved among the various groups of attorneys, goading them along.

"More than once, I had to find someone to address a point and would find them stretched on the

floor, sound asleep," he says. "I'd wake them and bring them to the table."

Thoughts of war and terrorism were never far away, as has been true in the capital since Sept. 11. "It was on the minds of everyone at the table," says Mr. Green. Only days before the negotiating marathon, men in white moon suits and respirators had swept the Fried Frank offices for anthrax.

Microsoft lawyers invoked a more-threatening world when they proposed inserting a security exemption in a different part of the settlement. The exemption applied to provisions that require the company to disclose the inner workings of Windows to competitors who want to make all sorts of software that works well with Windows. The company said it needed the exemption to guard against cyber-sabotage.

Mr. James thought this was reasonable and agreed to the exemption, according to people close to the deliberations.

The exemption frees the company from having to disclose anything that "would compromise the security of antipiracy, antivirus, software licensing, digital-rights management, encryption or authentication systems." Microsoft's competitors and some of the states claim that these technologies are used so commonly that the provision could shield a number of Microsoft's products from competition.

One example is Passport, a Microsoft service that helps consumers make Internet purchases and is crucial to Microsoft's push into online commerce. The exemption also could be read to shield Media Player, Microsoft's entrant in the market for online music and video distribution.

Mr. James rejects these criticisms and says the decision to protect Microsoft's security provisions was "one of those 'duh' issues." He continues: "Microsoft has security protocols. Are we going to tell everyone how they work? Do you want people to get access to your credit-card information when you shop on line?"

More broadly, "competitors would like it better if they had access to all of Microsoft's proprietary information," he says. "And any company that thinks Microsoft's security protocols are a form of predation, let them sue."

Mr. James and his deputy, Ms. Majoras, say their decisions were constrained by the June appeals-court ruling, which narrowed the remedies they could seek. Mr. James also sketches a

more-generous view than his predecessors of Microsoft's legal right to "bundle" the software code for Windows with the code for such features as the company's Internet browser.

While the appeals court found that in the past Microsoft had installed a browser in Windows to protect its monopoly, Mr. James says that today various Internet features are woven more deeply into Windows, offering consumers such benefits as one-click access to the Internet from e-mail.

"How would consumers be served if we forced Microsoft to remove that code?" he asks. "The market has changed."

When Mr. James and Attorney General John Ashcroft unveiled the settlement last Friday, it was met by a storm of criticism from competitors, who said the antiretaliation provisions would stop only some ways that Microsoft can discipline other companies. The rivals also said Microsoft would be able to evade other settlement terms too easily.

In a hearing before Judge Kollar-Kotelly, all 18 states split with the Justice Department and asked for more time to evaluate the deal. Over the weekend, they listened to Microsoft's competitors list criticisms of the settlement in hours of conference calls. Mr. James had declined to meet with the rivals during the mediation.

Although Mr. James insisted that no changes would be made, nine of the states, led by New York, persuaded Microsoft to tighten some provisions, in exchange for their endorsement of the pact. The New York group won a clarification in the provision on server-information disclosure, among other modest changes.

The back-channel negotiations infuriated the other nine states, however. Tuesday morning, the holdout states, led by California, Connecticut and Iowa, told Judge Kollar-Kotelly they couldn't accept the settlement without further changes. She has asked the dissenters for their proposals and scheduled additional hearings for March.

Before then, the deal faces a mandatory public-comment period and a full-scale court hearing on whether it is in the public interest, giving everyone at least one more chance to have a say on U.S. v. Microsoft.

Write to John Wilke at john.wilke@wsj.com

The Rule of Law Versus the Rule of Lobbyists

Roger P. Alford

Tech Policy Institute Aspen Forum

August 18, 2025

Thank you for the opportunity to be here today. I'm truly honored. Having served in and out of government for the past decade I have noticed something ironic. As a law professor I have so much to say, but so few are eager to listen. But as a senior government official, I have many eager to listen, but there is little I'm allowed to say. So today I'm in the fortunate position of being a law professor and recent senior government official who has so much to say and so many who are eager to listen.

I'm here today as someone who is happy and grateful, and hopeful that in the wake of the HPE/Juniper merger scandal, the Department of Justice may course correct with a few policy and personnel changes. Although challenging, I loved my time at the Department of Justice as the second highest official in the Antitrust Division. But I love being back home at Notre Dame even more. It feels a little like I've returned to the Shire after fighting the Orcs in the Battle of Helm's Deep.

I want to speak with you today about the battle within the Republican party over the future of the second Trump Administration. I am not talking about the well-known ideological battle between traditional conservatives and Trump supporters. I am talking about the battle between genuine MAGA reformers and MAGA-In-Name-Only lobbyists. It's a fight over whether Americans will have equal justice under law, or whether preferential access to our justice system is for sale to the wealthy and well-connected.

Will America be governed by the rule of law or the rule of lobbyists? For the words "equal justice under law" to be more than just a phrase etched in marble, it must be practiced by those privileged to enforce it. Attorney General Pam Bondi testified about this in her confirmation hearing. "If confirmed, I will work to restore confidence and integrity to the Department of Justice …. America must have one tier of justice for all."

The true MAGA Republicans know that we cannot restore integrity and protect the interests of the average American by allowing wealthy and powerful corporations to hire politically connected lobbyists to receive special treatment. Officials like my boss Assistant Attorney General Gail Slater and so many others are working hard to remain true to President Trump's core message that resonated so well with working-class Americans. Antitrust enforcement that applies equal justice under the law can prove that the DOJ is not for sale and deliver tangible results for millions of

Americans. As I said in my Senate Judiciary testimony last December, we are committed to "common sense populism [that] seeks to make housing more affordable, reduce the cost of higher education, promote choice and competition in healthcare, and adopt economic policies that drive down the cost of living and prices for everyday goods and services."

The MAGA-In-Name-Only lobbyists and DOJ officials enabling them are pursuing a different agenda. Their loyalty is not to the President's antitrust agenda or to rebuild confidence and integrity in the DOJ. Regardless of the outcome, their commitment is to exert and expand their influence and enrich themselves as long as their friends and supplicants are in power. If the rule of lobbyists prevails, the Republican vision of a realignment toward the average American will die.

The current front in this battle is being fought within the Department of Justice. It will not surprise you when I say that AAG Slater and Deputies Mark Hamer, Dina Kallay, Bill Rinner, and Chetan Sanghvi have been wonderful colleagues, and we are united in the battle to protect the average American by vigorously enforcing the antitrust laws. The same cannot be said for senior leadership above and around her.

Similar to my mentor James Buckley's call for Richard Nixon to resign in March 1974, I'm speaking out reluctantly as a friend because I know that what I have to say will bring pain and distress to many people I respect. I'm asking for statesmanship and courage by senior government officials to promote this Administration's antitrust agenda, restore integrity to the DOJ, and serve the greater interests of the nation.

I am speaking out now because it is still early days in this Administration and I think correcting the problems at the DOJ is still possible, either by political will or judicial decree. I experienced nothing remotely like this when I served at the DOJ the last time, and hopefully this is a short-term aberration.

To be clear, I have absolutely no reason to think the White House or other departments are involved in the current HPE/Juniper merger scandal. Nor do I think Deputy Attorney General Todd Blanche is involved. I met with him almost every week and I never had a negative experience with him. There are things I don't know, but I perceive him to be a man of character who is leading the DOJ under extremely difficult circumstances.

But I cannot say the same about a small set of actors in senior leadership within the DOJ. I met with the most senior officials of the DOJ regularly, and my concerns expressed today are not based on conjecture. The core problem is simple: AG Bondi has delegated authority to leaders like her Chief of Staff Chad Mizelle and Associate Attorney General nominee Stanley Woodward who do not share her commitment to the rule of law and to one tier of justice for all. With the DOJ led by a mix of officials with varying commitments to restore integrity to the Department of Justice, good may yet prevail, but at least with respect to senior DOJ oversight of antitrust enforcement, we are on a path toward injustice.

Let me discuss the battle lines that have been drawn between true MAGA Republicans and MAGA-In-Name-Only lobbyists and offer just a few reflections on the difference between the rule of law and the rule of lobbyists.

First, under the rule of law, rules matter and must be respected, both in substance and in procedure. Sir Thomas More in a *Man for All Seasons* put it this way in his famous quote about giving the devil the benefit of the law: "This country is planted thick with laws from coast to coast, man's law not God's! And if you cut them down, … do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil the benefit of law, for my own safety's sake." When Thomas More explained to Richard Rich why he could not accept even a small bribe such as a silver cup, he said with real power there will be offers of all sorts of things—homes, manors, and coats of arms. Only those with principles strong enough to reject the little temptations are worthy to serve in senior government where there will be offers of big temptations.

Under the rule of lobbyists, antitrust laws are nuisances or obstacles to overcome. Rather than the legitimate lobbyists who have expertise and perform traditional functions of education and engagement, corrupt lobbyists with no relevant expertise are perverting actual law enforcement through money, power, relationships and influence. In a *Man for All Seasons*, Thomas Cromwell beckoned Richard Rich to betray Sir Thomas More in exchange for a bribe. Rich did so and immediately felt guilty. Cromwell reassured Rich that while Sir Thomas More is a man of incorruptible principle, Rich has common sense, and accepting bribes gets easier with time. The corrupt Richard Rich rose to the heights of power, while the principled Thomas More resigned and then was imprisoned and martyred for insubordination.

There are people within the DOJ who follow the law and care deeply about protecting Americans from anticompetitive behavior. That is true of the leadership and career staff at the Antitrust Division. They believe in the principles that undergird the antitrust laws and want to enforce those laws for the common good. They reject the silver cup of temptation to betray the law for personal gain.

Sadly, there are other people inside and outside government who offer and accept the silver cup and who care little for the antitrust laws. They consider law enforcement not as binding rules but an opportunity to leverage power and extract concessions. They have, shall we say, a loose relationship with the law.

It goes without saying that the most senior law enforcement officials in the United States should care deeply about the rule of law. They should know the law and follow it. And they should not punish those who defend it.

Although I am limited in what I can say, it is my opinion that in the HPE/Juniper merger scandal Chad Mizelle and Stanley Woodward perverted justice and acted inconsistent with the rule of law. I am not given to hyperbole, and I do not say that lightly. As part of the forthcoming Tunney Act proceedings, it would be helpful for the court to clarify the substance and the process by which the

settlement was reached. Although the Tunney Act has rarely served its intended purpose, this time the court may demand extensive discovery and examine the surprising truth of what happened. I hope the court blocks the HPE/Juniper merger. If you knew what I knew, you would hope so too. Someday I may have the opportunity to say more.

The second distinction between the rule of law and the rule of lobbyists is that those who follow the rule of law show no special favors to the parties and counsel appearing before them. By contrast, the rule of lobbyists cares deeply about benefits they can extract in transactional relationships with perceived friends. At the Antitrust Division we routinely have lawyers appear before us whom we know and respect, but we also meet lawyers who are unethical scoundrels and malcontents—the kind who game the system and crow about it. We ignore the affiliations of these lawyers—whether friend or foe, Republican or Democrat—and attempt to treat everyone equally. That's how we maintain one tier of justice and restore the integrity of the Department.

Others at the DOJ and elsewhere in government consider some parties, counsel, and lobbyists to be on the "same MAGA team" and worthy of special solicitude. They consider others to be "enemies of MAGA" that merit particular disfavor. In my opinion based on regular meetings with him, Chad Mizelle accepts party meetings and makes key decisions depending on whether the request or information comes from a MAGA friend. Aware of this injustice, companies are hiring lawyers and influence peddlers to bolster their MAGA credentials and pervert traditional law enforcement.

Third, the rule of law provides predictability while the rule of lobbyists guarantees instability. Violations of antitrust laws impose grave risks to companies, including criminal prosecution, massive civil penalties, company breakups, and the blocking of mergers. Lawyers and their clients need a stable and predictable environment to do business. The Antitrust Division uniformly seeks to promote the rule of law in both litigation and merger enforcement. I personally have heard lawyers say that the political uncertainty of this Administration is more difficult than the predictable but hostile environment of the Biden Administration.

I should emphasize that I welcome all lawful competition and all procompetitive mergers. Before recent events, the original topic for my talk today was in praise of Little Tech innovation and pro-competitive mergers. Nor is there anything wrong with lobbying done the right way. But this new pay-to-play approach is so far removed from legitimate lobbying or traditional antitrust enforcement that it is creating massive legal and economic uncertainty. Those adopting this new approach care little about the instability this creates for the markets.

The cost to the country of this new pay-to-play approach to antitrust enforcement is enormous. For thirty pieces of silver, MAGA-In-Name-Only lobbyists are influencing their allies within the DOJ and risking President Trump's populist conservative agenda. This goes far beyond traditional lobbying functions. Their goal is to line their own pockets by working for any corporation that will pay top dollar to settle antitrust cases on the cheap. Doing so undermines the rule of law and desperately harms the average American. At risk are President Trump's antitrust goals of

reforming health care, addressing monopoly abuses, promoting deregulation, and helping renters, farmers and blue-collar workers.

Is this the new normal, with every law firm hiring an influence peddler to dual track and sidestep the litigation and merger review process? That's what law firms are now considering. The Department of Justice is now overwhelmed with lobbyists with little antitrust expertise going above the Antitrust Division leadership seeking special favors with warm hugs. On numerous occasions in a variety of matters we implored our superiors and the lawyers on the other side to call off the jackals. But to no avail. Today cases are being resolved based on political connections, not the legal merits.

Which case is the next casualty? Will the same senior DOJ officials ignore the President's Executive Order just because Live Nation and Ticketmaster have paid a bevy of cozy MAGA friends to roam the halls of the Fifth Floor in defense of their monopoly abuses? I wonder what the national security arguments will be in that case.

What must the antitrust bar think? If the new game in town is to hire well-connected lobbyists ignorant of the law to get your deal done or your case dismissed by going around and above AAG Slater, what role are respected, ethical antitrust lawyers supposed to play? Why did the lawyers advising the parties in the HPE/Juniper merger scandal not appreciate the risk they were generating, not only for their clients and their law firms, but for the entire antitrust bar?

Lastly, there are real costs for the lobbyists, the companies and lawyers who hired them, and the officials within government. Their reputations are forever linked to their unethical behavior. Mike Davis and Arthur Schwartz have made a Faustian bargain of trading on relationships with powerful people to reportedly earn million-dollar success fees by helping corporations undermine Trump's antitrust agenda, hurt working class Americans, break the rules, and then try to cover it up. Outside the small circle of transactional MAGA friends seeking and giving favors, do these lobbyists and their friends in power actually know what traditional or populist conservatives think about them? When lobbyists like Mike Davis and Will Levi go to their Supreme Court clerkship reunions, how do honorable conservative lawyers who clerked for the great Justices Alito and Gorsuch view their shenanigans? Do the executives and the lawyers who hire these lobbyists know what the antitrust bar and the Division's leaders and lawyers think of their behavior? They have long memories.

Those who forsake the rule of law are violating fundamental moral principles. "A just king gives a country stability, but one who demands bribes destroys it." (Proverbs 29:4). "You shall not pervert justice. You shall not show partiality…. Justice, and only justice, you shall follow." (Deuteronomy 16:19-20). "A wicked man receives a bribe in secret to pervert the ways of justice." (Proverbs 17:23). "Do not show partiality in judging; hear both the small and great alike." (Deuteronomy 1:17). I know many in and out of government who sincerely respect these moral principles. Perhaps now is the time to implement them. The influence peddlers and allies in government will hide behind their friends in power, excuse their behavior, claim we are naïve, and

hope this all goes away. But many of their friends in power have principles and want to avoid further scandal.

How will the Department of Justice recover from the current crisis? Will there be policy or personnel changes among the senior leadership at the Department of Justice? Will AAG Slater have the freedom to enforce the law and fire or hire her deputies consistent with the Administration's true antitrust agenda? At a minimum, will the Department of Justice remove the compromised Chad Mizelle and Stanley Woodward from any antitrust oversight, and have Gail Slater report directly to Todd Blanche? In the absence of reforms at the DOJ, must State AGs now join every DOJ antitrust lawsuit and merger challenge as a check on influence peddling? The status quo is simply unsustainable.

When I began my service at the DOJ, I swore a solemn oath to well and faithfully discharge the duties of my office. What will be done when senior DOJ officials betray their oath? What will be done to a nominee who has already shown he cannot be trusted to honor such an oath?

Let me conclude with a personal reflection. President Roosevelt was one of the great antitrust reformers and lately I've been thinking about his famous speech "The Man in the Arena."

> "Credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly."

In my first tour of duty at the DOJ, I loved that quote because I could relate to the triumph of high achievement as AAG Makan Delrahim and I successfully negotiated an agreement on fundamental due process signed by over seventy countries. In my second tour of duty at the DOJ, I love that quote for what it says about failing while daring greatly.

My position while I served in government was simple: lobbyists and lawyers are subordinate to the law. Yet by stating this truth, I was dismissed for insubordination. My termination letter is now framed and hangs on the wall in my office at Notre Dame. I joke with friends that I've never been fired before, and I've been working since my first job as a young teenager at the Dairy Queen in Sherman, Texas. All it took to be fired were lobbyists exerting influence on my superiors to retaliate against me for protecting the rule of law against the rule of lobbyists.

A final thought on the subject of taking risks to serve our country in these difficult times. Is it really worth leaving the Shire to battle the Orcs? On both occasions that I was offered a senior position within the DOJ I was told that I should not accept the offer because the risks were just too great. For me that was not a sufficient reason to say no. I knew I would be attacked. I knew it would be difficult. But I also know that the rule of law is not just an inheritance, it also an

opportunity and obligation. Soldiers are willing to go to war and risk their lives to serve our country. So why shouldn't we take lesser risks to serve our country and protect the rule of law? The principles inscribed in marble at the Department of Justice building only survive if each generation takes up the fight. Failure is always a possibility. But so too is triumph. I would rather fail while daring greatly than not serve at all. Thank you.

HPE/Juniper: As Fight Between DOJ Leadership and Antitrust Division Broils, Tunney Act Proceeding Looms

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After DOJ's suit to block HPE's (HPE) $14 billion acquisition of Juniper Networks (JNPR) culminated in a highly unusual settlement, the consent decree faces one last barrier to becoming final: Tunney Act review by U.S. District Judge Casey Pitts.

That's typically a rubber stamp. But given the settlement's atypical substance and process, plus third parties who may be motivated to intervene and a judge who may be inclined to approach the review skeptically, what's normally a quick judicial signoff could turn into a fraught process with wide-reaching implications.

The proposed settlement divided DOJ internally, sources familiar with the matter said. Assistant Attorney General Gail Slater, the antitrust division's chief, opposed settling, but senior DOJ officials, including Acting Associate Attorney General Chad Mizelle, overruled her, the sources said. In arguing against the settlement, Slater raised concerns about the Tunney Act process and the disclosures it would require about communications between the companies' representatives and the administration, the sources said.

A CBS News report last week that included some of these details referred to internal administration discussions of "whether to push out some [antitrust division] staff." Sources said that a fight continues over the potential ouster of two of Slater's top deputies, Principal Deputy Assistant Attorney General Roger Alford and Deputy Assistant Attorney General Bill Rinner. Both of their names and biographies had been removed this morning from the website listing the division's leadership but have since been put back on. A DOJ spokesperson didn't immediately respond to a request for comment.

The Antitrust Procedures and Penalty Act, also known as the Tunney Act, requires that a federal court find DOJ settlements "in the public interest" before making them final.

The act, which became law in 1974, grew out of concerns that the Nixon administration had improperly influenced DOJ antitrust settlements, including a series of 1971 consents with International Telephone & Telegraph Corporation (ITT). Subsequent reporting revealed that President Nixon had instructed his deputy attorney general to "stay the hell out" of the "ITT thing," seemingly in response to ITT's agreement to donate $400,000 to the 1972 Republican National Convention.

Those revelations led to widespread furor and congressional interest in preventing such scenarios in the future. "[T]he policy objective was to ensure that lobbying contacts did not influence the law enforce[ment] function of the Antitrust Division of the Department of Justice," former Senator John Tunney, the legislation's primary champion, said in a 2002 affidavit.

Under the Tunney Act, which Congress amended in 2004, courts determining whether a consent decree is in the public interest must consider: (1) "the competitive impact of such judgment," and (2) "the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury."

Despite this directive, courts reviewing proposed consent decrees under the law typically wave them through quickly. The only example of a district court pushing back on a DOJ settlement—a 1995 decision rejecting the consent settling Sherman Act charges against Microsoft (MSFT)—was subsequently overturned by the D.C. Circuit Court.

No court has ever rejected a merger settlement under the Tunney Act. In fact, there's only one recent example of a court even holding a live hearing: U.S. District Judge Richard Leon in 2019 probed a DOJ consent decree settling the case against CVS's (CVS) acquisition of Aetna through a two-day hearing that included six live witnesses.

If past is prologue, Pitts will finalize the settlement as soon as he's able. But given the substantive and procedural smoke around the HPE/Juniper matter, there's a meaningful chance that this time will be different.

Substantive questions. First, there's the substance. DOJ's January 30 lawsuit, brought by the Trump administration's acting antitrust division head Omeed Assefi, alleged the merger would harm competition in the market for "enterprise-grade WLAN solutions," in which HPE's Aruba and Juniper's Mist product lines were close head-to-head competitors.

But after an attorney for the defendants filed a settlement around midnight on June 28—just 12 days before trial was set to begin—DOJ dropped its case, calling the proposed consent decree a "novel approach."

The settlement is indeed novel, with its structural centerpiece HPE's commitment to divest its Instant On business. But Instant On is targeted at small and medium-sized businesses (SMB) and isn't an option for the large, "enterprise-grade WLAN solutions" customers DOJ's complaint alleged the merger would harm, three customers and an industry analyst told *The Capitol Forum*.

In fact, in a post-settlement victory lap that's almost certain to find its way into the Tunney Act record, HPE CEO Antonio Neri made a similar argument. Instant On is "a distinct offering separate from the traditional HPE Aruba platform and Aruba Central. It was specifically designed to serve the small business segment, particularly the 'S' in SMB and represents a small portion of our overall business," Neri said on a July 10 call with investors.

Given this disconnect, DOJ's proposed consent decree (which also includes an obligation to license certain Mist AI source code) is difficult to square with the allegations in the complaint, industry participants have said.

"It's ridiculous. I have no idea what the DOJ was thinking—Instant On had nothing to do with the enterprise business," one industry executive familiar with the merging parties' WLAN products said in an interview.

"It makes zero sense," the executive added. "Everybody that knows anything about the industry is scratching their heads. The whole terms of the settlement were absurd."

DOJ said in a competitive impact statement filed with the court that "the divestiture of assets, license, and other relief described in the proposed Final Judgment will preserve competition for the development and sale of enterprise-grade WLAN solutions in the United States." That position, however, may have little third-party support.

The public will have the opportunity to make their views heard: DOJ published the proposed final judgment in the federal register on July 10, which kicked off a 60-day period for public comment.

Those comment periods are usually sleepy affairs. But given the deal's high profile, and the remedy's questionable adequacy, that docket could become littered with critical comments.

Once the public comment period concludes, DOJ considers them, files its responses with the court and moves for the entry of final judgment. That typically occurs a few months after the comment period closes.

Only after DOJ moves for the entry of final judgment would the court consider holding an evidentiary hearing. In other words, if Pitts does hold a Tunney Act hearing, it'd be unlikely to occur until next year—and if the CVS/Aetna timeline is any guide, not until Q2 2026.

Importantly, the government has a low bar to clear in Tunney Act reviews. As one district court noted in 2016, DOJ "need not prove that the settlements will perfectly remedy the alleged antitrust harms; it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms."

And district courts have been explicitly deferential to DOJ's views—as another district judge noted in a 2003 Tunney Act decision, "[a] district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case."

Even providing for some degree of judicial deference, however, if preliminary industry feedback is any indication, whether the settlement clears even the low bar of proving "reasonably adequate" to address the harms alleged in the complaint is an open question.

Process questions. Substance aside, there's the question of process, and in particular whether the procedural smoke around the lead-up to the settlement—including Mizelle's move to overrule Slater—could inform Pitts' approach to the Tunney Act proceeding.

Mizelle's close involvement in the matter is highly unusual—as is the fact that no DOJ trial attorneys signed the resulting consent decree papers. It also raises questions that won't be quieted by HPE's July 7 disclosure that it retained MAGA-aligned antitrust thought leader Mike Davis to advocate for the deal.

In addition to Davis, HPE, in working to short-circuit the antitrust division's case, hired multiple lobbyists close to the White House, including Arthur Schwartz, a close confidante of Vice President JD Vance.

Slater in a meeting with HPE and Juniper officials told the companies to work directly with the antitrust division in advocating for the transaction rather than attempting to influence the process through consultants like Davis and Schwartz, sources said.

Section 16(g) of the Tunney Act requires parties to disclose to the court "all written and oral communications by, or on [their] behalf…with any officer or employee of the United States concerning or relevant to" the consent decree.

HPE's and Juniper's July 7 16(g) filing identifies Davis, as well as Will Levi, a partner at Sidley Austin who was chief of staff to the attorney general during Trump's first term. But the disclosure doesn't mention Schwartz, or any other outside lobbyists or consultants. That indicates that HPE is reading its obligation to identify communications "relevant to" the settlement fairly narrowly, and may in turn lead to third party or court questions about the adequacy of the company's disclosures.

That said, courts haven't meaningfully weighed in on the question of when 16(g) disclosures are adequate, and the merging parties here wouldn't be the first to view their obligations narrowly. Microsoft in a 2002 Tunney Act hearing argued that it was required to disclose only communications that involved a "term" in the final settlement agreement.

"HPE is confident it has fully complied with its obligations under the Tunney Act," an HPE spokesperson said. Davis, Schwartz and Levi declined to comment. Spokespeople for DOJ and Juniper Networks didn't respond to a request for comment.

HPE in the 16(g) filing also said that its communications with DOJ related to both settlement terms and "national security interests favoring consensual resolution of the action." Although courts may have limited latitude to consider non-competition factors in their Tunney Act analysis, that disclosure raises the prospect that DOJ could argue the consent decree is "in the public interest" for reasons beyond protecting competition in the enterprise-grade WLAN market.

Ultimately, however, a Tunney Act review focuses on a consent's competitive impact. And although process isn't necessarily part of the analysis, HPE did hire consultants close to the White House to lobby for their deal—and Mizelle subsequently overruled the antitrust

division's chief. That may lead Pitts to ask whether the settlement is consistent with a law Congress passed "to ensure that lobbying contacts did not influence the law enforce[ment] function of the Antitrust Division of the Department of Justice."

Court discretion. Courts have substantial power to gather evidence relevant to whether a settlement is "in the public interest" under the Tunney Act, including to (1) "take testimony of Government officials or experts," (2) "appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate," (3) "authorize full or limited participation in proceedings before the court by interested persons," and (4) "take such other action in the public interest as the court may deem appropriate."

Put differently, although courts rarely use it, the law grants them incredibly broad discretion to conduct hearings. Unhelpfully for DOJ, Pitts, a Biden appointee who until his confirmation in 2023 was a partner at Altshuler Berzon, a public interest law firm, isn't an administration-friendly draw. And although the circuit's Democratic lean has narrowed in recent years, the fact that an appeal of a Pitts rejection of the settlement would go to the Ninth Circuit—rather than the D.C. Circuit, as is typical in Tunney Act proceedings—is also an unhelpful dynamic.

To be sure, a court attempt to dig into the process through which the government settled the case would almost certainly face substantial pushback from DOJ, which would presumably take the position that the public interest inquiry is limited entirely to substantive factors. Any court move to solicit testimony on settlement process could also run into agency claims of, for example, deliberative process privilege (or, if national security becomes an issue, even state secrets privilege).

Nonetheless, the legislative intent of the Tunney Act indicates that the substantive and process questions are intertwined. As Tunney said in remarks on the Senate floor, "If I could sum up the true meaning and purpose of this act, I would cite the crisp and clear words of Justice Louis Brandeis: 'Sunlight is the best of disinfectants.' It is more sunlight that we are seeking to shed *on the methods and manner* by which we settle complex and costly antitrust suits through the consent decree process" (emphasis added).

Given its drafters' policy objectives—plus the text of the statue and the legislative history—it's seemingly within the court's power to consider, and perhaps even seek testimony on, process questions. The high likelihood that public comments will express concerns around the settlement process here may further increase the odds that Pitts takes the unusual step of considering the "methods and manner" question.

But even if Pitts opts against evaluating process, substantive factors alone indicate that the HPE/Juniper settlement is set to face an unusually impactful Tunney Act review—and one that, if it goes awry, could lead to meaningful hit to the credibility of the antitrust division—and the Justice Department more broadly—with the courts.

Such an outcome could also have serious follow-on effects—especially in a scenario where top DOJ officials in coming months seeks to settle other open antitrust division conduct lawsuits—for example, pending litigation against Google (GOOG), Apple (AAPL), Visa (V) or Live Nation (LYV).