

# The Dark Side of Antitrust Statements of Interest

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*28 U.S.C. § 517 allows the Department of Justice (DOJ) to file a statement addressing a governmental interest in any pending suit. This procedural tool laid dormant for decades, utilized sparingly in litigation involving foreign sovereigns. In the 1960s, the government expanded its use to aid in developing civil rights. In 2009, the DOJ deployed Section 517 in a new arena: antitrust. Since then, each administration has followed suit. Though initially criticized, these statements now draw praise from antitrust scholars as a cost-effective means for DOJ advocacy. This Article challenges these accolades. Its foundation is an analytical assessment of the DOJ's statements of interest in antitrust cases. This data exposes a dark side to such filings. This Article explains how the DOJ's use of Section 517 can tempt underenforcement of antitrust laws and overreach by the executive branch. This Article further discusses how the DOJ's use of Section 517 wastes already scarce resources necessary to implement the United States' antitrust laws.*

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## INTRODUCTION

Statements of interest (SOIs) are “[a]mong the most powerful—and least examined” procedural tools.<sup>1</sup> Under 28 U.S.C. § 517, the Attorney General may direct an officer of

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1. Victor Zapana, Note, *The Statement of Interest as a Tool in Federal Civil Rights Enforcement*, 52 HARV. C.R.-C.L. L. REV. 227, 228 (2017).

the Department of Justice to express the interests of the United States in any case pending in federal court.<sup>2</sup>

Historically, these statements addressed foreign policy concerns or litigation involving “federal government property, contracts, records, or employees.”<sup>3</sup> The George W. Bush administration, however, expanded the use of these statements to a broader range of topics, from the Alien Tort Claims Act<sup>4</sup> to human rights cases.<sup>5</sup> Subsequent administrations have continued this practice and have furthered its use into antitrust litigation.<sup>6</sup>

In 2019, during the Trump administration, the DOJ’s filing of antitrust statements of interest (ASOIs) reached a historic high.<sup>7</sup> While many statements supported antitrust enforcement, many others sought to diminish the reach of the Sherman Act. These statements aimed to weaken enforcement by urging for either limited scrutiny or a broader application of exemptions.<sup>8</sup>

Such statements triggered criticism. Antitrust experts lambasted the filings as “dangerous,”<sup>9</sup> “bad policy,”<sup>10</sup> and “politically motivated.”<sup>11</sup> Others pointed to them as evidence of “grossly misshapen priorities,”<sup>12</sup> “a worrisome lack of commitment to

2. 28 U.S.C. § 517.

3. Zapana, *supra* note 1, at 233.

4. Shelley Buchanan, Note, *Questioning the Political Question Doctrine: Inconsistent Applications in Reparations and Alien Tort Claims Act Litigation*, 17 CARDOZO J. INT’L & COMPAR. L. 345, 346 (2009).

5. See, e.g., Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department “Statements of Interest” in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L.J. 807, 808 (2006) (“[T]he Bush Administration now routinely intervenes in litigation brought to vindicate serious human rights abuses by seeking dismissal on behalf of powerful corporate defendants.”).

6. See *infra* Part I.B (identifying SOIs from the Obama, Trump, and Biden administrations).

7. *Id.*

8. See, e.g., Statement of Interest of the United States of America, *Lenovo (U.S.) Inc. v. InterDigital Tech. Corp.*, No. 20-cv-493 (D. Del. 2021) [hereinafter *Lenovo SOI*]; Statement of Interest of the United States of America, *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658 (N.D. Cal. 2019) (No. 17-cv-00220) [hereinafter *Qualcomm SOI*].

9. Jay Jurata & Emily Luken, Opinion, *DOJ Should Withdraw Improper Intervention in SEP Cases*, LAW 360 (Aug. 24, 2021), <https://www.law360.com/articles/1415348/doj-should-withdraw-improper-intervention-in-sep-cases> [<https://perma.cc/7MJV-M47S>].

10. Timothy Syrett, *The FTC’s Qualcomm Case Reveals Concerning Divide with DOJ on Patent Hold-Up*, IP WATCHDOG (June 28, 2019), <https://www.ipwatchdog.com/2019/06/28/ftcs-qualcomm-case-reveals-concerning-divide-doj-patent-hold/id=110764> [<https://perma.cc/D96E-7PNA>].

11. Letter from Jerrold Nadler, Chairman, H. Comm. on the Judiciary, to William Barr, Att’y Gen. (Feb. 28, 2020), <https://int.nyt.com/data/documenthelper/6792-nadler-barr-letter/9ca582ec0287b56963b8/optimized/full.pdf> [<https://perma.cc/9937-47X8>].

12. Letter from David N. Cicilline, Chairman, H. Subcomm. on Antitrust, Com. & Admin. L., to Makan Delrahim, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Just. 4 (May 22, 2019), [http://web.archive.org/web/20220104055320/https://cicilline.house.gov/sites/cicilline.house.gov/files/document/s/DOJ\\_05222019.pdf](http://web.archive.org/web/20220104055320/https://cicilline.house.gov/sites/cicilline.house.gov/files/document/s/DOJ_05222019.pdf) [<https://perma.cc/Z3P5-HQTT>].

competition enforcement and policy,”<sup>13</sup> and, more colorfully, “acting like a scolding nanny.”<sup>14</sup>

Filings under the new administration have elicited a different response. The Biden administration has continued the modern practice of filing ASOIs. Experts lauded these statements as an efficient means for the DOJ to engage in antitrust litigation when staffing levels are woefully low.<sup>15</sup> Others emphasized how the DOJ’s expertise could help generalist judges in notoriously challenging antitrust cases.<sup>16</sup> Some even declared such statements as “nothing but good” for antitrust plaintiffs.<sup>17</sup>

Praise for statements that support enforcement—and criticism of those that do not—says little about the practice of filing ASOIs. A critical examination of the ASOIs and the DOJ’s justifications is necessary. This examination must look past the politics to the reasons for the statements—a dimension often obscured when scholars focus only on the enforcement effect.

This Article unfolds as follows. Part I provides background on the antitrust enforcers to explain how ASOIs fit into the larger, multi-enforcer paradigm. It then explains Section 517 and its broad grant of authority. Part II analyzes the DOJ’s use of this authority in antitrust suits. It provides the first empirical data on these statements, from chronological to political trends. Using the findings in Part II, Part III lays out the dangers underlying this advocacy tool. It examines the rationale used by the DOJ in submitting such statements to uncover how they pose a risk to antitrust enforcement, conflict with separation of powers principles, and generate litigation waste. This Article concludes with a modest proposal to cabin the overly broad discretion of Section 517 to protect against the dark side of such statements.

## I. STATEMENTS OF INTEREST & THE ANTITRUST ENFORCER PARADIGM

Part I builds the necessary foundation to grapple with ASOIs. It starts by introducing the antitrust enforcers and explains how the DOJ fits into the United States’ multiplayer approach to combat anticompetitive conduct. Then, it provides background on the statutory authorization for SOIs, Section 517.

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13. AM. ANTITRUST INST., *THE STATE OF ANTITRUST ENFORCEMENT AND COMPETITION POLICY IN THE U.S.* 6 (2020).

14. Michael Kades, *The Curious Case of the Federal Prosecutor Who Sided with Defendants*, WASH. CTR. FOR EQUITABLE GROWTH (Aug. 25, 2020), <https://equitablegrowth.org/the-curious-case-of-the-federal-prosecutor-who-sided-with-defendants> [<https://perma.cc/YG27-78YE>].

15. See Dan Papsun, *Justice Looks to Sway Private Antitrust Law with More Briefs*, BLOOMBERG (Aug. 4, 2022), <https://news.bloomberglaw.com/antitrust/doj-gains-early-sway-in-private-antitrust-law-with-more-briefs> [<https://perma.cc/Q4H9-DMPV>] (praising DOJ SOIs for “achiev[ing] a positive development in the law without having to bring a full case”).

16. See *id.*; see generally Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1 (2011) (explaining the difficulty for generalist judges to fully comprehend complex antitrust cases).

17. Papsun, *supra* note 15.

### A. Meet the Enforcers

An informed analysis of ASOIs starts with the players. Enforcement in the United States benefits from a unique structural advantage. Rather than having a single entity tasked with enforcement, oversight is co-equally shared among groups of potential enforcers: the DOJ, FTC, state attorney generals, competitors, and consumers.<sup>18</sup> This blend of public and private enforcers is an intentional design feature.<sup>19</sup> It responds to potential weaknesses of a centralized enforcement scheme—one that relies on one actor from a single governmental branch.

History shows this intentionality. States first enacted antitrust laws before any federal legislation,<sup>20</sup> as burgeoning interstate commerce necessitated laws on a national scale.<sup>21</sup> The first federal antitrust law, the Sherman Act, originally gave the DOJ sole oversight.<sup>22</sup> It did not take long for Congress to realize that the DOJ lacked the ability, for both political and financial reasons, to shoulder this weighty responsibility alone.

In 1914, Congress expanded antitrust enforcement to more actors. Congress empowered the FTC and deputized private enforcement through the Clayton Act.<sup>23</sup> With the Clayton Act, Congress expressly afforded private individuals a remedy for antitrust violations and incentivized these actions by awarding treble damages and attorney fees.<sup>24</sup> The Clayton Act also extends enforcement to states who, through their attorney generals, can sue for damages suffered by the state as purchasers<sup>25</sup> or by acting as *parens patrie* on behalf of their residents.<sup>26</sup>

Overlapping authority means a single case may pique the interest of multiple enforcers: one tackles some enforcement, while another fills the gaps. For example, if the

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18. See *The Enforcers*, FTC, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers> [<https://perma.cc/3TKC-XH38>] (outlining each enforcer and their respective roles within antitrust enforcement).

19. See Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 152–53 (2005) (“Congress created the private right of action to supplement public enforcement because it was aware that the government would not have the necessary resources to uncover, investigate, and prosecute all violations of the antitrust laws.”); Max Huffman & Daniel B. Heidtke, *Behavioral Exploitation Antitrust in Consumer Subprime Mortgage Lending*, 4 WM. & MARY POL’Y REV. 77, 98 (2012) (“Where government enforcers are blind to something, consumers and competitors may see them. Where consumers and competitors know too little, government enforcers have enhanced fact-finding powers. So [collectively] it is less likely something slips by.” (footnote omitted)).

20. See David Millon, *The First Antitrust Statute*, 29 WASHBURN L.J. 141, 141 (1990) (noting that at least twelve states had antitrust legislation prior to the United States Congress passing the Sherman Act in 1890).

21. See Kevin J. O’Connor, *Federalist Lessons for International Antitrust Convergence*, 70 ANTITRUST L.J. 413, 420 (2002) (noting “[t]he great trusts . . . exposed the inadequacies of” splintered, state-enforced antitrust laws).

22. 15 U.S.C. § 4.

23. 15 U.S.C. § 45.

24. 15 U.S.C. § 15a. Congress decided “multiplying the agencies . . . would help enforce the Act and therefore make it more effective.” *Maltz v. Sax*, 134 F.2d 2, 4 (7th Cir. 1943), *cert. denied* 319 U.S. 772 (1943). Allowing private enforcement would “aid in achieving the broad social object of the [Sherman Act].” *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 365 (9th Cir. 1955).

25. 15 U.S.C. §§ 15c–15e.

26. 15 U.S.C. § 15c.

DOJ pursues a criminal case, private class actions often follow.<sup>27</sup> The follow-on case might expand the number of defendants, the scope of the wrongdoing, or ensure that consumers receive redress.<sup>28</sup> The inverse is also true. Federal enforcers sometimes act only after a private<sup>29</sup> or state suit.<sup>30</sup> Other times, a single enforcer shoulders the entire enforcement responsibility.<sup>31</sup>

While some have argued for antitrust enforcement consolidation, doing so would forego the benefits of this design: maximizing compensation<sup>32</sup> and shielding against shifting political tides.<sup>33</sup> As to the former justification, having multiple enforcers has aided

27. See, e.g., Indirect Purchaser Plaintiffs' Motion for Final Approval of Their Settlement with The Home City Ice Co., *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952 (E.D. Mich. June 6, 2017), ECF No. 547 (discussing coordination government action); Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Proposed Settlement Agreements at 3, *Ace Marine Rigging & Supply, Inc. v. Va. Harbor Servs., Inc.*, No. SACV11-00436 (C.D. Cal. Dec. 5, 2011) (noting the DOJ had additionally "launched a criminal investigation into the alleged conspiracy" to rig bids and allocate markets).

28. See Order Granting Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, & Incentive Award, *In re Anadarko Basin Oil & Gas Lease Antitrust Litig.*, No. CIV-16-209 (W.D. Okla. Apr. 25, 2019) (expanding the scope of wrongdoing); Indirect-Purchaser Class Plaintiffs' Notice of Motion & Motion for Attorneys' Fees & Incentive Awards, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-md-1827 (N.D. Cal. Sept. 7, 2012) (expanding the recovery); Plaintiffs' Motion for Approval of Proposed Plan of Distribution of Settlement Funds, Award of Attorneys' Fees & Reimbursement of Expenses, & Award of Class Representatives' Incentive Fees, *In re Ready-Mixed Concrete Antitrust Litig.*, No. 05-cv-00979 (S.D. Ind. Mar. 3, 2009) (expanding the wrongdoers).

29. See, e.g., *In re Nasdaq Market-Makers Antitrust Litig.*, 894 F. Supp. 703 (S.D.N.Y. 1995) (noting the DOJ filed suit five months after the plaintiff class action suit commenced).

30. See, e.g., *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993) (involving a multi-state attorney general boycott suit brought after the DOJ declined to investigate).

31. See, e.g., Class Plaintiff's: (1) Notice of Motion, Motion for, & Memorandum in Support of Approval of Attorneys' Fees as Reasonable & (2) Responses to Objectors on Fee Issues, *Hemphill v. San Diego Ass'n of Realtors, Inc.*, No. 04-CV-1495 (S.D. Cal. Jan. 25, 2005) (class action is the sole enforcer); Plaintiffs' Notice of Motion & Motion for an Award of Attorneys' Fees, Reimbursement of Expenses & Class Representative Incentive Awards; Memorandum of Points & Authorities in Support Thereof, *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. 07-cv-05634 (N.D. Cal. Apr. 7, 2015); Direct Purchaser Plaintiffs' Motion for Attorneys' Fees, Expenses, & Service Award, *In re Resistors Antitrust Litig.*, No. 15-cv-03820 (N.D. Cal. June 10, 2019).

32. See O'Connor, *supra* note 21, at 426 ("[T]he multiplicity of antitrust enforcers does minimize the possibility that valuable cases will be overlooked."). To avoid duplicative recovery, the remedies each pursues differ. The federal agencies do not return money to consumers—the victims of antitrust offenses. Robert L. Hubbard & James Yoon, *How the Antitrust Modernization Commission Should View State Antitrust Enforcement*, 17 LOY. CONSUMER L. REV. 497, 526 (2005) ("Federal enforcers simply do not . . . focus primarily on the monetary claims of consumers."). The DOJ can pursue criminal charges and fines but not redress for injured parties other than the government. 15 U.S.C. § 15a. The FTC is limited to injunctive relief. *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1347 (2021). A state attorney general can seek restitution only for citizens of its state. See *Georgia v. Evans*, 316 U.S. 159, 162–63 (1942) (holding that a state is a "person" in the context of Section 4 of the Clayton Act). Private enforcement can seek injunctive and declaratory relief, as well as damages for individuals across state lines. 15 U.S.C. § 15a.

33. See Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI-KENT L. REV. 207, 230 (2003) ("At the federal level, enforcement priorities change from administration to administration, or with appointment of a new Assistant Attorney General or FTC chair."); see, e.g., *Oversight of the Department of*

the United States in the development of a richer body of antitrust law than other enforcement regimes.<sup>34</sup> The latter insulates antitrust law from an administration with a greater desire for deregulation. This could lead to the crippling of antitrust enforcement through underfunding and leaving the FTC and DOJ without the resources to fully provide oversight. Rather than a hypothetical, this very scenario has already played out time and again in the history of U.S. antitrust enforcement.<sup>35</sup>

Even now, a time marked by a revitalized interest in aggressive antitrust enforcement, the DOJ and FTC play a limited role. Federal enforcers focus primarily on merger clearance and “hard-core” violations, meaning cartel behavior.<sup>36</sup> Thus, private enforcement, and increasingly state attorney general oversight, lie at the forefront of competition oversight. Over ninety percent of antitrust suits are brought by class actions,<sup>37</sup> and States are more willing to pursue vertical restraint cases than their federal counterparts.<sup>38</sup> Simply put, without multiple enforcers, anticompetitive conduct will fester, unredressed and underdeterred.

With multiple enforcers, though, comes disagreement. Different enforcers will have different visions of competition oversight.<sup>39</sup> While all can agree on the need for “effective”

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*Justice: Political Interference and Threats to Prosecutorial Independence Before the H. Comm. on the Judiciary*, 116th Cong. 42, 46 (2020) [hereinafter *Hearing on Political Interference to Prosecutorial Independence*] (statement of John W. Elias, Attorney, Department of Justice) (describing 2019 DOJ antitrust investigations triggered by “[p]ersonal dislike of an industry” and presidential tweets rather than “on an antitrust analysis”).

34. See O’Connor, *supra* note 21, at 425. Despite these recognized gains, having multiple enforcers does have drawbacks. See Deborah Platt Majoras, *Recognizing the Significance of Prosecutorial Discretion in a Multi-Layered Antitrust Enforcement World*, 11 GEO. MASON L. REV. 121, 124 (2002) (discussing how multi-layered enforcement invites conflict, interference, and lack of enforcement predictability).

35. See Alex Kantrowitz, “It’s Ridiculous.” *Underfunded FTC and DOJ Can’t Keep Fighting the Tech Giants Like This*, BIG TECH. (Sept. 17, 2020), <https://www.bigtechnology.com/p/its-ridiculous-underfunded-us-regulators> [<https://perma.cc/K32T-59PW>] (discussing the rise and fall of funding).

36. See Darren Bush, *Out of the DOJ Ashes Rises the FTC Phoenix: How to Enhance Antitrust Enforcement by Eliminating an Antitrust Enforcement Agency*, 53 WILLAMETTE L. REV. 33, 50 (2016) (discussing agency enforcement as focusing on criminal per se litigation and merger oversight, while Section 2 cases remain “the unicorn of antitrust litigation and adjudication”).

37. Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303, 308 (2004) (“In a typical year, private complaints account for 90-95% of all antitrust actions.”); *Civil Cases Filed, by Jurisdiction and Nature of Suit*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/judicial-business-2022-tables> (Sept. 30, 2022) [<https://perma.cc/V6UL-B8LP>] (listing that 94% of civil antitrust cases commenced between September 30, 2021 and September 30, 2022 were initiated as private actions).

38. Hubbard & Yoon, *supra* note 32, at 506; see also Bauer, *supra* note 37, at 307 (“The states are playing an increasingly important role in enforcing the federal antitrust laws as well as their own laws.”). Whether this trend is changing, though, remains to be seen. Of late, the federal agencies are dipping their toes back into the proverbial vertical restraint pool—and finding some success with these efforts. See, e.g., Opinion of the Commission, *In re Illumina, Inc. & Grail, Inc.*, FTC Docket No. 9401 (Mar. 31, 2023).

39. Fred S. McChesney, *Talking ‘Bout My Antitrust Generation: Competition for and in the Field of Competition Law*, 52 EMORY L.J. 1401, 1403 (2003) (“No body of law ever commands unanimity as to what it should achieve, and different groups predictably will vie to define the field. However, the competition has been more vigorous in antitrust . . .”).

competition, the definition of that term is hotly debated amongst experts who draw different lines.<sup>40</sup>

Historically, prosecutorial discretion served to exercise this line drawing.<sup>41</sup> An enforcer would choose whether or not to prosecute depending on both the substantive and factual merits of the case. Now SOIs add to this complex backdrop of intersecting players. As the next section explains, these statements provide an alternative means by which the DOJ can chime in on pending litigation it has opted against pursuing.

### B. Statements of Interest

The Attorney General may submit an SOI in any lawsuit, even when the United States is not a party. Under 28 U.S.C. § 517:

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.<sup>42</sup>

However, Congress has provided little guidance on the outer bounds for when the DOJ may insert itself, or how courts should treat the opinions offered.

SOIs are one of the many advocacy tools available to the DOJ to offer views as a nonparty. They “explain to a court the interests of the United States in litigation”<sup>43</sup> but lack any sort of acute standard, unlike the other advocacy tools at the DOJ’s disposal. For example, amicus briefs require prior authority authorization from the Solicitor General<sup>44</sup> and must establish (1) the desirability of the brief and (2) the relevancy of the brief.<sup>45</sup> Similarly, the intervention of right requires (1) a timely motion; (2) an interest relating to the property or transaction underlying the action; (3) that interest would be impaired or impeded depending on the resolution of the case; and (4) the parties inadequately represent that interest.<sup>46</sup>

Unlike amicus briefs, SOIs are not reserved for appeals. Instead, the DOJ may file a statement in any pending state or federal court case.<sup>47</sup> Leave of court is not required.<sup>48</sup> Parties have little recourse to challenge SOIs. While courts have complete discretion to

40. Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 569 (2012) (“No consensus exists in the United States or elsewhere on an effective competition process or a unifying theory of competition.”).

41. Platt Majoras, *supra* note 34, at 125–26 (“[T]he integrity of antitrust enforcement in a multi-layered enforcement scheme has, and continues to, depend on the exercise of sound prosecutorial discretion.”).

42. 28 U.S.C. § 517.

43. *Hunton & Williams v. U.S. Dep’t of Just.*, 590 F.3d 272, 291 (4th Cir. 2010) (Michael, J., dissenting).

44. 28 C.F.R. § 0.20(c) (2023). Leave of court is not required for such briefs. SUP. CT. R. 37 (“No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General . . .”).

45. FED. R. APP. P. 29(a)(3)(B).

46. FED. R. CIV. P. 24(a). If a would-be intervenor has a claim or defense that shares a question of law or fact with the pending action, they can alternatively seek permissive intervention. FED. R. CIV. P. 24(b)(2).

47. *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1317 (S.D. Fla. 2017).

48. *Id.*

accept (or reject) such statements,<sup>49</sup> usually only untimely SOIs are rejected.<sup>50</sup> That a statement may extend litigation or increase costs are insufficient grounds to strike SOIs.<sup>51</sup>

The only condition to file an SOI is an articulated interest<sup>52</sup>—an undefined, ambiguous term. Legislative history provides few clues,<sup>53</sup> and little litigation has discussed the term.<sup>54</sup>

Historically, statements—or “suggestions” as they were commonly then-referenced—occurred in cases limited to narrow interests: namely where the litigation impacted governmental property or foreign relations.<sup>55</sup> In the 1930s and 40s, the United States pushed to file statements with a broader range of interests. The judicial response was mixed. Some permitted the filing and left it to the Attorney General’s discretion as to whether a sufficient “interest” was at stake,<sup>56</sup> so long as “there was no arbitrary or

49. United States *ex rel.* Gudur v. Deloitte Consulting LLP, 512 F. Supp. 2d 920, 927 (S.D. Tex. 2007) (citing Waste Mgmt. of Pa. v. City of York, 162 F.R.D. 34, 36–37 (M.D. Pa. 1995)), *aff’d sub nom.* United States *ex rel.* Gudur, v. Deloitte & Touche, No. 07-20414, 2008 WL 3244000 (5th Cir. Aug. 7, 2008).

50. *See id.* at 927 (evaluating whether the submission was “‘timely and useful’ or otherwise necessary to the administration of justice”).

51. *See* United States *ex rel.* Johnson v. Golden Gate Nat’l Senior Care, LLC, No. 08-cv-1194, 2016 WL 11031222, at \*2–\*7 (D. Minn. June 1, 2016).

52. *See, e.g., Gil*, 242 F. Supp. 3d at 1317 (citing cases that reference the *de minimis* requirements for filing and acceptance).

53. Section 517 traces its lineage to Section 35 of the Judiciary Act of 1789, which created the attorney general position and afforded him/her responsibility to provide “advice and opinion” on questions of law. *See* Department of Justice Act of 1870, Pub. L. No. 41-97, § 6, 18 Stat. 162, 163. As part of the creation of the DOJ, Congress amended the statute to permit the Attorney General to assign the task to the DOJ. *Id.* § 5, 18 Stat. at 162. Subsequent amendments did not substantively amend the 1870 language. *Compare id.* (“And the solicitor-general, or any officer of the Department of Justice, may be sent by the Attorney-General to any State or district in the United States to attend to the interests of the United States . . . .”), and 8 Rev. Stat. § 367 (“The Solicitor-General, or any officer of the Department of Justice, may be sent by the Attorney-General to any State or District in the United States to attend to the interests of the United States . . . .”), and 5 U.S.C. § 316 (“The Solicitor-General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States . . . .”), with 28 U.S.C. § 517 (“The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States . . . .”). Neither the bills nor house reports for these statutes define what interest the United States may pursue.

54. Cases that do address governmental interest often conflate the authority to file statements of interest with other authority afforded the government by different statutory provisions. *See, e.g., Cavanaugh v. Saul*, 233 F.R.D. 21, 26 (D.D.C. 2005) (conflating Sections 516 and 517); *Allen v. Cnty. Sch. Bd.*, 28 F.R.D. 358, 364 (E.D. Va. 1961) (blurring intervention and statement of interest authority).

55. In the late 1890s and early 1900s, courts allowed the United States to file statements and actively participate in the litigation despite not being a party. *See, e.g., Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 117–18 (1812) (allowing a U.S. attorney to appear and essentially conduct the defense); *Florida v. Georgia*, 58 U.S. (17 How.) 478, 480–82 (1854) (allowing an Attorney General to appear, introduce evidence, and examine witnesses).

56. *See People ex rel. Woll v. Graber*, 68 N.E.2d 750, 755 (Ill. 1946) (noting that no “provision in the Federal statutes prescribes rules to govern [the Attorney General’s] action or interferes with his discretion in determining whether the interests of the United States are involved in a civil suit between private parties, and, if so, the necessity or propriety of the appearance therein of a United States Attorney”); *see also People ex rel. Kerner v. Keeney*, 78 N.E.2d 252, 254 (Ill. 1948) (allowing the AG to insert itself in private litigation based on



capricious use of his power.”<sup>57</sup> Others tried to define the contours of these “qualifying” government interests.<sup>58</sup> Even these limited debates often occurred in dicta.<sup>59</sup>

By the early 1970s, the United States staked out a larger claim to its interests after successfully using Section 517 in civil rights suits. Courts allowed SOIs in any matter that “affect[ed] the public at large.”<sup>60</sup> By the 1990s, the federal government moved into what some call “modern” federal interests, such as “policing, consumer protection, and informational privacy.”<sup>61</sup> Most commonly, SOIs support private litigants in efforts to expand civil rights.<sup>62</sup> These interests, however, continue to expand to other areas, ranging from terrorism to antitrust.<sup>63</sup>

Just as Congress did not define what interests the government may advance, it also failed to instruct courts on how to value these statements. While courts afford SOIs respect,<sup>64</sup> the degree of judicial deference differs by topic and judge. Courts are more willing to give the government’s opinion “great weight” topically when it addresses the interpretation of treaty terms, the application of diplomatic immunity,<sup>65</sup> or issues of sovereign immunity.<sup>66</sup> Conversely, deference on foreign policy issues—an area dictated by the president and the executive branch—is a case-by-case decision.<sup>67</sup> However, when

“facts know to him” even though they were “unknown to the judge,” and despite not articulating a specific interest); *but see Cavanaugh*, 233 F.R.D. at 27 (rejecting a U.S. Attorney statement for failure to identify “the interest he seeks to protect”).

57. *See Keeney*, 78 N.E.2d at 253; *see also* *Falkowski v. EEOC*, 783 F.2d 252, 253 (D.C. Cir. 1986) (per curiam) (“[N]either [Section 517], nor any regulation, nor any administrative practice cabins this discretion or furnishes any standard by which to review the Attorney General’s determinations in this area.”).

58. *See, e.g., Calhoun Cnty. v. Roberts*, 137 F.2d 130, 131 (5th Cir. 1943) (per curiam) (“[I]f the object is not to protect an interest of the United States but to aid a private claimant . . . or if it proposes to raise technical objections to the doing of equity and justice,” then the court should not permit the SOI).

59. *See id.* (rejecting filing as improper but allowing the United States to intervene).

60. *See Brawer v. Horowitz*, 535 F.2d 830, 836 (3d Cir. 1976) (quoting *In re Debs*, 158 U.S. 564, 586 (1895)). The then Solicitor General also took a sweeping view of governmental interests. *See* Erwin N. Griswold, *The Office of the Solicitor General—Representing the Interests of the United States Before the Supreme Court*, 34 MO. L. REV. 527, 535 (1969) (construing “interest” for Section 517 “to mean the long-range interests of the United States, not simply in terms of fisc, or its success in the particular litigation, but as a government, as a people”).

61. *See Zapana, supra* note 1, at 233 (analyzing civil rights SOIs).

62. *See* Matt Apuzzo, *Justice Dept. Presses Civil Rights Agenda in Local Courts*, N.Y. TIMES (Aug. 19, 2015), <https://www.nytimes.com/2015/08/20/us/justice-dept-presses-civil-rights-agenda-in-local-courts.html> [<https://perma.cc/S5DG-HM6P>]; Zapana, *supra* note 1, at 230 (finding modern SOIs generally are “consistent with the government’s longstanding role in protecting civil rights”).

63. *See, e.g., Conrad v. Jimmy John’s Franchise, LLC*, No. 18-cv-00133, 2019 WL 2754864, at \*3 (S.D. Ill. May 21, 2019) (discussing SOI support in the antitrust context); *Hausler v. Cuba*, No. 08-20197, 2013 WL 12347279, at \*1 (S.D. Fla. Sept. 11, 2013) (discussing SOI support in the terrorism context).

64. *Abelesz v. Erste Grp. Bank AG*, 695 F.3d 655, 664 (7th Cir. 2012).

65. *United States v. Stuart*, 489 U.S. 353, 369 (1989) (citing *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)); *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187, 193 (D.D.C. 2007).

66. *Federal Statutes and Regulations*, 118 HARV. L. REV. 436, 475 (2004).

67. *See Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004) (listing six tests for the existence of a “political question,” including: (1) “a textually demonstrable constitutional commitment” by one political branch to an issue; or (2) “a lack of judicially discoverable and manageable standards” for resolving the issue (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

such statements contradict the facts or procedural stance of a given case, no deference is appropriate.<sup>68</sup> Similarly, courts hold fast that no deference is appropriate in areas constitutionally assigned to the judiciary, such as statutory interpretation.<sup>69</sup>

It is undisputed that Congress gave the DOJ the ability to file positional statements in cases where it is a nonparty. Whether any limits exist on that authority, and how courts should handle them, is a different question.

## II. UNDERSTANDING ANTITRUST STATEMENTS OF INTEREST

Procedural tools can impact substantive areas differently. This Part surveys the 40 antitrust cases in which the DOJ filed an SOI.<sup>70</sup> It uncovers how the DOJ has used Section 517, both in volume and scope, to influence the judicial process. It also reveals an uncertain judiciary as they grapple with these statements.

The earliest available DOJ ASOI dates to 2009.<sup>71</sup> Until 2018, the DOJ only filed such statements occasionally. Since then, such filings have become more commonplace in the antitrust landscape.<sup>72</sup>

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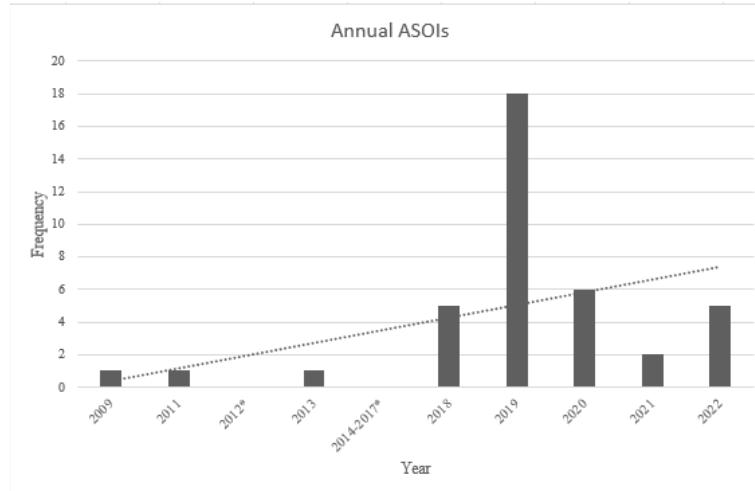
68. Both fact finding and procedural determinations are squarely within the court's authority. This is why, even in reviewing administrative decisions, courts do not afford deference to agency views on such questions. *See, e.g.*, William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1138 (2008) (“[T]he Court should be expected to interpret federal procedural rules on its own, rather than deferring to agency interpretations.”); John C. Reitz, *Deference to the Administration in Judicial Review*, 66 AM. J. COMPAR. L. 269, 274 (2018) (discussing how a “court is authorized to ignore the agency’s determination and conduct its own fact finding”).

69. *See Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004) (noting issues of statutory interpretation are for the courts, so opinions by the executive branch “merit no special deference”); Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT’L L. 773, 775 (2008) (“In areas constitutionally assigned to the judiciary, however, such as statutory interpretation, courts do not defer.”). This treatment is distinct from the treatment courts afford statements by administrative agencies regarding the interpretation of the agency’s governing statute. Generally, such SOIs are not entitled to deference. *See Foley v. JetBlue Airways, Corp.*, No. C 10-3882, 2011 WL 3359730, at \*10 (N.D. Cal. Aug. 3, 2011) (“Statement[s] of Interest [are] not the type of formal agency interpretation entitled to *Chevron* deference.”).

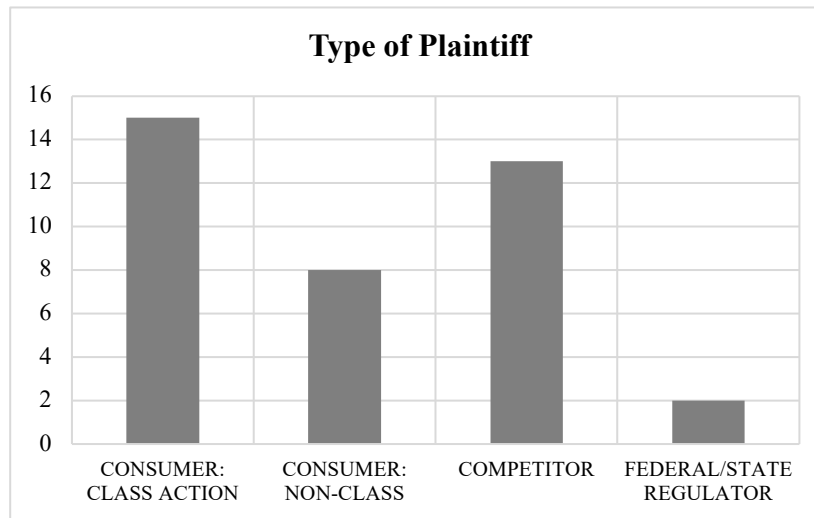
70. The DOJ website contains a database of public filings, including its SOIs. *Statements of Interest*, DEP’T OF JUST. (Oct. 24, 2023), <https://www.justice.gov/atr/statements-interest> [<https://perma.cc/W86N-PHEL>]. To ensure the completeness of this dataset, my research fellows and I conducted Westlaw, Bloomberg, and Lexis searches. These combined sources identified 4242 cases, though the total number of statements was greater given the DOJ did file multiple statements in at least 4 cases. (dataset on file with author)

71. Statement of Interest of the United States of America Regarding Proposed Class Settlement, Authors Guild, Inc. v. Google Inc., No. 05-cv-08136 (S.D.N.Y. Sept. 18, 2009).

72. This growth of statements in antitrust cases is part of a larger trend of the government filing such statements that dates to the 1960s. A 2017 study identified 614 federal and state cases where the United States filed SOIs in private actions. Zapana, *supra* note 1, at 232. Over half involved cases dealing with federal government property, contracts, records, or employees; 156 involved foreign policy; and 24 involved Congress’s constitutional authority to enact certain legislation. *Id.* at 233. The remaining 20% (124) involved “modern” federal interests, including consumer protection (which includes antitrust issues), civil rights, and informational privacy. *Id.*

Figure 1. Annual ASOIs, 2009–2022<sup>73</sup>

Most of these statements addressed litigation between competitors—not other enforcers. The DOJ did, however, raise arguments against fellow state, federal, and private enforcers.

Figure 2. Type of Plaintiff<sup>74</sup>

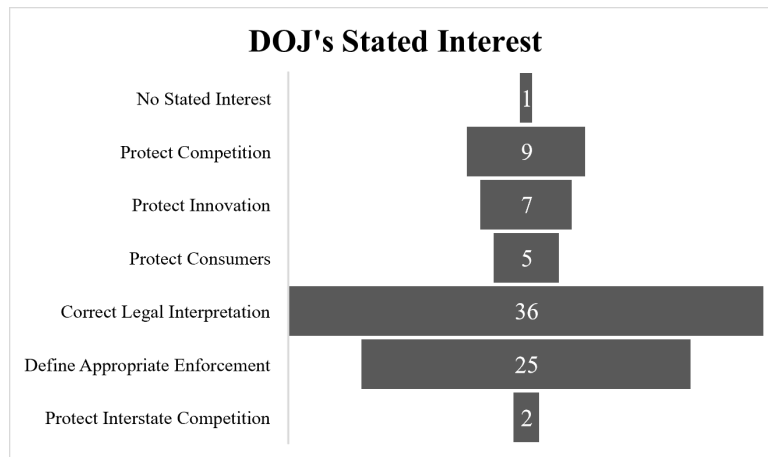
73. *Supra* note 70 and accompanying text.

74. *Supra* note 70 and accompanying text.

As the DOJ expanded its use of Section 517, it enlarged its definition of a governmental interest. Early filings between 2009 and 2013 were either invited by the court or addressed the DOJ's interest in strong settlement terms for antitrust class actions.<sup>75</sup>

The DOJ's post-2018 uptick came with a new, more expansive vision on what constitutes a governmental interest. The DOJ staked its role as "principally responsible for enforcing the federal antitrust laws."<sup>76</sup> From this posture, it claimed "a strong interest in the correct application" of those laws.<sup>77</sup> History and actual antitrust enforcement efforts do not align with this characterization.<sup>78</sup> Nonetheless, even after new leadership took over the DOJ in November 2021, the Division continues to cite these interests to justify filings.<sup>79</sup>

Figure 3. DOJ's Stated Interest<sup>80</sup>



The DOJ's desire to dominate antitrust enforcement results in advocacy on procedural issues, substantive interpretation, or a hybrid of the two.

75. See, e.g., Statement of Interest of the United States of America, *The Authors Guild, Inc. v. Google, Inc.*, 1:05-cv-08136 (S.D.N.Y. Sept. 18, 2009) (discussing public interest in encouraging further settlement negotiations); Statement of Interest of the United States of America, *In re Transpacific Air Trans. Antitrust Litig.*, No. 07-cv-05634 (N.D. Cal. Jan. 21, 2011) (invited statement).

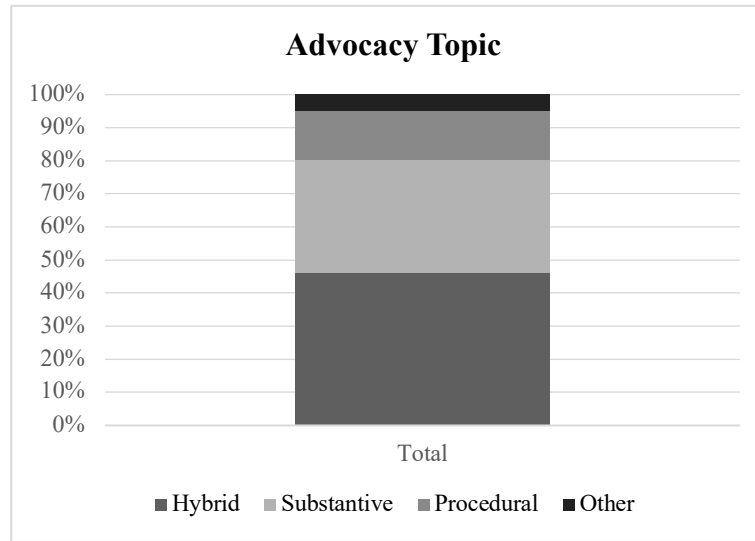
76. See, e.g., Statement of Interest of the United States of America at 2, *Oscar Ins. Co. of Fla. v. Blue Cross & Blue Shield of Fla. Inc.*, 413 F. Supp. 3d 1198 (M.D. Fla. 2019) (No. 18-cv-1944) [hereinafter *Blue Cross Blue Shield SOI*]; Statement of Interest on Behalf of the United States of America at 1, *Sitzer v. Nat'l Ass'n of Realtors*, No. 19-cv-00332 (W.D. Mo. Sept. 30, 2019).

77. *Id.*

78. See *supra* Part I.A (discussing the origins of U.S. antitrust enforcement—namely, that multiple enforcers play vital roles).

79. See, e.g., Statement of Interest of the United States at 1–2, *In re Deere & Co. Repair Servs. Antitrust Litig.*, No. 22-cv-50188 (N.D. Ill. Feb. 14, 2023) (“This suit affects the United States’ interest in promoting a correct interpretation of the federal antitrust laws.”).

80. *Supra* note 70 and accompanying text.

Figure 4. Advocacy Topic<sup>81</sup>

The most common procedural question the DOJ addressed was how a court should decide a motion to dismiss.<sup>82</sup> Substantively, these statements addressed a range of interpretative issues from what constitutes an antitrust injury, to the appropriate standard of review for a particular restraint, to the reach of antitrust exemptions.<sup>83</sup>

The DOJ's reliance on these statements is bipartisan. Fifty-six percent of the statements were filed under the Trump administration, with the remainder filed under Democratic administrations.<sup>84</sup> That said, should the DOJ continue at its current rate of filing, the Biden administration will mark the largest volume of ASOIs to date.

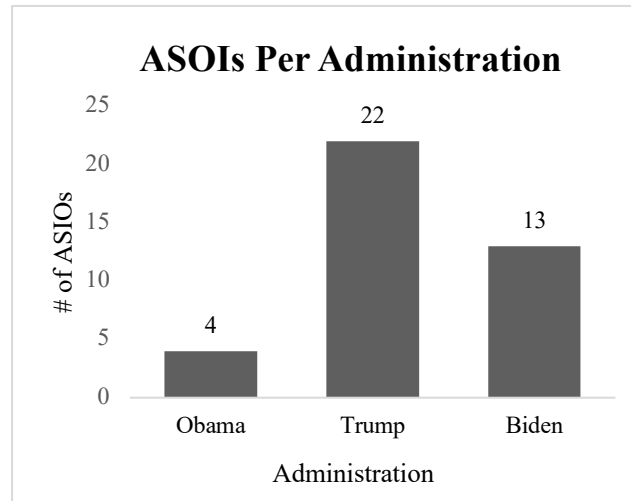
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81. *Supra* note 70 and accompanying text.

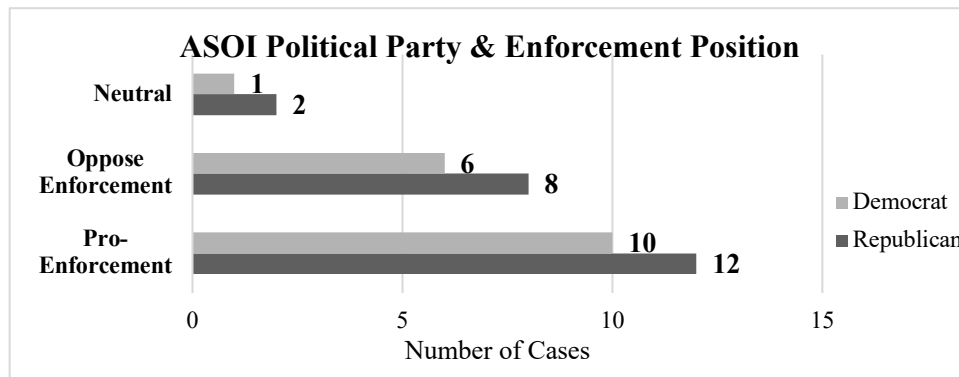
82. *Supra* Figure 4.

83. *Supra* note 70 and accompanying text.

84. *Infra* Figure 5.

Figure 5. ASOIs Per Administration<sup>85</sup>

Both parties use ASOIs and there is seemingly no correlation between the administration that issued the ASOI and its enforcement position.

Figure 6. ASOI Political Party & Enforcement Position<sup>86</sup>

Over 35% of ASOIs opposed enforcement activity.<sup>87</sup> SOIs in other areas of law lean more heavily toward enforcing rights, particularly in civil rights actions.<sup>88</sup> More specifically, most government statements support enforcement of disability rights,

85. *Supra* note 70 and accompanying text.

86. *Supra* note 70 and accompanying text.

87. *Supra* Figure 6.

88. See Zapana, *supra* note 1, at 244 (“The vast majority of trial-level amicus briefs in civil rights litigation take the side of the rights-asserting plaintiff and advocate for promotion of the civil right or liberty at issue.”).

prisoners' rights, voting rights, and data privacy.<sup>89</sup> The closest parallel to the pro- and anti-enforcement positions occurred in policing cases.<sup>90</sup> There, the DOJ's position splintered depending, in part, on the defendant. It advocated strongly against rights when the defendant was a state or municipal government in a civil suit.<sup>91</sup> However, in antitrust, this support for fellow governmental enforcers evaporates. In cases where a fellow government enforcer sued, the DOJ opposed enforcement.<sup>92</sup>

The judicial response to these statements is difficult to decipher. In some instances, judges have point-blank rejected the filings' contents.<sup>93</sup> In others, they engage in a complex dance to demonstrate respect for the filing, but without necessarily clarifying what level of influence the opinion had.<sup>94</sup> In others still, judges either do not reference the statement<sup>95</sup> or will cite it without comment.<sup>96</sup> Any deference to the DOJ's position, though, is a bit surprising, especially when the DOJ pushes the court to adopt particular interpretations of antitrust laws. Unlike the FTC,<sup>97</sup> the DOJ is not an administrative agency, so its opinion does not warrant even *Skidmore* deference.<sup>98</sup>

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89. *Id.* at 243–46.

90. *See id.* at 245–46 (describing “the area of policing” as an area that the DOJ “sometimes argu[es] for [expanding individual rights] and sometimes not”).

91. *Id.* at 246 (identifying “defend[ing] the state or municipal government” as a “common attribute” to explain otherwise idiosyncratic positions taken in certain SOIs).

92. *See* Qualcomm SOI, *supra* note 8, at 3–5 (requesting that, if the court found liability, it impose an evidentiary hearing and permit additional briefing to do “minimal harm to the public and private interests”); *New York v. Facebook, Inc.*, 549 F. Supp. 3d 6 (D.D.C. 2021).

93. *See, e.g.*, Transcript of Motion Hearing Held Telephonically at 4, *Deslandes v. McDonald’s USA, LLC.*, No. 17-cv-4857 (N.D. Ill. Mar. 3, 2022) (denying the DOJ’s motion to file an ASOI); *LSP Transmission Holdings, LLC, v. Lange*, 329 F. Supp. 3d 695, 703–04 (D. Minn. 2018) (declining to consider the ASOI “[i]n light of the Antitrust Division’s unjustified delay and the fact that th[e] case has been fully . . . briefed by all other parties”).

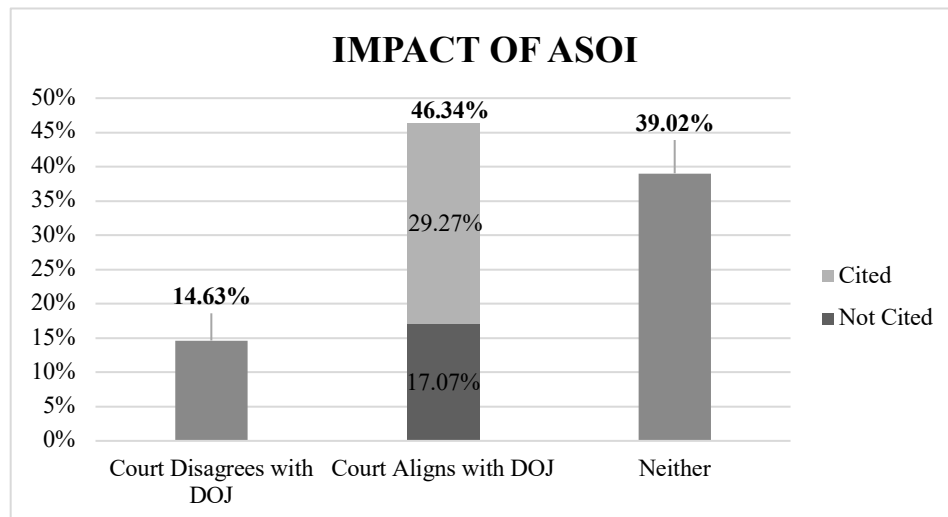
94. *See, e.g., In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 485 (W.D. Pa. 2019) (determining to deny the defendant’s motion to dismiss before noting its “decision . . . is supported by the [SOI]”).

95. *See, e.g., Seaman v. Duke Univ.*, No. 15-cv-00462, 2019 WL 13193731 (M.D.N.C. Sept. 24, 2019).

96. *See City of Oakland v. Oakland Raiders*, No. 18-cv-07444, 2019 WL 3344624, at \*12 (N.D. Cal. July 25, 2019).

97. While some scholars contend courts should afford *Chevron* deference to opinions by the FTC regarding how to interpret the FTC Act (see generally Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357 (2020)), the FTC has not taken that position. *See* Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 214 (2014).

98. *See Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008) (We afford *Skidmore* deference to official agency interpretations without the force of law. . . . We do not afford *Chevron* or *Skidmore* deference to litigation positions unmoored from any official agency interpretation.” (footnote omitted)).

Figure 7. Impact of ASOI<sup>99</sup>

Given the lack of judicial clarification, it is difficult to measure the precise implications of these statements. In its own press releases, the DOJ looks to the ultimate outcome of the case to measure the impact of these statements.<sup>100</sup> It then compares that result to its position taken in the ASOI. For example, the DOJ's estimation of success may depend on whether the court should grant a motion to dismiss or grant a plaintiff's summary judgment motion. If the DOJ's preferred outcome occurs, the DOJ considers the SOI a success, even if the court's rationale departs from their argument.<sup>101</sup> Using this definition of success, the DOJ enjoys a 46.34% success rate.<sup>102</sup>

Despite this, the pool of filings is still too small to make concrete conclusions. Even the finding that the volume of statements is on the rise is a qualified one. Many of the filings made during Biden's term have tried to reverse policy positions advanced by the prior administration's DOJ.<sup>103</sup> Hence, it would be premature to conclude the DOJ's relatively newfound interest in Section 517 will become a permanent feature of antitrust

99. *Supra* note 70 and accompanying text.

100. See, e.g., Leah Nylén & Joshua Sisco, *DOJ Weighs in on More Antitrust Cases, with Mixed Success*, MLEX: FTCWATCH (Oct. 11, 2019), <https://www.mlexwatch.com/articles/6615/print?section=ftcwatch> [<https://perma.cc/W23P-ZD4F>] (explaining how the DOJ considers itself successful "[w]hen the court rules on other grounds and does not advance the erroneous argument, we naturally consider that a victory, whether they mention the erroneous argument or not").

101. *Id.*

102. *Supra* Figure 7. The DOJ's own accounting during Delrahim's tenure showed a higher success rate. It concluded that it "prevailed in seven matters, . . . lost in zero matters, and . . . successfully avoided a negative outcome in five matters." Nylén & Sisco, *supra* note 100.

103. Steven Hill, *Biden's Antitrust Push*, AM. PURPOSE (July 21, 2023), <https://www.americanpurpose.com/articles/bidens-antitrust-push> [<https://perma.cc/C6AE-MBT2>].



litigation. But, as the next Part discusses, if this trend continues, this data—along with a close reading of ASOIs to date—shows reason for apprehension.

### III. EXPLORING THE DARK SIDE

The data in Part II may beckon a “so what?” from some. Because antitrust is a notoriously complex area of law, judges may welcome and even need the help from the DOJ. The DOJ has over 130 years of experience with competition law.<sup>104</sup> And for a generalist judge staring down the barrel of his first antitrust case, the more guidance available, maybe, the better. This position does have merit. The outcome of any judicial process depends on quality arguments, guidance, and opinions. SOIs provide more input to judges to reach an equitable judgment, so this Article willingly assumes that these statements can have informational value.

But this Article also urges a degree of caution and wariness. For any gains these statements offer, they also come with significant risks. This Part discusses three such risks. It explains how the DOJ’s statements can undermine enforcement, trigger constitutional concerns, and prolong already costly antitrust litigation.

#### A. SOIs Threaten Effective Enforcement

Overall enforcement can suffer at the hands of the DOJ’s ASOIs. These filings can urge courts to stifle efforts to extend antitrust laws to new industries or novel anticompetitive conduct. This stagnation in antitrust development can taper innovation, harm consumers, and starve competition.<sup>105</sup> Further, depending on how the government frames its interest, even facially supportive statements can destabilize the multiple enforcer paradigm—a central feature to combat anticompetitive conduct.

By using SOIs, the DOJ sometimes abdicates its primary responsibility of enforcement, opting to moderate other regulators. The DOJ is responsible for uncovering, preventing, and punishing illegal conduct.<sup>106</sup> If unrestrained, Section 517 empowers the DOJ to forego its responsibility to regulate anticompetitive conduct and, instead, focus on regulating fellow enforcers. SOIs create a loophole for the DOJ to inject its own policy positions and dictate rules to limit other enforcers—or even competitors—to development precedent.

The threat to enforcement materializes when the statements urge courts to adopt weaker tests for analyzing anticompetitive behavior or broaden exemptions.<sup>107</sup> Twenty-eight percent of the DOJ’s SOIs advocate for policy positions that would either constrain

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104. See *supra* Part I.A (introducing the enforcers, including the DOJ).

105. Giulio Federico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption*, 20 INNOVATION POL’Y & ECON. 125, 126 (2020).

106. Madeleine DeGeorges, *Indecent Disclosure: Has the Department of Justice Provided Sufficient Clarity to Incentivize Corporations to Admit Wrongdoing?*, 5 ADMIN. L. REV. ACCORD 53, 62 (2019).

107. Perhaps most well-known is the DOJ’s treatment of no-poach agreements. See Christine P. Bartholomew, *Playing Nicely with Others* (Antitrust Law Journal, Working Paper, 2023) (discussing the DOJ’s use of statements of interest to urge courts to apply rule of reason treatment to franchise no-poach agreements in private antitrust class actions).

the reach of antitrust laws or hinder enforcement efforts by co-enforcers—at a cost to potential antitrust oversight.<sup>108</sup> In filing such ASOIs, the DOJ can thwart the interests it posits to protect.<sup>109</sup>

The Division certainly has the authority to define the scope of its own enforcement. But SOIs allow the DOJ to interfere with their fellow enforcers' efforts to strengthen competition oversight. When one enforcer takes a more aggressive stand than the DOJ might, the DOJ's interference can slow the evolution of antitrust laws.

Take, for instance, licensing practices. Most prominently during the Trump administration, the DOJ filed statements that advocated for a narrow antitrust role in combating anticompetitive licensing behavior in standard setting organizations (SSOs).<sup>110</sup> In these organizations, members develop, support, and set performance standards for new technologies.<sup>111</sup> Standards can have procompetitive benefits, allowing interoperability between products and driving down production costs.<sup>112</sup> A USB key that operates across different computers, for example, protects consumers from being “locked into” a single brand.

When an SSO develops a standard, members discuss any intellectual property rights that may intersect with a proposal.<sup>113</sup> If a member holds a patent that overlaps with a proposed standard, the SSO asks that member to commit to license its patent on “fair and reasonable” terms.<sup>114</sup> Antitrust litigation often stems from a competitor's refusal to fulfill this commitment, thereby—in the parlance of antitrust—improperly obtaining a monopoly under Section 2 of the Sherman Act.

SSOs now span industries from telecommunications to electronics to medical equipment.<sup>115</sup> Under the Trump administration, the DOJ filed ASOIs attacking SSO-related antitrust claims. In some, it argued against standing.<sup>116</sup> In others, it urged courts to

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108. See Letter from David N. Cicilline to Makan Delrahim, *supra* note 12, at 1 (discussing how “several of the Division's briefs advance positions that would hamper robust enforcement of the antitrust laws”).

109. See *supra* Figure 3.

110. See, e.g., Lenovo SOI, *supra* note 8; Qualcomm SOI, *supra* note 8 (“While many statements supported antitrust enforcement, many others sought to diminish the reach of the Sherman Act.”).

111. See Manveen Singh, *Tracing the Evolution of Standards and Standard-Setting Organizations in the ICT Era*, 24 MARQ. INTELL. PROP. L. REV. 217, 227–31 (2020) (explaining the evolution, structure, and legality of SSOs).

112. See, e.g., Joanna Tsai & Joshua D. Wright, *Standard Setting, Intellectual Property Rights, and the Role of Antitrust in Regulating Incomplete Contracts*, 80 ANTITRUST L.J. 157, 157 (2015) (discussing the “economic benefits of standardization and of commercializing innovation”).

113. See Joshua D. Wright, Comm'r, Fed. Trade Comm'n, SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts, Remarks at the Center for the Protection of Intellectual Property Inaugural Academic Conference (Sept. 12, 2013), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/ssos-frand-and-antitrust-lessons-economics-incomplete-contracts/130912cpip.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/ssos-frand-and-antitrust-lessons-economics-incomplete-contracts/130912cpip.pdf) [<https://perma.cc/KE6S-PHLA>].

114. See Jay P. Kesan & Carol M. Hayes, *FRAND's Forever: Standards, Patent Transfers, and Licensing Commitments*, 89 IND. L.J. 231, 233 (2014).

115. Tom Jevens & Andy Sim, *Standard Setting Organizations: A Checklist for New or Continuing SSO Participants*, PRAC. LAW., Apr. 2004, at 51, 52.

116. Lenovo SOI, *supra* note 8, at 15.

adopt the weak rule of reason review<sup>117</sup>—a standard that all but guarantees a defendant win.<sup>118</sup> Still, in others, it challenged the appropriate remedy.<sup>119</sup> The DOJ’s position stands in stark contrast to other competition enforcement agency officials.<sup>120</sup> The limited sample size makes drawing conclusions difficult; however, *every* licensing case’s outcome matched the DOJ advanced position. This result meant fewer opportunities to expand or confirm antitrust’s role in regulating botched SSO agreements.

ASOIs essentially allow the DOJ to influence how *all* enforcers interpret antitrust laws. An enforcer who disagrees with the DOJ’s demarcation between competitive and non-competitive conduct will now have to fight not only the defendant but also the DOJ. Consider the recent kerfuffle between the DOJ and FTC in *Federal Trade Commission v. Qualcomm*.<sup>121</sup> The FTC challenged Qualcomm’s exclusionary licensing practices,<sup>122</sup> contending they helped the company unlawfully maintain a monopoly over two types of modem chips. After a bench trial, the Northern District of California ruled for the FTC.<sup>123</sup> The DOJ then submitted an SOI contesting any injunction that would require Qualcomm to renegotiate its licensing agreements on reasonable, non-discriminatory terms.<sup>124</sup> The district court denied this request, although the Ninth Circuit issued a partial stay of the injunction pending appeal.<sup>125</sup>

On appeal, the DOJ filed an amicus brief to support Qualcomm.<sup>126</sup> The DOJ maintained it was duty-bound not just to enforce antitrust laws—the authority afforded the agency under the Sherman Act—but to ensure the “correct application” of federal antitrust law.<sup>127</sup> From this starting frame, its brief contradicted the FTC’s argument that a

117. *See e.g., id.* at 14 n.14.

118. Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1375 (2009) (discussing the deficiencies with rule of reason treatment).

119. Qualcomm SOI, *supra* note 8, at 1.

120. Wright, *supra* note 113, at 158 (noting that “enforcement agency officials around the world,” along with academics and practitioners, have “call[ed] for an expanded role for antitrust law to deter patent holdup, to facilitate efficient SSO contracting, and to solve the SEP licensing problem”).

121. *See* FTC v. Qualcomm Inc., 411 F. Supp. 3d 658, 676 (N.D. Cal. 2019), *rev’d and vacated*, 969 F.3d 974 (9th Cir. 2020).

122. *Id.* at 672.

123. *Id.* at 807.

124. *See* Qualcomm SOI, *supra* note 8, at 10–11 (asserting that an injunction was an unbounded remedy which did not carefully consider all potential competitive consequences); *see also* United States’ Statement of Interest Concerning Qualcomm’s Motion for Partial Stay of Injunction Pending Appeal, FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020) (No. 19-16122) (renewing challenges to district court’s injunctive relief). The FTC’s frustration with this filing is evident in Plaintiff Federal Trade Commission’s Response to Statement of Interest Filed by United States Department of Justice Antitrust Division, FTC v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019) (No. 17-cv-00220)(*vacated* 969 F.3d 974 (9th Cir. 2020) (“[C]larify[ing] that the FTC did not participate in or request this filing.”).

125. *Qualcomm Inc.*, 969 F.3d at 756.

126. Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, *Qualcomm*, 969 F.3d 974 (No. 19-16122).

127. *Id.* at 1.

monopolist must deal with competitors.<sup>128</sup> The Ninth Circuit accepted the DOJ's position, deeming Qualcomm's conduct as *hypercompetitive*, not anticompetitive.<sup>129</sup> Thus, with the DOJ's support, Qualcomm avoided liability.

When the DOJ criticizes other enforcers and claims its interpretation of the law as the "right" one, it seems to suggest a hierarchy—one where the DOJ stands atop. As it repeatedly crowns itself the "principal" antitrust enforcer,<sup>130</sup> the DOJ's SOIs solidify this hierarchy. Outside criminal enforcement, however, the DOJ enjoys no legal or historical claim to define the only "accurate" enforcement of these laws.

Any argument that the DOJ makes when it, alone, defines antitrust policy is a potential boon for defendants. It provides leverage to minimize antitrust exposure. In fact, Meta successfully made this very argument in *New York v. Facebook*.<sup>131</sup>

In 2020, the FTC filed an antitrust suit against Facebook, asserting a Section 2 monopoly claim.<sup>132</sup> Part of the claim references the company's acquisition of WhatsApp and Instagram, and Facebook's ongoing anticompetitive course of conduct.<sup>133</sup> The district court dismissed the complaint, maintaining it failed to allege cognizable anticompetitive conduct.<sup>134</sup> While allowing the FTC's amended complaint to proceed,<sup>135</sup> the district court dismissed the overlapping claims brought by 48 state attorney generals.<sup>136</sup> The judge distinguished between federal antitrust regulators and all other regulators. He held laches precluded the States' complaint but not the federal parallel claims,<sup>137</sup> markedly constricting the case's potential remedies.<sup>138</sup>

In reaching this conclusion, the judge adopted Meta's distinction between state and federal antitrust regulators. The judge cited a DOJ amicus brief from the Microsoft decision contending states "do not stand on equal footing with the United States as enforcers of the federal antitrust laws."<sup>139</sup>

Affirmed on appeal,<sup>140</sup> the decision shows reason for caution. The Clayton Act explicitly gives the states a role in developing even federal antitrust policy through their

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128. The Division maintained that Qualcomm could wholly refuse to sell modem chips to original equipment manufacturers who refused to sign a patent licensing agreement that prohibited the reselling of Qualcomm's chips. *Id.* at 19.

129. *Qualcomm*, 969 F.3d at 1005.

130. *See supra* Part II (discussing how the DOJ maintains it is the principal enforcer of antitrust laws in justifying SOIs).

131. *New York v. Facebook, Inc.*, 549 F. Supp. 3d 6, 38–40 (D.D.C. 2021).

132. *FTC v. Facebook, Inc. (Facebook I)*, 560 F. Supp. 3d 1, 11 (D.D.C. 2021).

133. *Id.* at 7–9.

134. *Id.* at 31.

135. *FTC v. Facebook, Inc. (Facebook II)*, 581 F. Supp. 3d 34, 65 (D.D.C. 2022).

136. *Facebook I*, 581 F. Supp. 3d at 32.

137. *New York v. Facebook, Inc.*, 549 F. Supp. 3d 6, 38–39 (D.D.C. 2021).

138. For example, the States' Complaint included a request for supplemental state reporting for future high-value acquisitions that was not a part of the FTC action. Complaint at 75, *New York v. Facebook, Inc.*, 549 F. Supp. 3d 6 (D.D.C. 2021) (No. 20-cv-03589).

139. *New York*, 549 F. Supp. 3d at 39 (citing Memorandum Amicus Curiae of the United States at 4, *New York v. Microsoft Corp.*, No. 98-1233 (D.D.C. Apr. 15, 2002)).

140. *New York v. Meta Platforms, Inc.*, 66 F.4th 288, 306 (D.C. Cir. 2023).

litigation efforts.<sup>141</sup> Their task is no less vital than that of federal enforcers. Yet, Meta continued to push to distinguish federal antitrust regulators from its brethren.<sup>142</sup> ASOIs grounded in the DOJ's contention that it is the principal enforcer provides ammunition for this distinction—and thereby risks destabilizing the multi-enforcer paradigm necessary for strong antitrust enforcement.<sup>143</sup>

Of course, just how dire a danger Section 517 poses to antitrust enforcement is unclear. One cannot confidently link the DOJ's statements to the judiciary's slow growth of antitrust laws. With the recent uptick in filings lies a lack of transparency. Courts fail to explain the role these statements play in their decision-making.<sup>144</sup> But as it stands, some judges afford the DOJ more respect than other antitrust enforcers.<sup>145</sup> Further, the DOJ's increasing success rates suggest reason to fear SOIs as they afford the DOJ too loud a voice in setting antitrust policy. As the DOJ urges courts towards narrow interpretations of the antitrust laws or provides defendants new grounds to avoid liability, the threat to enforcement lingers.

### B. SOIs Enable Executive Overreach

In addition to undermining antitrust enforcement, ASOIs can violate the separation of powers principle. The Sherman Act is infamously broad, so much so that from inception, it needed judicial interpretation.<sup>146</sup> Take Section 1, for example. Facially, it precludes all combinations, contracts, and conspiracies that restrain trade.<sup>147</sup> But realistically, any contract could restrain trade—even if simply committing a purchaser to buy a widget from

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141. 15 U.S.C. § 15c.

142. Brief for Defendant-Appellee Facebook, Inc. at 1–2, 14–20, *New York v. Meta Platforms, Inc.*, 66 F.4th 288 (D.C. Cir. 2023) (No. 21-7078).

143. See Comments of the Am. Antitrust Inst., to the House Comm. on the Judiciary Subcomm. on Antitrust, Com. & Admin. L. 11 (Apr. 17, 2020), [https://www.antitrustinstitute.org/wp-content/uploads/2020/04/HJC\\_AAI-Comments\\_4.17.20.pdf](https://www.antitrustinstitute.org/wp-content/uploads/2020/04/HJC_AAI-Comments_4.17.20.pdf) [<https://perma.cc/YMW8-KPRH>] (“For the system as a whole to function effectively, FTC investigatory authority and administrative cease-and-desist authority must be complemented by strong private and state enforcement and DOJ civil and criminal enforcement, so that the threat of treble damages, fines, and jail sentences, respectively, create ‘general deterrence.’”).

144. See generally *supra* Part II. Courts sometimes do not cite to the SOIs, but often, they end up adopting the DOJ's position to an extent.

145. This risk is compounded by the respect some judges afford governmental filings. See Nylén & Sisco, *supra* note 100 (“If I had a government antitrust agency asking to file [a statement], I would feel differently than other private organizations.” (quoting U.S. District Judge Beth Labson Freeman)).

146. See William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 *FORDHAM L. REV.* 49, 51 (1991) (explaining how the “open-ended language” of antitrust statutes “has given federal judges a crucial role in determining the content of the statutes’ competition commands”).

147. 15 U.S.C. § 1.

a particular seller. Given this reality, Congress left the line drawing to the judiciary,<sup>148</sup> and the judiciary alone.<sup>149</sup>

The separation of powers doctrine aims to protect the allocation of power between the three “co-equal” executive, legislative, and judicial branches.<sup>150</sup> According to the Supreme Court, “separation of governmental powers . . . is essential to the preservation of liberty.”<sup>151</sup> An independent judiciary vitally “checks” the more politically influenced branches.<sup>152</sup> However, as the weakest branch of government, the judiciary stands in “continual jeopardy of being overpowered, awed or influenced by its coordinate branches.”<sup>153</sup>

If history is any guide, antitrust warrants a particular concern about executive overreach. While the DOJ maintains independence when evaluating claims and exercising professional judgment,<sup>154</sup> the pressure on the Division varies by administration. Presidents from Theodore Roosevelt to Nixon<sup>155</sup> to Trump<sup>156</sup> have all attempted to strong-arm the DOJ in antitrust matters.

148. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997) (Lynch, J., concurring) (“The broad, general language of the federal antitrust laws and their unilluminating legislative history place a special interpretive responsibility upon the judiciary.”); 1 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* ¶ 106, at 15 (1978) (noting the federal courts have been invested “with a jurisdiction to create and develop an ‘antitrust law’ in the manner of the common law courts”); 9 ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910–21*, at 130 (1984) (explaining Congress opted for “regulation by lawsuit” for the Sherman Act); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 429 (2008) (“The Sherman Act is a clear-cut and self-conscious delegation of lawmaking power to courts.”).

149. *See* Lemos, *supra* note 148, at 462 (“[T]he ultimate responsibility for interpretation of the Sherman Act lies not with the DOJ or the FTC but with the federal courts.”).

150. *Clinton v. Jones*, 520 U.S. 681, 699 (1997).

151. *Mistretta v. United States*, 488 U.S. 361, 380 (1989); *see also* SARAH A. BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK 7* (2003) (discussing how division between three branches aimed to combat potential tyranny, to “insulat[e] the judiciary,” and to limit “legislative encroachment over executive responsibilities”).

152. *Baxter*, *supra* note 5, at 808 (“The judiciary is an independent, coordinate branch of government, which must protect its powers from overreaching by the executive branch, a ‘political’ branch of government.”); *see also* *Clinton v. City of New York*, 524 U.S. 417, 449–50 (1998) (Kennedy, J., concurring) (“The Constitution’s structure requires a stability which transcends the convenience of the moment. . . . Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.” (citations omitted)).

153. FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

154. *See* Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 22 (2018) (“DOJ officials assume that prosecutorial decisions should not be influenced by partisan political considerations that may motivate the White House. Internal DOJ policy likewise presupposes that prosecutors should be independent.” (footnote omitted)).

155. Nixon was not successful in this effort. Attorney General John Mitchell refused Nixon’s mandate that he order the Assistant Attorney General in charge of antitrust to stop its investigation of a pending merger proposal. Nevertheless, he ran into trouble for lying about the exchange during his confirmation hearings. JAMES ROSEN, *THE STRONG MAN* 184–220 (2008).

156. John Elias, a career DOJ employee, alleged President Trump sought to use antitrust for political gain by appointing an Attorney General willing to do his bidding, who then instructed Antitrust Division leadership to act

ASOIs tempt the DOJ to encroach on the judiciary’s independence by “thrust[ing] a legal determination [by the executive branch] on the court.”<sup>157</sup> With increased filings, the DOJ seeks to expand its influence on judicial determinations and interpretations. In this expansion, SOIs invite the judiciary to rely too heavily on the executive branch’s opinions, given the lack of guidelines from the legislature. But as Justice Douglas once warned, if the judiciary abdicates its role, it can end up “a mere errand boy for the Executive Branch[,] which may choose to pick some people’s chestnuts from the fire, but not others.”<sup>158</sup>

Unrestrained, SOIs push the judiciary toward realizing Justice Douglas’s prophecy. Though “[t]he interpretation of the laws is the proper and peculiar province of the courts,”<sup>159</sup> the DOJ now regularly submits ASOIs squarely instructing courts how to interpret antitrust laws. It has sought to influence how courts define an antitrust injury under the Clayton Act,<sup>160</sup> doing “the business of insurance” for purposes of the McCarran-Ferguson Act,<sup>161</sup> and a legitimate self-interest for the statutory labor exemption.<sup>162</sup>

Overreach is also evident when the government opines on procedural questions in ASOIs. The DOJ has weighed in on whether a private party has sufficiently plead a claim,<sup>163</sup> proper jury instructions,<sup>164</sup> and standing.<sup>165</sup> The executive branch lacks constitutional authority over such inquiries.<sup>166</sup>

Even well-meaning support for a fellow enforcer can still raise separation of power concerns. For example, the United States filed a SOI in support of the plaintiff’s motion

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against his targets. *Hearing on Political Interference to Prosecutorial Independence*, *supra* note 33, at 42–43 (statement of John W. Elias, Att’y, Dep’t of Just.) (describing 2019 DOJ antitrust investigations triggered by “[p]ersonal dislike of an industry” and presidential tweets rather than on an antitrust analysis).

157. *Cf.* Aron Ketchel, Note, *Deriving Lessons for the Alien Tort Claims Act from the Foreign Sovereign Immunities Act*, 32 *YALE J. INT’L L.* 191, 210 (2007) (discussing the use of statements of interest in FSIA cases to influence legal, not policy-based, inquiries).

158. *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773 (1972) (Douglas, J., concurring).

159. *FEDERALIST NO. 78*, *supra* note 153, at 525 (Alexander Hamilton).

160. *E.g.*, Statement of Interest of the United States, *City of Oakland v. Oakland Raiders*, No. 18-cv-07444 (N.D. Cal. July 12, 2019).

161. *See, e.g.*, *Blue Cross Blue Shield SOI*, *supra* note 76.

162. Statement of Interest of the United States, *William Morris Endeavor Ent., LLC v. Writers Guild of Am., Inc.*, 478 F. Supp. 3d 932 (C.D. Cal. 2020) (No. 19-cv-05465).

163. *See, e.g.*, *Lenovo SOI*, *supra* note 8, at 19–20 (arguing Lenovo’s complaint did not “satisfy the rigorous standards of Fed. R. Civ. P. 9(b)” and the court should “reject the overbroad interpretations of the antitrust laws”).

164. Statement of Interest on Behalf of the United States of America, *Sitts v. Dairy Farmers of Am., Inc.*, No. 16-cv-00287 (D. Vt. Sept. 28, 2020) (“We offer the following analysis of the Capper-Volstead Act as an aid to the Court in applying it . . . to jury instructions.”). That case was ultimately dismissed. *Sitts v. Dairy Farmers of Am., Inc.*, No. 16-cv-00287 (D. Vt. Oct. 5, 2023).

165. *See, e.g.*, Statement of Interest of the United States, *McCain v. Apex Energy Grp.*, No. 14-cv-00791-MRB (S.D. Ohio Apr. 25, 2018).

166. *See, e.g., id.* Nor does Section 517 delegate in the statutory language to opine on the “correct interpretation” of the law—a domain reserved for the judiciary. *See* 28 U.S.C. § 517. Giving leave “to attend to the interests of the United States” seems to direct the Executive toward enforcing the law and its interests, not encroaching on the judiciary.

for reconsideration in *District of Columbia v. Amazon*.<sup>167</sup> The superior court dismissed the District of Columbia's complaint alleging Amazon's merchant contracts violated Section 1 by prohibiting them from selling their products on other platforms at lower prices.<sup>168</sup> The court held the complaint was too conclusory to pass from possible to plausible, echoing the pleading standard set out by the Supreme Court in *Twombly* and *Iqbal*.<sup>169</sup> As the superior court explained, the complaint leaves it "equally likely the prices are the result of lawful, unchoreographed free-market behavior."<sup>170</sup>

In its SOI, the DOJ argued the court applied too burdensome a pleading standard. It argued that requiring an antitrust complaint to "exclude lawful explanations for alleged restraints . . . could jeopardize the enforcement of antitrust law by improperly raising the bar on plaintiffs challenging anticompetitive contractual restraints . . . ."<sup>171</sup>

The United States is not wrong. *Twombly* and *Iqbal* does hinder enforcement efforts.<sup>172</sup> But from a purely separation of power standpoint, SOIs are not the vehicle to remedy this problem. The responsibility to fix pleading standards is for Congress or the Supreme Court, acting under legislative delegation.<sup>173</sup>

These separation of powers concerns stem from Section 517's open-ended language.<sup>174</sup> The statute provides no outer bounds as to what "interests" the executive branch can assert.<sup>175</sup> Courts have made no effort to confine this authority, instead deferring to the government's determination that such an interest exists. Nor does the statute clarify what deference, if any, courts should afford these statements.<sup>176</sup> As a result, it is not

167. Statement of Interest of the United States of America in Support of Plaintiff's Motion for Reconsideration, *District of Columbia v. Amazon.Com, Inc.*, No. 2021-CA-001775 (D.C. Super. Ct. Apr. 27, 2022) [hereinafter "Amazon SOI"].

168. *Id.* at 1–2.

169. *Id.* at 10–11.

170. *Id.* at 9–10.

171. *Id.* at 3–4.

172. See Christine P. Bartholomew, *Twiqbal in Context*, 65 J. LEGAL EDUC. 744, 756 (2016).

173. Congress has the authority to amend the Federal Rules of Civil Procedure. *Hawkins v. United States*, 358 U.S. 74, 78 (1958). Similarly, the Supreme Court can revisit its interpretation of the procedural rules. See Bartholomew, *supra* note 173, at 748–49 (discussing how, in *Twombly*, the Court revised its interpretation of Rule 8).

174. The separation of power issue is not unique to antitrust. Other scholars have pointed out similar concerns during the Bush administration, when SOIs were filed to assert whether a political question was involved in alien tort statute (ATS) cases. Seth Korman, *The New Deference-Based Approach to Adjudicating Political Questions in Corporate ATS Cases: Potential Pitfalls and Workable Fixes*, 9 RICH. J. GLOB. L. & BUS. 85, 100 (2010) ("Corporate ATS cases remain at the forefront of an ongoing separation of powers battle between the executive and the judiciary, a dispute exacerbated during the eight years of the Bush Administration."). That the dangers from SOIs extend beyond antitrust confirms the problem stems from Section 517's lack of definitional boundaries.

175. In statements seeking to limit the reach of enforcement, there are extra reasons for caution. Such statements may properly be viewed as part of a larger effort by the executive branch to "exert control over cases brought against corporations." *Id.* at 85.

176. Baxter, *supra* note 5, at 808 ("Affording too much deference to such statements results in a diminished role for the judiciary . . .").



surprising that the DOJ has fallen victim to what courts describe as the “hydraulic pressure”<sup>177</sup> that exists to encroach on the domain of another branch.<sup>178</sup>

Some judges have recognized the separation of power issue that arises from the DOJ’s ASOIs. For example, District Judge Jorge L. Alonso rejected a filing where the DOJ sought to clarify the appropriate standard of review for franchise no-poach agreements.<sup>179</sup> The Judge explained, “while I do appreciate that I cannot have too much information, and I cannot know too much, I will respectfully deny the motion . . . based upon principles of separation of power[s] . . . Article III created an independent judiciary and commands that the independence of the judicial branch be jealously gu[ar]ded.”<sup>180</sup> But other judges trend a finer line: either not acknowledging separation of power problems a particular filing poses or, even more worrisome, inviting the filing.<sup>181</sup> Given the significant number of opinions that eventually align with the position asserted in ASOIs,<sup>182</sup> this concern deserves recognition.<sup>183</sup>

### C. SOIs Breed Waste & Delay

Amid their other risks, ASOIs can also add costs and length to already protracted litigation.<sup>184</sup> Even antitrust settlements usually occur only after significant motion practice: the median time from filing to settlement takes 52.9 months in private enforcement.<sup>185</sup>

The DOJ, like other enforcers, has a finite amount of time and money to devote to antitrust oversight. Governmental enforcers have long lamented the inadequate financial resources to complete the daunting job of merger clearance and limited Section 1 oversight.<sup>186</sup> Given these realities, some praise SOIs as a cost-saving measure.<sup>187</sup> But after closer examination of these filings, this praise falls flat.

ASOIs generate long-term waste. The DOJ’s changing attitude toward no-poach agreements is illustrative. As previously discussed, the DOJ originally articulated an

177. *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983).

178. Jamil Jaffer, Comment, *Congressional Control Over Treaty Interpretation*, 70 U. CHI. L. REV. 1093, 1097 (2003).

179. Transcript of Motion Hearing Held Telephonically, *supra* note 93, at 4.

180. *Id.* at 4–5.

181. *See, e.g.*, Statement of Interest of the United States of America at 1, *In re Transpacific Passenger Air Trans. Antitrust Litig.*, 69 F. Supp. 3d 940 (N.D. Cal. 2014) (No. 07-cv-05634) (“The United States provide[d] th[e] Statement in response to the Court’s letter . . . to the State Department Legal Adviser.”).

182. *See supra* Part II.

183. *See Baxter, supra* note 5, at 815 (“Extending uncritical deference to State Department submissions in these cases weakens the power of the federal judiciary to determine the cases brought before it and results in a loss of the judiciary’s autonomy as a coordinate branch of government.”).

184. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (discussing the high pre-trial costs of antitrust litigation).

185. Christine P. Bartholomew, *Antitrust Class Actions in the Wake of Procedural Reform*, 97 IND. L.J. 1315, 1349–51 (2022).

186. *See* George N. Bauer, Note, *eMonopoly: Why Internet-Based Monopolies Have an Inherent “Get-Out-of-Jail-Free Card,”* 76 BROOK. L. REV. 731, 732 (2011) (explaining that the DOJ and the federal courts lack the resources to cope with the current model).

187. *See Papsun, supra* note 15 (explaining how some experts see statements of interest as economically efficient).

aggressive posture against unlawful restraints that limit employee mobility.<sup>188</sup> Under Trump, the DOJ altered its course. It filed SOIs urging courts to distinguish franchise agreements from other no-poach agreements—despite contrary conclusions by economists and think tanks.<sup>189</sup> Under Biden, the DOJ again changed course, filing more SOIs to argue that ASOIs filed under the prior administration do not “fully and accurately reflect the U.S.’ current views.”<sup>190</sup>

This string of filings comes at a cost. Flip-flopping means the DOJ now must devote its limited resources to monitoring cases for opportunities to remediate policy related ASOIs.<sup>191</sup> The DOJ could have pressed its policy position through its prosecutorial discretion or moved to intervene if it had a right not protected by the parties.<sup>192</sup> Either option would have obviated the need for corrective filings in suits brought by fellow enforcers.

Admittedly, not all statements reflect shifting political positions. Some provide the judiciary with information that is otherwise unavailable, such as details about a prior governmental settlement between parties. Such filings can add value but, as the volume of ASOIs increases, the DOJ will commonly duplicate arguments already made by the parties. These filings can belabor expensive litigation without adding sufficient value to justify the waste. Take a case like *Oscar Insurance Co. v. Blue Cross & Blue Shield*, where the DOJ echoed the plaintiff’s argument that the McCarren-Ferguson Act did not apply.<sup>193</sup> Or *Lenovo v. InterDigital*, where the DOJ’s statement repeated the defendant’s contention that plaintiff failed to allege a sufficient antitrust injury.<sup>194</sup> Rather than adding new information, these filings reiterated points already before the court.

This waste is compounded when ASOIs trigger satellite litigation—side disputes about the propriety of the additional filing. A single statement can now lead to a string of filings where litigants challenge the DOJ. Some challenge the timing of ASOIs, particularly when they come late in a suit’s lifespan. Others challenge whether there is a true governmental

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188. ANTITRUST DIV., DEP’T OF JUST. & FTC, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 4 (2016), <https://www.justice.gov/atr/file/903511/download> [<https://perma.cc/WXY9-XRDZ>]; see also Makan Delrahim, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Just., Remarks at the Public Workshop on Competition in Labor Markets (Sept. 23, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition> [<https://perma.cc/DF4W-TCQ9>] (confirming that combating no-poach agreement remains a “high priority” for the DOJ).

189. See, e.g., Letter from Am. Antitrust Inst., to Makan Delrahim & Michael Murray, U.S. Dep’t of Just. (May 2, 2019), <https://www.antitrustinstitute.org/wp-content/uploads/2019/05/AAI-No-Poach-Letter-w-Abstract.pdf> [<https://perma.cc/48DL-R736>] (critiquing vertical no poach agreements).

190. United States’ Motion for Leave to File Statement of Interest, *Deslandes v. McDonald’s USA, LLC*, No. 17-cv-04857 (N.D. Ill. Feb. 17, 2022).

191. Using resources for such monitoring is particularly worrisome when the Antitrust Division has a weak enforcement record. See Letter from David N. Cicilline to Makan Delrahim, *supra* note 12, at 4–5.

192. Cf. Platt Majoras, *supra* note 34, at 126 (“[O]ur current multi-headed hydra is only kept from thrashing out of control because enforcers have exercised sound prosecutorial discretion, which has meant that sometimes one enforcer must stand down and let another enforce the laws in a particular matter and in a particular manner.”).

193. *Blue Cross Blue Shield SOI*, *supra* note 76.

194. *Lenovo SOI*, *supra* note 8.

interest advanced by the filing. Still others urge courts to disregard statements as nothing more than shifting policy positions by the DOJ.<sup>195</sup>

Intra-enforcer disputes over ASOIs result in fewer governmental reserves available to combat anticompetitive conduct.<sup>196</sup> For example, when the DOJ filed a statement challenging the FTC suit against Qualcomm,<sup>197</sup> the FTC shot back, arguing the filing was both unrequested and untimely.<sup>198</sup> Similarly, the DOJ's filing in *New York v. Deutsche* triggered a flurry of responsive filings, frittering away the DOJ and multiple state attorney generals' resources.<sup>199</sup> The DOJ expends more to justify the filing's legitimacy, even in instances when the ASOIs adds little to the overall case.

These filings also create waste by generating more confusion than clarity. For example, the DOJ filed a statement in *Steves & Son v. JELD-WEN*, a competitor lawsuit challenging JELD-WEN's acquisition of a fellow manufacturer.<sup>200</sup> After a jury trial win, plaintiff sought divestiture, which the defendant opposed.<sup>201</sup> While the parties briefed the divestiture question, the DOJ filed an ASOI.<sup>202</sup> Defense counsel argued the statement was "an absolute game-changer" that questioned the propriety of divestiture.<sup>203</sup> Plaintiff's counsel contended the statement actually supported divestiture and confirmed the court's pronounced course of action for evaluating the requested remedy.<sup>204</sup> In response to this confusion, the judge appointed a special master to evaluate the DOJ's recommendations.<sup>205</sup> Then, the parties filed additional briefing, and the court evaluated the special master's report. Eventually, the court ordered the divestiture,<sup>206</sup> but only after a significant, extended delay that originated from the DOJ's ASOI. Nothing suggests the prolonged litigation resulted in a better, more informed result.

195. Defendants' Response to Statement of Interest of the United States at 1, 4, *Markson v. CRST Int'l Inc.*, No. 17-cv-01261 (C.D. Cal. Aug. 1, 2022) ("The Court does not owe any deference to the DOJ's views . . . . The only thing that has changed in the past few years is the DOJ's *policy* preferences.").

196. Even Assistant Attorney General Makan Delrahim acknowledged that disputes between enforcers waste time. *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Pol'y & Consumer Rts. of the S. Comm. on the Judiciary*, 116th Cong. (2019), <https://www.judiciary.senate.gov/meetings/09/17/2019/07/23/2019/oversight-of-the-enforcement-of-the-antitrust-laws> [https://perma.cc/J6UX-YJKA].

197. See *supra* Part III.A (discussing *Qualcomm*).

198. FTC's Response to Statement of Interest, *supra* note 124.

199. E.g., Memorandum of Law in Support of State of Washington Motion for Leave to File Amicus Brief in Response to Statement of Interest of the United States of America, *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (No. 19-cv-05434).

200. Statement of Interest of the United States of America Regarding Equitable Relief, *Steves & Sons, Inc., v. JELD-WEN, Inc.*, 345 F. Supp. 3d 614 (E.D. Va. 2018) (No. 16-cv-00545), *aff'd in part, rev'd in part* 988 F.3d 690 (4th Cir. 2021).

201. *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 703 (4th Cir. 2021).

202. Statement of Interest of the United States of America Regarding Equitable Relief, *supra* note 200.

203. Complete Transcript of the Conference Call Before the Honorable Robert E. Payne at 8, *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 345 F. Supp. 3d 614 (No. 16-cv-00545) (4th Cir. 2021).

204. *Id.* at 9–10.

205. *Id.* at 12.

206. *Steves*, 988 F.3d at 705.

As the Government stretches its authority to file statements of interest, concerns about waste increase. The DOJ reads Section 517 as “contain[ing] no restrictions on the content or timing” of a SOI.<sup>207</sup> If accepted, this means parties can litigate a dispute for years, assuming a particular interpretation of antitrust laws applies. But at any time and without notice, the DOJ could inject its interpretation of the laws. Depending on how much deference a court affords that opinion, it could mean a radical reorientation of the case. Parties would need to revisit discovery and dispositive motions—adding an additional outlay of time and resources.<sup>208</sup>

Once the judiciary and other antitrust litigants are considered, any cost-effectiveness of SOIs are overshadowed by the resources they can sap over the long term. Not every SOI has this effect, but the risk remains, particularly as the DOJ relies more frequently on Section 517. Coupled with their potential to compromise enforcement and enable executive overreach, SOIs lose some of their allure.

#### CONCLUSION

28 U.S.C. § 517 seems innocuous enough. It allows the United States to weigh in on pending litigation where it has an interest without having to be a party. As the DOJ files more statements, it invites a closer examination of how the Division applies this authority. As this Article uncovers, accolades touting ASOIs as instruments that “are nothing but good”<sup>209</sup> overpromise and underdeliver.

Stated simply, there lies a dark underbelly to Section 517 statements. The DOJ contends it has an interest in how courts apply and interpret antitrust laws, meaning it can file a statement in *any* pending antitrust suit. However, in applying this limitless interest, the DOJ can undermine enforcement and allow overreach by the executive branch. ASOIs also enable the Division to repeat arguments parties could have already articulated, drawing concerns about wasted resources.

There is a path forward. With the assistance of Congress and the courts, Section 517 can act as a tool for the DOJ to aid courts without inviting problems. First, Congress needs to amend Section 517 to clarify what qualifies as a suitable governmental interest. Rather than a finite list, a better option is to articulate which interests should not count. Opinions on procedural questions or statutory interpretation of antitrust laws should not suffice. Creating this carveout will reduce political filings that can compromise the role of the judiciary.<sup>210</sup>

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207. United States’ Response to Plaintiff’s Motion to Strike the Statement of Interest of the United States, at 1, *Credle v. Gimenez*, No. 17-cv-22477 (S.D. Fla. July 5, 2017).

208. To date, courts have responded differently to the DOJ’s assertion that it can submit a statement of interest at any time. *Compare* Transcript of Motion Hearing, *supra* note 93, at 5 (denying a motion by the DOJ to file an SOI because the litigation was already underway for four and half years), *with* FTC’s Response to Statement of Interest, *supra* note 124 (urging, unsuccessfully, for the court to reject the DOJ’s untimely filing).

209. *See* Papsun, *supra* note 15.

210. Some urge the Government to include policies for statements of interest as part of the U.S. Attorneys’ Manual. Zapana, *supra* note 1, at 253–54. While such a proposal has transparency gains, it likely would have limited ability to reign in problematic filings. The DOJ can simply amend the manual to expand its authority to

As for the courts, they can shed light on how SOIs influence their decision-making, if at all. Currently, the lack of judicial transparency obscures whether courts defer too readily to the DOJ. Since the DOJ lacks antitrust rule-making authority, courts should take care not to defer to any advocacy within this realm. More transparency will help circuit courts correct any instance where the trial court affords too much deference to the opinion of a single antitrust enforcer. Should appellate courts fail to act, Congress may need to further amend Section 517.

Though Section 517 has long been on the books, its actual use is a modern phenomenon. How the DOJ employs its authority uncovers the need for boundaries for this procedural tool. Acting now can balance both the gains and perils of SOIs in antitrust litigation.

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conform with the vision of a particular administration. Hence, focusing on Section 517 is a more effective solution.