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COMMENT: The Tunney Act: Judicial Discretion in *United States v. Microsoft Corporation*

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UNITED STATES v. MICROSOFT CORPORATION

INTRODUCTION

In Bill Gates's book, *The Road Ahead*,[1] the Microsoft chairman paints a rosy portrait of a world full of wallet-size computers, digital cash and an online marketplace eliminating the need for retail middlemen.[2] He, of course, imagines himself at the helm of this digital revolution. Noteworthy in his autobiography, however, is the absence of any mention of the U.S. government's four-year antitrust investigation of Microsoft, which was settled in 1995.[3]

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[1] BILL GATES, THE ROAD AHEAD (1995).

[2] *Id.*

[3] Although the particular investigation discussed in this Comment was settled in 1995, the U.S. Department of Justice's inquiry into Microsoft practices is ongoing. In May 1995, Microsoft's intended $2 billion acquisition of Intuit Inc., maker of Quicken personal finance software, was abandoned when the Justice Department threatened to contest the deal. Elizabeth Corcoran, *Microsoft Halts Merger with Intuit; Prospect of Lengthy Antitrust Trial Is Key*, WASH. POST, May 21, 1995, at A1. More recently, Netscape Communications Inc., Microsoft's major rival in the market for Internet software, encouraged the Justice Department to look into Microsoft's marketing practices. Netscape claimed that Microsoft was using its dominance in operating systems to influence computer manufacturers and Internet service providers into using Microsoft's browser software instead of Netscape's. Netscape accused Microsoft of offering financial incentives, such as discounts on its operating system, in exchange for ensuring that Netscape's Internet browser is made less accessible to users. Microsoft has claimed that these accusations are untrue and are a public relations ploy to divert attention away from the quality of Microsoft technology. David S. Hilzenrath & Elizabeth Corcoran, *Justice Renews Antitrust Scrutiny of Microsoft; Marketing of Internet Software Is Questioned*, WASH. POST, Sept. 20, 1996, at F1.

Microsoft, the world's largest developer of computer software,[4] had been charged with violating Sections 1 and 2 of the Sherman Act.[5] After a three-year Federal Trade Commission ("FTC") investigation into Microsoft's practices ended in a 2-2 deadlock over whether to file suit, the Justice Department began its own investigation of Microsoft.[6] As a result of this inquiry, Assistant Attorney General Anne Bingaman, head of the Antitrust Division,[7] initiated settlement negotiations with Microsoft in June 1994. A consent decree was filed simultaneously with a formal complaint brought by the Justice Department on July 15, 1994. In the consent decree, Microsoft agreed to alter those contracts with personal computer manufacturers that were allegedly preventing competitors from promoting their own operating system software.[8]

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[4] It is estimated that Microsoft controls about 85% of the operating system market. Viveca Novak & Don Clark, *Microsoft Antitrust Pact Rejected by Federal Judge*, WALL ST. J., Feb. 15, 1995, at A3.

[5] Complaint, United States v. Microsoft, 159 F.R.D. 318 (D.D.C.) (No. 94-1564) [hereinafter *Microsoft I*] (denying entry of consent decree), *rev'd*, 56 F.3d 1448 (D.C. Cir. 1995). The Sherman Act, 15 U.S.C. § 1 (1988), *as amended by* Act of Nov. 16, 1990, Pub. L. No. 101-588, § 4(a), 104 Stat. 2880, reads as follows:

    Trusts, etc., in restraint of trade illegal; penalty:

    Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

    Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 states:

    Monopolizing trade, a felony; penalty:

    Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[6] Henry J. Reske, *Judge Takes Lead Role in Microsoft Case: In a Controversial Ruling, Sporkin Rejects Antitrust Consent Decree*, A.B.A. J., Apr. 1995, at 36.

[7] Assistant Attorney General Anne Bingaman, who was appointed by President Clinton in 1993 to head the Justice Department's Antitrust Division, retired from the agency on October 18, 1996. Joel Klein, Ms. Bingaman's principal deputy, was designated her successor. *Sidebar: News of the Profession*, 19 NAT'L L.J. 8, Oct. 21, 1996, at A5.

[8] Proposed Consent Decree, *Microsoft I*, 159 F.R.D. 318 (D.D.C.) (No. 94-1564),

Judge Stanley Sporkin of the U.S. District Court for the District of Columbia may have provided the only exciting moment for Bill Gates in the entire investigation.[9] In an exceptional ruling which stunned both Microsoft and the Justice Department, Judge Sporkin rejected the proposed consent decree.[10] Specifically, he objected to the lack of information given to the court regarding the consent decree, the narrowness of the decree's scope, the fact that the parties were unwilling to address certain anticompetitive practices, and what he perceived to be the ineffectiveness of the decree's enforcement and compliance mechanisms.[11]

In refusing to approve the decree, Judge Sporkin clashed with the Justice Department regarding the appropriate amount of discretion he had to review the settlement under the 1974 Antitrust Procedures and Penalties Act, commonly referred to as the Tunney Act, which requires courts to determine whether a consent decree in an antitrust case is "in the public interest."[12] In determining the scope of his review, Judge Sporkin pointed to the language of the Tunney Act, its legislative history, case law and "common sense."[13] He concluded that Congress passed the Tunney Act because it was concerned about the secrecy of corporate dealings with the government.[14] Congress, therefore, had envisioned an independent role for the courts in reviewing antitrust consent decrees.[15] Judge Sporkin justified his decision by claiming that courts were not to serve as mere "rubber stamps" in the proceedings.[16]

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rev'd, 56 F.3d 1448 (D.C. Cir. 1995).

[9] Judge Sporkin has acquired a reputation for controversy, both as a district court judge and as an enforcement lawyer at the Securities & Exchange Commission. For background information on Judge Sporkin, see Saundra Torry & Elizabeth Corcoran, *Sporkin: Overruled, But Undeterred; Microsoft Case Typifies the Judge's Blunt Activism*, WASH. POST, July 23, 1995, at B1.

[10] *See* Viveca Novak & Don Clark, *Microsoft Pact Rejected by Federal Judge*, WALL ST. J., Feb. 15, 1995, at A3.

[11] Reske, *supra* note 6.

[12] Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1994) [hereinafter Tunney Act].

[13] *Microsoft I*, 159 F.R.D. at 330-32.

[14] *Id.*

[15] *Id.*

[16] *Id.*

Both the Justice Department and Microsoft quickly appealed Judge Sporkin's decision to the U.S. Court of Appeals for the District of Columbia Circuit.[17] The Justice Department claimed that Judge Sporkin's broad reading of the Tunney Act radically altered the permissible scope of judicial review under the law and threatened the ongoing enforcement program of the Antitrust Division, which relies heavily upon settlements based on consent decrees.[18] Four months later, the D.C. Circuit upheld the consent agreement and ruled that a court cannot second-guess the government's investigative process unless there has been a "strong showing" of bad faith or improper conduct.[19] The case was then transferred to another judge who approved the decree.[20]

This Comment examines Judge Sporkin's reliance on the Tunney Act in rejecting the Microsoft consent decree. Specifically, this Comment analyzes whether the language of the statute, case law and legislative history support Judge Sporkin's expansive view of the judiciary's role in reviewing such decrees in antitrust cases. Part I sets forth the provisions contained in the Tunney Act for settling antitrust cases. Part II provides a background of the personal computer industry, as well as an account of the history of the Microsoft litigation. Part III outlines Judge Sporkin's reasons for rejecting the consent decree and the bases for the appeals brought by the Justice Department and Microsoft. Part IV analyzes Judge Sporkin's reasoning in rejecting the decree. Finally, this Comment concludes that Judge Sporkin's expansive view of judicial discretion in reviewing consent decrees under the Tunney Act was both an accurate expression of congressional intent and a necessary instrument for the promotion of the public welfare in antitrust cases.

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[17] Microsoft's Motion for Expedited Consideration and for Briefing Schedule, United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995) (No. 94-1564) [hereinafter *Microsoft II*]; Justice Department's Motion for Expedited Consideration and for Briefing Schedule, *Microsoft II*, 56 F.3d 1448 (D.C. Cir. 1995) (No. 94-1564).

[18] Justice Department's Motion for Expedited Consideration and for Briefing Schedule at 1, *Microsoft II*, 56 F.3d 1448 (D.C. Cir. 1995) (No. 94-1564).

[19] *Microsoft II*, 56 F.3d at 1449.

[20] United States v. Microsoft Corp., No. CIV.A. 94-1564, 1995 WL 505998 at *1 (D.D.C. Aug. 21, 1995) [hereinafter *Microsoft III*].

I. THE TUNNEY ACT

The Tunney Act, passed by Congress in 1974 amid public concern about the secrecy of antitrust settlements, contains a number of provisions designed to address consent decrees in antitrust cases.[21] Any proposed settlement must be accompanied by a "competitive impact statement" which describes the agreement and its predicted effects on competition.[22] The competitive impact statement must also contain: (1) the reasons for the complaint and the alleged antitrust violations; (2) the remedies available to private claimants if the decree is entered; and (3) a description and evaluation of any alternatives to the settlement that the Justice Department considered.[23] Both the proposed consent decree and the competitive impact statement must be filed with the district court and published in the *Federal Register* at least sixty days prior to the effective date of the decree.[24] A summary of the agreement, the competitive impact statement, and other materials related to the investigation must be published in newspapers of general circulation at least sixty days before the effective date of the decree.[25] During this sixty-day period, the public may submit written comments relating to the proposal, and the Justice Department must file responses to such comments with the *Federal Register* and the district court.[26]

Subsections (e) and (f) of the Tunney Act are central to the dispute between the Justice Department and Judge Sporkin.[27]

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[21] Tunney Act, 15 U.S.C. § 16(b)-(h) (1994); see *infra* Section IV.B for a discussion of the legislative history behind the Tunney Act.

[22] Tunney Act, 15 U.S.C. § 16(b).

[23] *Id.*

[24] *Id.*

[25] *Id.* § 16(c).

[26] *Id.* § 16(d).

[27] Specifically, § 16(e)-(f) of the Tunney Act reads as follows:

(e) Before entering any consent judgment by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and

Subsection (e) provides that at the close of the public comment period, and before entering the consent decree, the district court must determine whether the approval of the proposed settlement is "in the public interest."[28] The Act does not define "public interest"; however, it lists a number of factors that the court may consider in making its determination.[29] The first group of factors, listed in subsection (e), includes the general competitive effects that such a settlement would have on both individuals claiming specific injury and the public at large.[30] The court may also consider the provisions for enforcement, the anticipated effects of alternative remedies the Justice Department actually considered and "any other considerations bearing upon the adequacy of such judgment."[31]

In subsection (f), the Tunney Act authorizes the court at its discretion to consider a number of specific factors in making its public interest determination.[32] The court may hear the testi-

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individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) Procedure for public interest determination

In making its determination under subsection (e) of this section, the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

[28] Tunney Act, 15 U.S.C. § 16(e).
[29] *Id.* § 16(e)-(f).
[30] *Id.* § 16(e).
[31] *Id.*
[32] *Id.* § 16(f).

mony of government officials or expert witnesses, appoint a special master or other outside consultants, authorize intervention or amici curiae, and review any comments or objections to the proposed settlement.[33] Finally, the statute provides that the court may "take such other action in the public interest as the court may deem appropriate."[34]

II. History of the Case Against Microsoft

A. *Industry Background*

In order to comprehend the necessity for expansive judicial review of the Microsoft consent decree, it is important to understand the complexity of the computer industry and the investigation of Microsoft. The unique interdependence of computer technology has been one of the most significant factors in the investigation of Microsoft's practices. This interrelatedness, which leads toward natural monopoly, makes antitrust oversight of the computer industry particularly essential and complex because, given the inherent tendency toward cohesion, the government must be especially cautious to prevent a market leader such as Microsoft from erecting artificial barriers that extend its naturally derived monopoly.[35]

To function properly, every computer must have a microprocessor, or chip, which is the "brain" of the computer.[35] In addition, the computer must have an operating system that permits the computer to integrate its component parts to operate smoothly together.[37] Computers are usually sold with the microprocessor in place and the operating system installed.

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[33] Tunney Act, 15 U.S.C. § 16(f).

[34] *Id.* § 16(f)(5). The Tunney Act does not require the court to consider the proposed settlement only in terms of antitrust law. The court may also contemplate "non-substantive reasons inherent in the process of settling cases throughout the consent decree procedure." Note, *The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974*, 82 MICH. L. REV. 153, 157 (1983) [hereinafter *Scope of Judicial Review*] (quoting 1973 H.R. REP. NO. 1463, 93d Cong., 2d Sess., at 12 (1973), *reprinted in* 1974 U.S.C.C.A.N. 6542).

[35] *See* Joel Klein & Preeta Bansal, *International Antitrust Enforcement in the Computer Industry*, 41 VILL. L. REV. 173 (1996).

[36] Roger D. Blair & Amanda K. Esquible, *The Microsoft Muddle: A Caveat*, 40 ANTITRUST BULL. 257, 258 (1995).

[37] *Id.*

Application software is then added, permitting the computer to perform specific tasks.[38] Application software must be compatible with the installed operating system in order to function. This requirement has shaped the growth of the personal computer industry and the investigation of Microsoft.[39]

Microsoft sells both operating systems (MS-DOS, Windows 95 and NT) and application software for personal computers ("PCs"). Application software includes word processing programs, spreadsheets, databases and other programs that allow users to complete tasks with their PCs.[40] The operating system is the device that controls the application software. In turn, the application software controls hardware devices and performs functions such as reading and writing files on a disk.[41]

Microsoft owes much of its success to another leader in the PC market, International Business Machines ("IBM"). Prior to the 1980s, IBM dominated the market in mainframe computers. However, it did not expect the dramatic demand for PCs that developed in the 1980s. When IBM began developing its PC, it selected Intel Corporation to supply 808 microprocessors and Microsoft to supply computer languages.[42] IBM also needed an operating system for its new PC. It looked to the then-dominant CP/M operating system from its developer, Digital Research, Inc. ("DRI"). However, that deal fell through, and Microsoft was asked to step in. Microsoft acquired the rights to a clone of the CP/M operating system called QDOS, which it modified and licensed to IBM as MS-DOS. Fortunately for Microsoft, the deal with IBM was not exclusive, and Microsoft began licensing its operating system to manufacturers who had

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[38] *Id.*

[39] *Id.* This interdependence, which is often referred to as "network externalities," provides that an operating system with a large installed base has certain self-reinforcing qualities. First, independent software vendors are more likely to write application programs for operating systems with a large installed base. Additionally, an operating system with a large installed base is more likely to attract consumers because it means that many others will use the same or similar products, permitting the consumer to exchange work products with peers successfully. Klein & Bansal, *supra* note 35, at 177.

[40] John E. Lopatka & William H. Page, *Microsoft, Monopolization, and Network Externalities; Some Uses and Abuses of Economic Theory in Antitrust Decision Making*, 40 ANTITRUST BULL. 317, 321 (1995).

[41] *Id.*

[42] Blair & Esquible, *supra* note 36, at 259.

cloned the IBM PC. The IBM PC became the standard for the entire industry, resulting in an enormous market of lower-priced clones of the IBM PC, each containing a Microsoft operating system.[43] Microsoft's operating system, "having caught a ride with IBM . . . became nearly the entire market."[44]

IBM and DRI continued to develop their own operating systems, despite the selection of MS-DOS for IBM's PC. IBM began selling its own version of MS-DOS, called PC-DOS, which it marketed with its computers. Microsoft and IBM also teamed up to develop OS/2, an alternative operating system. After a dissolution of the partnership between IBM and Microsoft in 1992, IBM continued its development of OS/2, while Microsoft focused its attention on Windows. Since then, IBM has introduced a major upgrade, called OS/2 Warp, which it is touting as an alternative to Windows.[45]

DRI modified its own operating system, which sold somewhat successfully as DR-DOS. Version 5.0 of DR-DOS managed to acquire ten percent of all operating system sales in 1990. Shortly after the introduction of DR-DOS, Microsoft made announcements that its upgrade of MS-DOS, version 5.0, would approximate all the advantages of DR-DOS.[46] It took a year, however, before version 5.0 was available. Simultaneously, Microsoft began selling its 3.0 version of Windows,

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[43] Lopatka & Page, *supra* note 40, at 322.

[44] Blair & Esquible, *supra* note 36, at 259. The MS-DOS system, because of memory limitations, is controlled by textual commands that the user must type. Microsoft Windows, developed later in the 1980s, addressed this limitation by adding a graphical user interface ("GUI") and the ability to run more than one application at a time ("multitasking"). Windows allows MS-DOS to mimic Apple Computer's use of the mouse, on-screen icons and menus for executing commands. Lopatka & Page, *supra* note 40, at 322.

[45] Lopatka & Page, *supra* note 40, at 322. Although IBM's OS/2 operating system is widely perceived to be a "sinking ship," it has developed a small, but loyal following. For example, "EurOS/2" is a forum dedicated, by its own accounts, to providing "mutual support" between users of OS/2 who subscribe to the policy of "ABM," an acronym for "anything but Microsoft." At a November 1996 meeting of EurOS/2, the guest speaker was none other than Graham Lea, editor of the newsletter *Microsoft Monitor* and a man who has dedicated his life to "illuminat[ing] Microsoft's nefarious practices." *See Embattled OS/2 Users Find Mutual Support in Pitying, Rather Than Fearing Microsoft Corp.*, COMPUTERGRAM INT'L, Nov. 4, 1996 [hereinafter *Embattled OS/2 Users*].

[46] Lopatka & Page, *supra* note 40, at 323; *see* Kenneth C. Baseman et al., *Microsoft Plays Hardball: The Use of Exclusionary Pricing and Technical Incompatibility to Maintain Monopoly Power in Markets for Operating System Software*, 40 ANTITRUST BULL. 265 (1995).

followed by Windows 3.1. Shortly thereafter, DR-DOS sales began to falter, and DRI subsequently removed DR-DOS from the market, leaving Microsoft with an even greater market share.[47]

B. *The Federal Trade Commission Investigation*

In June 1990, the FTC began investigating Microsoft, focusing on allegations that Microsoft had used predatory practices to bring about the failure of DR-DOS and to extend its operating system monopoly into application software. These predatory practices included "vaporware"—misleading product announcements which discourage competition—and technical sabotage that made DR-DOS appear to be incompatible with Windows. The FTC also examined Microsoft's per processor licensing agreements with original equipment manufacturers ("OEMs") who preinstall operating systems in their products before selling to consumers. Per processor licenses require these OEMs to pay a license fee for each microprocessor that they sell, regardless of whether it is installed with a Microsoft operating system.[48]

The FTC investigation focused on similar practices by Microsoft regarding its application software, revealing a number of troubling practices.[49] First, Microsoft allegedly intended to make its application software more compatible than other independent software vendors ("ISVs") with Microsoft operating systems. Second, Microsoft purportedly sought to use its control over operating systems to prevent the introduction of application software upgrades by these ISVs.[50] Third, Microsoft allegedly encouraged competitors to continue developing OS/2 software, knowing that Microsoft was planning a full-scale promotion of its Windows operating system in the near future.[51] This practice gave Microsoft a head start on developing application software compatible with its Windows operating system. Finally, there were allegations that

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[47] Lopatka & Page, *supra* note 40, at 323.
[48] Lopatka & Page, *supra* note 40, at 323.
[49] Lopatka & Page, *supra* note 40, at 323.
[50] Lopatka & Page, *supra* note 40, at 324.
[51] Lopatka & Page, *supra* note 40, at 324; *see* Stuart Taylor, Jr., *What to Do with the Microsoft Monster*, AM. LAW., Nov. 1993, at 72.

Microsoft's operating system division provided confidential information to its application software division about ISVs. This information was obtained while Microsoft's operating system division was supposed to be investigating problems with the ISVs product's compatibility.[52] The result of these practices was that any system installed with either the MS-DOS or Windows operating system was virtually tied to Microsoft application software.[53]

In February 1993, the FTC deadlocked on its Bureau of Competition's recommendation to bring an action against Microsoft.[54] A second vote in July again resulted in a deadlock,[55] and the FTC decided to end its investigation.[56]

C. *The Justice Department's Case Against Microsoft*

In August 1993, the Justice Department initiated its own extensive investigation of Microsoft.[57] The Justice Department issued twenty-one civil investigative demands[58] to Microsoft and third parties, interviewed more than one hundred people, and deposed twenty-two individuals. The investigation consumed 14,000 attorney hours, 5500 paralegal hours and 3650 economist hours.[59]

On July 15, 1994, the Justice Department filed a complaint in the U.S. District Court for the District of Columbia alleging that Microsoft had violated Sections 1 and 2 of the Sherman Act.[60] The complaint alleged that Microsoft had mo-

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[52] Lopatka & Page, *supra* note 40, at 323.

[53] Lopatka & Page, *supra* note 40, at 324.

[54] James Coates, *Microsoft Avoids FTC Charges, But Case Remains Open*, CHI. TRIB., July 22, 1993, at 1.

[55] *Id.*

[56] *Id.* The FTC declined to comment on the deadlock. On July 21, 1993, the Commission adjourned its closed meeting regarding Microsoft without making a public announcement, which it generally makes when a complaint is issued. The decision to bring a complaint is usually voted on by five members. In the case of Microsoft, however, one member, Roscoe Starek III, removed himself from the vote because his family owns computer stock. *FTC Reportedly Deadlocks Again in Vote on Antitrust Action Against Microsoft*, COURIER J., July 22, 1993, at 3D.

[57] David Bender, *The Microsoft Antitrust Wars*, in INTELLECTUAL PROPERTY ANTITRUST: 1995, at 321 (PLI Patents, Copyrights & Literary Property Course Handbook Series No. G4-3942, 1995).

[58] A civil investigative demand ("CID") is a general discovery subpoena authorized under 15 U.S.C. §§ 1311-1314 (1994).

[59] Bender, *supra* note 57, at 321.

[60] Complaint ¶¶ 42, 44, *Microsoft I*, 159 F.R.D. 318 (D.D.C. 1995) (No. 94-

nopoly power in the PC operating system market because, for almost a decade, Microsoft had retained a market share consistently in excess of seventy percent.[61] In addition to the natural barriers frustrating entry into the market, the Justice Department found that Microsoft had entered into "a series of exclusionary and anticompetitive contract terms to maintain its monopoly."[62]

The complaint also made a number of specific allegations regarding Microsoft's contracts with OEMs. First, Microsoft's exclusionary and anticompetitive OEM licenses foreclosed access to the OEM channel by competitors of Microsoft's PC operating system. Second, Microsoft's licenses imposed an unwarranted penalty or tax by requiring payment to Microsoft even if the OEM installed a non-Microsoft operating system. Third, the contract length of Microsoft's anticompetitive per processor contracts magnified its exclusionary effects, and Microsoft's exclusionary contracts foreclosed other PC operating system vendors from a substantial and critically important segment of the market. Finally, the Justice Department alleged that Microsoft maintained anticompetitive nondisclosure agreements that restricted ISVs from working with competing PC operating system developers to create competitive products.[63]

The purported anticompetitive effects of Microsoft's conduct were set forth in the complaint as well.[64] The government alleged that Microsoft's exclusionary practices had the effect of excluding competitors on a basis other than competition on the merits.[65] This allowed Microsoft to perpetuate illegally its monopoly in the PC operating system market.[66]

1564), *rev'd,* 56 F.3d 1448 (D.C. Cir. 1995).

[61] *Id.* ¶ 15. Monopoly power, by itself, is not illegal. For a violation of § 2 of the Sherman Act, the monopolist must have purposefully exercised its monopoly power to acquire or maintain its market. *See* Aluminum Co. of Am. v. United States, 148 F.2d 416 (2d Cir. 1945).

[62] Complaint ¶ 19, *Microsoft I* (No. 94-1564).

[63] *Id.* ¶ 29.

[64] *Id.* ¶¶ 35-38.

[65] *Id.* ¶ 35.

[66] *Id.* OEMs that do not offer customers a choice of operating systems may charge customers a higher price for PCs with non-Microsoft operating systems in order to be able to pay the double royalty necessitated by the Microsoft per processor agreements. Thus, users who do not receive a Microsoft system are still, indirectly, paying Microsoft. *Id.* ¶ 37.

Moreover, not only did Microsoft's unlawful conduct harm consumers directly, its practices also deterred the development of competing operating systems, thereby depriving consumers of a choice of systems with possibly superior features.[67]

Microsoft and the Justice Department filed a proposed consent decree simultaneously with the Justice Department's formal complaint.[68] The consent decree precluded Microsoft from a number of practices. Microsoft was prohibited from: (1) entering into any license agreement for a Microsoft operating system[69] with a duration of more than one year; (2) requiring OEMs to purchase a minimum number of Microsoft operating systems; (3) requiring OEMs to purchase other Microsoft products as a condition of licensing Microsoft operating systems; (4) entering into any license agreement that restricted an OEM from licensing, selling or distributing any non-Microsoft operating system product; and (5) entering into any licensing agreement that required an OEM to pay a royalty for each PC sold, regardless of the type of microprocessor used. Finally, with a few exceptions, Microsoft was prevented from entering into any licensing agreement other than one in which royalties were based on the number of copies of each Microsoft operating system sold.[70]

According to the decree, any OEM whose current licensing agreement with Microsoft was inconsistent with the consent decree could either terminate the licensing agreement or ne-

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[67] Complaint ¶ 38, *Microsoft I* (No. 94-1564).

[68] Proposed Consent Decree, United States v. Microsoft, 159 F.R.D. 318 (D.D.C.) (No. 94-1564), *rev'd*, 56 F.3d 1448 (D.C. Cir. 1995). In addition to executing the proposed settlement with the U.S. Justice Department, Microsoft simultaneously agreed to a settlement with the European Community Commission. This followed a complaint filed with the EC Commission by Novell, the world's second largest PC software company. The EC Commission, like the U.S. Justice Department, was concerned about Microsoft's use of per processor licenses and the duration of Microsoft license agreements. Microsoft agreed to the exchange of information between the Justice Department and the EC Commission, which resulted in a settlement with the EC Commission that was very similar to Microsoft's settlement with the United States. Bender, *supra* note 57, at 322.

[69] The consent decree expressly excluded Windows NT, which does not possess a substantial market share. Deborah A. Garza, *The Court of Appeals Sets Strict Limits on Tunney Act Review: The Microsoft Consent Decree*, ANTITRUST, Fall 1995, at 21-22.

[70] However, the licensee may have the option to renew for a second year. Proposed Consent Decree, *Microsoft I* (No. 94-1564).

gotiate with Microsoft to modify it.[71] Further, within thirty days of the entry of the consent decree, Microsoft was required to provide a copy of the consent decree to all OEMs with whom it had licensing agreements.[72] Absent from the consent decree was any reference to Microsoft's alleged "vaporware" practices whereby Microsoft preannounced products in order to discourage competition from other software developers.

In the stipulation accompanying the proposed consent decree, Microsoft agreed to be bound by the decree unless the government withdrew its approval of the decree.[73] The final step in the settlement process was to be the Tunney Act proceeding. Prior to this case, formal judicial approval of an antitrust settlement generally had been pro forma.[74]

III. JUDGE SPORKIN'S REJECTION OF THE CONSENT DECREE

A. *The Tunney Act Hearing*

On January 20, 1995, a hearing was held pursuant to the Tunney Act to consider the proposed consent decree. The proceeding generated an unusual amount of public interest.[75] In addition to the Justice Department and Microsoft, a number of representatives from the computer industry were present.[76] Assistant Attorney General Bingaman began the proceeding by stating that the role of the court was to determine whether the consent decree was "within the reaches of the public interest."

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[71] *Id.*

[72] *Id.*

[73] Bender, *supra* note 57, at 319 (quoting Stipulation Accompanying Proposed Consent Decree, *Microsoft I* (No. 94-1564)).

[74] *See, e.g.,* United States v. Western Elec., 993 F.2d 1572 (D.C. Cir. 1993); United States v. Bechtel, 648 F.2d 660 (9th Cir. 1981); United States v. National Broadcasting Co., 449 F. Supp. 1127 (C.D. Cal. 1978).

[75] The Justice Department's settlement with Microsoft was much weaker than many had hoped. Many of Microsoft's application software competitors had hoped that Microsoft would be forced to build a "wall" between its operating system and its application software. Some had even hoped for a forced breakup of the computer giant. Garza, *supra* note 69, at 22.

[76] Representatives appeared on behalf of the Computer and Communications Industry Association ("CCIA"), I.D.E. Corporation ("IDEA"), and three anonymous companies. Although he allowed them to participate in the proceedings, Judge Sporkin denied the motions of IDEA and CCIA to intervene. *Microsoft I*, 159 F.R.D. at 328.

B. *Judge Sporkin's Opinion and Order*

On February 14, 1995, Judge Sporkin surprised both Microsoft and the Justice Department when he handed down his opinion and order denying the motion to enter the proposed consent decree. He complained that the proposed decree was "significantly and substantially narrower than the requests contained in the prayer for relief in the complaint,"[77] and that there was a "severe lack of information regarding the proposed consent decree," noting that only five public comments were filed during the public comment period provided by the Tunney Act.[78] He was also displeased that neither the Justice Department nor Microsoft had supplied any information regarding how the consent decree was formulated, stating that "[i]f a Court is asked to approve a decree without information regarding the effect of the decree, then the Court's role becomes a nullity, exactly what the Tunney Act sought to prevent."[79] Because of the lack of information provided by both the Justice Department and Microsoft, Judge Sporkin decided to invoke the procedures provided by the Tunney Act, including permitting the appearance of amici curiae.

Judge Sporkin then addressed the scope of his authority regarding the public interest determination. Contrary to what the Justice Department and Microsoft argued, Judge Sporkin viewed his role in the determination as expansive, arguing that the language of the statute, the legislative history, precedent and common sense supported his position.[80]

Asserting what he viewed to be his authority under the Tunney Act, Judge Sporkin did not find the proposed consent decree to be in the public interest for four reasons.[81] First, the government refused to supply the court with certain information that it deemed necessary in making its public interest determination. As Judge Sporkin noted: "Basically, other than being told the Government spent a great deal of time on a wide

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[77] *Id.* at 324.
[78] *Id.* at 326.
[79] *Id.* at 327.
[80] *Id.* at 330. "It would be an abdication of the Court's responsibility, as mandated by Congress, not to conduct a thorough review of this proposed decree." *Id.* at 329.
[81] *Microsoft I,* 159 F.R.D. at 332.

ranging inquiry and that the defendant is a tough bargainer, the Court has not been provided with the essential information it needs to make its public interest finding."[82] Second, the scope of the decree was too narrow.[83] In particular, Judge Sporkin was critical of the fact that the settlement applied only to Windows and MS-DOS and not to operating systems that might later be developed by Microsoft. He noted, "Given the pace of technological change, the decree must anticipate covering operating systems developed for new microprocessors. In addition, taking into account Microsoft's penchant for narrowly defining the antitrust laws, the Court fears there may be endless debate as to whether a new operating system is covered by the decree."[84] Third, the parties were unwilling to address certain anticompetitive practices in which Microsoft had allegedly engaged.[85] Finally, Judge Sporkin was not satisfied that the enforcement and compliance mechanisms in the decree were sufficient.[86]

Both Microsoft and the Justice Department submitted appeals to Judge Sporkin's rejection of the proposed consent decree.[87] These appeals are discussed in turn below.

C. *The Justice Department Appeals*

In its appeal, the Justice Department argued that Judge Sporkin had "misconstrued the permissible scope of his review under the Tunney Act"[88] and that his decision, "unprecedented in the history of the Tunney Act, radically alters the nature

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[82] *Id.* In a typically colorful line, Judge Sporkin added, "Tunney Act courts are not mushrooms to be placed in a dark corner and fertilized." *Id.* at 333.

[83] *Id.* at 333.

[84] *Id.*

[85] *Id.* The court was concerned about the allegations of vaporware, Microsoft's use of its monopoly in the operating systems market to give it an advantage in the application market, and its use of technical sabotage to render competitor's application software incompatible with Microsoft operating systems.

[86] *Microsoft I*, 159 F.R.D. at 333. Judge Sporkin was not convinced that the settlement would open the market, which has large entry barriers. *See supra* note 39.

[87] *See* David Bender, *Microsoft and the Antitrust Wars*, in COMPUTER SOFTWARE AND THE INTERNET, at 39 (PLI Patents, Copyrights & Literary Property Course Handbook Series No. G4-2953, 1995).

[88] Motion for Expedited Consideration and for Briefing Schedule, *Microsoft I* (94-1564).

of Tunney Act review . . . [and] threatens the ongoing enforce-
ment of the Antitrust Division."[89] The Justice Department
claimed that Judge Sporkin had transformed the Tunney Act
into a "blueprint" for judicial prosecution of antitrust cases.[90]
According to the Justice Department, Judge Sporkin commit-
ted three fundamental errors in reaching his decision. First, he
erroneously concluded that the Tunney Act permits a court to
review the history of the government's investigation, including
its decision not to challenge certain practices, and its intention
to challenge other conduct in the future. The Justice Depart-
ment argued that "[t]he Tunney Act, however, never was in-
tended to substitute the court's views of what case to bring for
the government's."[91] Second, the court erred in failing to lim-
it its consideration of the effects of the decree to the specific
allegations made in the complaint.[92] Third, Judge Sporkin
failed to defer to the judgment and expertise of the Justice De-
partment, as the contended he was required to do.[93] Finally,
the Justice Department argued that the rejection of the con-
sent decree, if uncorrected, would deter future antitrust parties
from entering into consent judgments, resulting in effects "po-
tentially devastating to efficient enforcement of the
law . . . ."[94]

D. *Microsoft Appeals*

Microsoft's criticism of Judge Sporkin's decision was
somewhat stronger than that of the Justice Department.[95]
Microsoft explicitly appealed on a separation of powers princi-
ple, claiming that as a matter of constitutional law the court
was required to rely on the expertise of the Justice Depart-
ment in making its public interest determination.[96] Microsoft

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[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] Motion for Expedited Consideration and for Briefing Schedule, *Microsoft I*
(94-1564).
[94] *Id.*
[95] Bender, *supra* note 57, at 350 (citing Microsoft's Brief on Appeal, *Microsoft
II*, 56 F.3d 1448 (D.C. Cir. 1995) (No. 95-5039)).
[96] Bender, *supra* note 57, at 350 (citing Microsoft's Brief on Appeal, *Microsoft
II*, 56 F.3d 1448 (D.C. Cir. 1995) (No. 95-5039)).

argued that if the Tunney Act was intended to be used in the manner Judge Sporkin suggested, it would be an uncon- stitutional grant of prosecutorial discretion to the judiciary.[97]

Microsoft also alleged a number of serious procedural errors, one of which was Judge Sporkin's alleged reliance on *Hard Drive*,[98] a book about Bill Gates and Microsoft.[99] Microsoft claimed that the book was "riddled with factual inac- curacies, which Microsoft [had] no real opportunity to re- but."[100] Microsoft argued that Judge Sporkin should be dis- qualified for his decision to gather facts outside the record and for forming an adverse opinion based on these extrajudicial sources.[101]

E. *The Appeals are Granted and the Consent Decree Approved*

On April 24, 1995, the parties argued their appeals before the U.S. Court of Appeals for the District of Columbia Circuit. Judge Laurence Silberman wrote the opinion for the court, rejecting Judge Sporkin's reasoning and remanding the case ·with instructions that it be assigned to another district court judge.[102] Specifically, Judge Silberman ruled that a federal

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[97] Bender, *supra* note 57, at 350 (citing Microsoft's Brief on Appeal, *Microsoft II*, 56 F.3d 1448 (D.C. Cir. 1995) (No. 95-5039)).

[98] JAMES WALLACE & JIM ERICKSON, HARD DRIVE: BILL GATES AND THE MAK- ING OF THE MICROSOFT EMPIRE (1994).

[99] Bender, *supra* note 57, at 351 (citing Microsoft's Brief on Appeal, *Microsoft II*, 56 F.3d 1448 (D.C. Cir. 1995) (No. 95-5039)).

[100] Bender, *supra* note 57, at 351 (quoting Microsoft's Brief on Appeal at 23, *Microsoft II*, 56 F.3d 1448 (D.C. Cir. 1995) (No. 95-5039)).

[101] "It is apparent that to Judge Sporkin's mind, a book based largely on con- versations with Microsoft's competitors and disgruntled former employees has replaced the Complaint as the yardstick against which the sufficiency of the con- sent decree was to be measured." Bender, *supra* note 57, at 351 (quoting Microsoft's Brief on Appeal at 24, *Microsoft II*, 56 F.3d 1448 (D.C. Cir. 1995) (No. 95-5039)).

[102] The appeals court was troubled by a number of Judge Sporkin's actions, including his reliance on the book *Hard Drive* and his decision to allow three companies to proceed anonymously against Microsoft. Because of these concerns, the court took the unusual step of reassigning the case to a judge other than Judge Sporkin. *Microsoft II*, 56 F.3d at 1463-65.

Some trial judges were surprised at Judge Sporkin's removal from the case. Torry & Corcoran, *supra* note 9, at B1. One colleague of Judge Sporkin comment- ed that the tone of the opinion seemed "unduly harsh" and that the ruling may have reflected a build-up of tensions between appellate and trial judges in recent years. Torry & Corcoran, *supra* note 9, at B1. Judge Sporkin himself objected to

court is limited to determining only whether a proposed con-
sent decree in an antitrust case falls "'within the *reaches* of the
public interest.'"[103] Using this narrow standard, Judge
Silberman determined that the government cannot be com-
pelled to investigate further or bring claims it did not bring
originally.[104] Thus, absent a "strong showing" of bad faith or
improper behavior, a federal court is not free to second guess
the Justice Department's investigative process.[105] The case
was transferred and the consent decree approved.[106]

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the unusual move, stating that judges should have a right to defend themselves
when a party seeks their removal: "We give more due process to the common
criminal than we do to a judge. That can't be right . . . ." Torry & Corcoran,
supra note 9, at B1.

[103] *Microsoft II*, 56 F.3d at 1458 (quoting United States v. Gillette Co., 406 F.
Supp. 713, 716 (D. Mass. 1975)).

[104] *Id.*

[105] *Id.* at 1459 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401
U.S. 402, 420 (1971)).

[106] *Microsoft III*, No. CIV.A.94-1564, 1995 WL 505998 (D.D.C. Aug. 21, 1995).
Judge Thomas Penfield Jackson approved the consent decree in a brief decision.
His written analysis of the public interest determination consisted of a single
sentence concluding that "entry of this final judgment is in the public interest." *Id.*
at *7.

After the consent decree was approved, Assistant Attorney General Bingaman
declared that the case "sends a powerful message" to those who violate antitrust
law. G. Pascal Zachary, *A Winning Deal: Microsoft Will Remain Dominant Despite
Pact in Antitrust Dispute*, WALL ST. J., July 18, 1994, at A1. Public sentiment,
however, indicates that those claims may be "political hyperbole" and that the
Justice Department failed to attack some of Microsoft's most successful
anticompetitive tactics. *Id.* One reason for this may have been the Justice
Department's reluctance to take on a company that has been a symbol of Ameri-
can technological superiority after years of being trounced by the Japanese in
many markets. *Id.*

Microsoft's competitors and industry analysts were certainly disappointed with
the agreement. *Id.* Rick Sherlund, an analyst at Goldman Sachs, called the settle-
ment "a fairly hollow victory" for the government. *Id.* Gordon Eubanks, chief exec-
utive officer of Symantec Inc., a medium-size software company, added, "It doesn't
seem like anything has changed at all." *Id.* And, perhaps most tellingly, William
Neukom, Microsoft's general counsel, predicted that the decree would have "no
material effect" on the company. *Id.*

IV. ANALYSIS OF JUDGE SPORKIN'S DECISION

A. *The Language of the Tunney Act*

The plain language of the Tunney Act does not contain the limitations contemplated by Judge Silberman, the Justice Department and Microsoft. Instead, the language is broad, discretionary and supportive of Judge Sporkin's interpretation. Before entering a consent decree, the court must determine that the decree is "in the public interest."[107] Although the Act does not define the term "public interest," it does broadly suggest that the court may use, in making its public interest determination, "any other considerations bearing upon the adequacy of such judgment."[108]

Subsection (f) of the Tunney Act offers the court specific recommendations for making the public interest inquiry. These include, but are not limited to: (1) taking the testimony of government officials or experts; (2) appointing special masters, experts or consultants and requesting the views, evaluations or advice of any person with respect to any aspect of the decree; (3) authorizing third parties to participate in a full or limited basis as intervenors, amici curiae, or in any other capacity the court deems to be in the public interest; and (4) reviewing public comments and the Justice Department's responses to them.[109] Following each of these four recommendations is a discretionary phrase, "or as the court may deem appropriate."[110] Despite the clarity of this language, Congress reiterates the message a final time in the concluding language of subsection (f), which states: "[T]he court may . . . take such other action in the public interest as the court may deem appropriate."[111]

It is a basic canon of statutory interpretation that when the language of a statute is plain and unambiguous, it must be given effect.[112] The theory behind this principle is that the

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[107] Tunney Act, 15 U.S.C. § 16(e).

[108] *Id.*

[109] *Id.* § 16(f).

[110] *Id.*

[111] *Id.* § 16(f)(5).

[112] HENRY C. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 35-36 (1896); FRANCIS J. MCCAFFREY, STATUTORY CONSTRUCTION 38

best way to determine the meaning of statutory language is to examine the language of the statute itself.[113] When the words employed are straightforward, the statute needs no further interpretation because it interprets itself.[114] The Tunney Act is one such example where the meaning behind the words is evident and, thus, further explanation becomes superfluous.

Despite the clarity of the Tunney Act's language, Microsoft and the Justice Department claimed that Judge Sporkin was limited in his public interest determination to the allegations specified in the complaint.[115] Under their reading of the Act, Judge Sporkin was not permitted to consider whether other Microsoft practices were detrimental to the public interest. Microsoft and the Justice Department referred to the following language in subsection (e) of the Tunney Act to support this assertion: "[T]he court may consider . . . the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations *set forth in the complaint* including consideration of the public benefit . . . ."[116] Their argument for reliance on a single phrase of the Act is a tenuous one, however, for as the Supreme Court held in *King v. St. Vincent's Hospital,*[117] statutes are not intended to be read in pieces. Their true meaning can only be deduced from reading them as a whole.[118] An application of this basic principle of

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(1953). There is one exception to this principle of statutory construction and that is if the plain language of the statute would lead to "patently absurd consequences," then it need not be given effect. United States v. Brown, 333 U.S. 18, 27 (1948); *see* Church of the Holy Trinity v. United States, 143 U.S. 457, 460-61 (1892) (the decision gives examples of such absurd results: a sheriff was prosecuted for obstructing the mails even though he was executing a warrant to arrest the mail carrier for murder; a law against drawing blood in the streets was to be applied against a physician who came to the aid of a man who had fallen ill in the street).

[113] McCAFFREY, *supra* note 112, at 1; Robert J. Araujo, *The Use of Legislative History in Statutory Interpretation: A Look at Regents v. Bakke,* 16 SETON HALL LEGIS. J. 57, 70 (1992).

[114] McCAFFREY, *supra* note 112, at 1.

[115] The Justice Department and Microsoft submitted separate briefs on appeal. Justice Department's Brief on Appeal, *Microsoft II* (No. 95-5037); Microsoft's Brief on Appeal, *Microsoft II* (No. 95-5037).

[116] Tunney Act, 15 U.S.C. § 16(e) (emphasis added).

[117] 502 U.S. 215 (1991).

[118] *See* Conroy v. Aniskoff, 507 U.S. 511 (1993); Kokoszka v. Belford, 417 U.S. 642 (1974). "[T]he key to the whole act approach is . . . that all provisions and other features of the enactment must be given force, and provisions must be interpreted so as not to derogate from the force of the other provisions and features of

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statutory interpretation necessitates a reading of the Tunney Act in its entirety, including the language granting the court broad discretionary power in its public interest determination.

B. *Legislative History*

The legislative history surrounding the passage of the Tunney Act reinforces the plain meaning of the Act and supports Judge Sporkin's position that Congress intended to give the judiciary broad review powers.[119] The Tunney Act was passed in the wake of public concern over secrecy in government settlements with large corporations—it was intended to prevent settlements which "take on the aspects of a 'sweetheart' agreement."[120] One such settlement in particular, the ITT antitrust settlement, was crucial in sparking the legislative reform effort that led to the passage of the Tunney Act.[121]

ITT was already the nation's ninth largest company when it attempted to acquire three major companies, Grinnell Corporation, Canteen Corporation and the Hartford Fire Insurance Company. This attempted expansion was met by a government antitrust challenge in 1969. The cases challenging the acquisitions of Grinnell and Canteen were tried on the merits, and in both cases the government lost.[122] After the second loss, but prior to a third trial challenging the acquisition of Hartford, the government reached a settlement with ITT. The settlement permitted ITT to retain Hartford in exchange for divesting itself of several smaller subsidiaries.[123] When the settlement was reached in 1971, only the proposed consent decree was

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the whole statute." WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, JR., CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY 644 (2d ed. 1995).

[119] It is a basic principle of statutory construction that the object of all interpretation of statutes is to ascertain the meaning and intention of the legislature. *See* BLACK, *supra* note 112, at 35; MCCAFFREY, *supra* note 112, at 1. For a review of how legislative history is used to clarify statutes, see Araujo, *supra* note 113.

[120] 119 CONG. REC. HR28,156 (1973).

[121] Note, *The ITT Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 COLUM. L. REV. 595, 603 (1973) [hereinafter *ITT Dividend*].

[122] *Id.*

[123] *Id.* at 603-04.

made public, which was the general practice at that time. The details of the negotiation process and the reasons for the government's decision were not revealed.[124]

The reasons for the settlement, however, became public the following spring during the hearings in which a Senate committee considered the qualifications of Richard G. Kleindienst to be Attorney General. This probe of the negotiation process surrounding the ITT case aroused suspicion that there were some inappropriate reasons for the government's settlement. Among these was the suggestion that ITT had offered to help finance the 1972 Republican National Convention in return for the settlement. Another was the Antitrust Division's concern that a divestiture of Hartford would cause "hardship" to ITT, its stockholders and the economy.[125]

Ralph Nader, who had opposed the approval of the ITT consent decree, attempted to use these revelations to reopen the ITT case. His suit suggested that "hardship" was not a legally permissible ground upon which to settle an antitrust suit, and that the Antitrust Division had violated its duty to disclose the reasons for the settlement of the case. Extensive hearings on the merits of Nader's claim were held. The allegation that ITT had offered to help finance the Republican Convention was found to be completely unjustified.[126] In addition, the court determined that the government's reliance on "hardship" as a factor in reaching a settlement carried no implication of fraud. Nevertheless, in the wake of the unproven allegations regarding the ITT settlement, legislation was introduced to rectify the defects in the antitrust settlement process.[127]

The congressional debate surrounding the introduction of the Tunney legislation in 1973 indicates concern that public confidence in the propriety of the antitrust settlement process was waning. As one Senator stated:

> [R]ecent disclosures in connection with the ITT antitrust settlement have again shaken public confidence in our legal system. At a time when public confidence in our institutions is, according to polls, at

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[124] *Id.* at 604.
[125] *Id.*
[126] *ITT Dividend, supra* note 121, at 605.
[127] *ITT Dividend, supra* note 121, at 606.

an all-time low, the recent disclosures concerning the ITT case are a further blow to the already beleaguered Department of Justice.[128]

The Senate discussions also recognized the importance of antitrust settlements to the public, a public that is largely unable to voice its opinions about such settlements: "[E]nforcement of the antitrust laws may have a very profound effect on the lives of every citizen of this country."[129] In addition, the bill's sponsor, Senator Tunney, voiced concern over the political implications that an increasing concentration of economic power could have, stating: "[T]he bigger the company, the greater the leverage it has in Washington . . . . We are not yet a corporate state but we may wish to decide whether we want to be before it happens by default."[130]

The above concerns reemphasize the position that Congress intended the Tunney Act to provide the courts with broad review powers. As a tool of statutory construction, the *Congressional Record* confirms the plain meaning of the legislation:

> The mandate is a highly significant one because it states as a matter of law that the role of the district court in a consent decree proceeding is an *independent* one. The court is not to operate simply as a rubber stamp, placing an imprimatur upon whatever is placed before it by the parties. Rather it has an independent duty to assure itself that entry of the decree will serve the interests of the public generally. Though this may seem a truism to some, too often in the past district courts have viewed their roles as simply ministerial in nature—leaving to the Justice Department the role of determining the adequacy of the judgment from the public's view.[131]

C. *Case Law*

In making the public interest determination, courts have employed varying standards of review. Many have been deferential, expressing a reluctance to question the Justice Department's capabilities in formulating settlements, absent a showing of bad faith or malfeasance. This trend seems to have begun with an antitrust case that predated the Tunney Act and dealt with intervention of parties rather than review of

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[128] 119 CONG. REC. S35,907 (1973) (statement of Sen. Mathias).
[129] 119 CONG. REC. S3451 (1973) (statement of Sen. Tunney).
[130] *Id.*
[131] 119 CONG. REC. S31,675 (1972) (emphasis added).

consent decrees, *Sam Fox Publishing Co. v. United States.*[132] In *Sam Fox*, the Supreme Court advocated deference to the government's position, stating that: "[S]ound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting."[133] Although the *Sam Fox* decision involved a district court's denial of intervention to private parties and not specifically consent decrees, the district court in *United States v. Associated Milk Producers, Inc.* concluded that "lower federal courts must follow the guidance of the dictum of [*Sam Fox*]."[134] Similarly, the district court in *United States v. National Broadcasting Co.* concluded that the *Sam Fox* policy of deference should be followed despite evidence that the Tunney Act was specifically designed to prevent judicial rubber stamping of consent decrees.[135]

A number of cases, however, demonstrate a more intensive exercise of judicial review. In *United States v. AT&T Co.,*[136]

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[132] 366 U.S. 683 (1961). For a more in-depth discussion of this case, see *Scope of Judicial Review, supra* note 34, at 165-69.

[133] *Sam Fox*, 366 U.S. at 689.

[134] 394 F. Supp. 29, 41 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976).

[135] United States v. National Broadcasting Co., 449 F. Supp. 1127 (C.D. Cal. 1978). Criticism of this approach followed. *See* Michael J. Zimmer & Charles A. Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination; Optimizing Public and Private Interests*, 1976 DUKE L.J. 163, 208, 210 ("[U]ntil recently, courts routinely rubber-stamped proposed consent decrees . . . largely due to doubts about the wisdom of reviewing Justice Department determinations. The Tunney Act, however, establishes a contrary public policy.").

[136] 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). *AT&T* also involved a monopoly of the telecommunications industry. In that case, however, the consent decree called for the forced breakup of the defendant telecommunications giant. In *United States v. GTE Corp.,* another antitrust case, Judge Greene determined that GTE's status was not as dominating as AT&T's had been and, thus, complete divestiture was not required.

In *Maryland v. United States*, the Supreme Court affirmed without opinion the entry of several consent decrees. In a dissent joined by Chief Justice Burger and Justice White, Justice Rehnquist questioned whether the public interest determination of the Tunney Act is "within the judicial power." 460 U.S. at 1106 (Rehnquist, J., dissenting). Justice Rehnquist suggested that the public interest review may be a political question that is beyond the competence of the judiciary. *Id.* at 1105; *see* Joseph C. Teitelbaum, *The Scope and Constitutionality of Judicial Review under the Tunney Act: United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C.

despite claiming that a lower standard of review was required, a district court judge subjected a consent decree to intense examination. In that case, Judge Harold Greene stated that a less rigorous review was required because parties would not otherwise be motivated to consent to judgments. As a consequence of a higher standard of review, the consent decree would be eliminated as a tool for antitrust enforcement. Judge Greene reasoned that as long as the proposed settlement falls within the reaches of acceptability, it should be valid.[137]

Nevertheless, Judge Greene emphasized that this deferential standard does not imply that a court must approve a settlement that it feels is inadequate. To do so, he felt, would be to ignore the clear intent of Congress in passing the Tunney Act.[138] In making the public interest determination, Judge Greene emphasized that the court's role was to view the settlement in terms of the basic purposes of antitrust law.[139] He noted that the Supreme Court had found that in enacting the Sherman Act, Congress had sought to "preserv[e] free and unfettered competition as the rule of trade."[140] Thus, the decree must look not only to past violations, but to future ones as well, and must foreclose the reoccurrence of further antitrust violations.[141] Judge Greene then carefully evaluated the individual terms of the proposed settlement, and conditioned his approval of the decree on the parties' acceptance of modifications that satisfied the district court's public interest criteria.[142]

Two years after *AT&T*, in *United States v. GTE Corp.*,[143] Judge Greene again subjected a consent decree to intense judicial review. He emphasized that the court's role is to determine that each provision of a proposed settlement is in the public interest, not merely that the settlement as a whole is

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Cir. 1995), 19 HARV. J.L. & PUB. POL'Y 941 (1996) (arguing that whether the scope of a particular consent decree is in the public interest is a nonjusticiable political question).

[137] *AT&T*, 552 F. Supp. 131 (D.D.C. 1982).

[138] *Id.* at 151.

[139] *Id.* at 149.

[140] *Id.* (quoting Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958)).

[141] *Id.*

[142] *AT&T*, 552 F. Supp. at 231.

[143] 603 F. Supp. 730 (D.D.C. 1984).

reasonable.[144] In *GTE*, the government filed an antitrust action challenging the acquisitions by GTE of the telecommunication companies owned by the Southern Pacific Company, operators of Sprint long distance. The complaint declared that the effect of the acquisitions would be to lessen competition in the telecommunications industry, especially in the areas where GTE provided local telephone service. On the same day that the complaint was filed, the parties also filed a consent decree to settle the case.[145]

The consent decree in *GTE* allowed for the acquisition of Southern Pacific subject to a number of conditions.[146] In approving the decree, Judge Greene advocated a lower standard of review than he had used in the *AT&T* case because GTE had a smaller market share than AT&T and was a less concentrated company.[147] Despite this call for a less strenuous review, the court conditioned its approval of the settlement on several modifications of the proposed consent decree.[148]

In *United States v. Gillette Co.*,[149] Judge Bailey Aldrich of the U.S. District Court for the District of Massachusetts granted approval of a proposed consent decree between the government and Gillette, and provided one of the clearest indications that there is judicial uncertainty about the proper role to be taken by judges in the consent decree process. In *Gillette*, the government brought an action charging the defendant with violating antitrust laws in the dry shaving market. In its complaint, the government called for the complete divestiture of all the assets of the Braun Company, a German corporation.[150] The settlement, however, provided for only the divestiture of Braun's capacity to sell electric shavers in the United States.[151]

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[144] *Id.* at 740-41.
[145] *Id.*
[146] The additions demanded by Judge Greene included: (1) the establishment of procedural and substantive guidelines to be followed in the event of a violation of the decree; (2) the elimination of a provision permitting GTE within five years to provide information services directly; and (3) a modification to protect competition in the Hawaii-mainland telecommunications market. *Id.* at 753.
[147] *Id.* at 732-35.
[148] *GTE*, 603 F. Supp. at 753.
[149] 406 F. Supp. 713 (D. Mass. 1975).
[150] *Id.*
[151] *Id.*

In his opinion, Judge Aldrich recognized the difficult burden the court has in making the public interest determination. He stated that the legislative history of the Tunney Act shows that Congress "did not intend the court's action to be merely pro forma, or to be limited by what appears on the surface."[152] Judge Aldrich found it impossible to overlook the circumstances under which the Tunney Act was passed, implying a reference to the ITT litigation and public concern that antitrust settlements were too secretive. Additionally, he recognized the desire of Congress to impose a check on the government's expertise and good faith.[153]

Judge Aldrich also emphasized, however, the need to balance the above interests with the need to settle antitrust cases as efficiently as possible. He argued that the Tunney Act's listing of various procedures short of a comprehensive examination suggested the requirement that the court make the determination in the least complicated and least time consuming manner possible, stating, "Just as the parties are compromising, so in its process of weighing the public interest, must the court."[154] Recognizing that consent decrees are an important enforcement tool because they allow the allocation of resources elsewhere, the court declined to engage in extended proceedings in making the public interest determination.[155]

Judge Aldrich failed to offer clear reasons for his approval of the consent decree in *Gillette*. Rather, he stated generally that the settlement had met the requirements of the Tunney Act, the record had been open and extensive, and the government had acted in good faith.[156] In seeking to clarify the court's role in the proceedings, Judge Aldrich emphasized that it is not the court's duty to determine whether the consent decree is the best settlement possible for the public. Instead, the court must determine only whether the settlement is "within the reaches of the public interest."[157] In making this deter-

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[152] *Id.* at 715.
[153] *Id.*
[154] *Gillette*, 406 F. Supp. at 715.
[155] *Id.*
[156] *Id.* at 715-16.
[157] *Id.* at 716.

mination, Judge Aldrich suggested that the court must "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass."[158]

In contrast, the decision in *United States v. BNS Inc.*[159] suggests that the Ninth Circuit might agree with Judge Sporkin's independent inquiry.[160] In *BNS*, the Justice Department challenged the takeover of Koppers by BNS, both of which are companies that manufacture and sell aggregate rock in southern California. The complaint by the Justice Department claimed that the merger would stifle competition in the sale of aggregate rock in this market.[161] In an attempt to resist the takeover, Koppers argued that the Justice Department should enjoin the entire transaction because it would stifle competition in southern California as well as other geographic and product markets. The district court, invoking its review powers under the Tunney Act, preliminarily enjoined the merger in order to give the court more time to review the effects of the merger on other markets.[162] The Ninth Circuit upheld the decision, implicitly approving the district court's investigation beyond the complaint to anticompetitive harm not alleged by the Justice Department.

Much of the case law concerning antitrust settlements fails to advance conclusively the court's independent role in making the public interest determination. Instead, the majority of cases pay great deference to the Justice Department's conclusions.[163] It is unclear why this occurs in light of the plain language of the statute, as well as Congress's intent as evidenced by the *Congressional Record*. A number of theories for this anomaly have been proposed. One is that there is a general reluctance by the courts to review the discretionary decisions of

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[158] *Id.*

[159] 848 F.2d 945 (9th Cir. 1988).

[160] *See* Garza, *supra* note 69, at 24.

[161] *BNS*, 848 F.2d at 459.

[162] *Id.* at 458.

[163] *See, e.g.,* United States v. Bechtel Corp., 648 F.2d 660, 665 (9th Cir. 1981) ("The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General."); United States v. Western Elec. Co., 993 F.2d 1572, 1576 (D.C. Cir. 1993) ("[T]he court [is] bound to accept any modification that the Department reasonably regarded as advancing the public interest."); United States v. Airline Tariff Publishing Co., No. CIV.A.92-2854, 1993 WL 95486 (D.D.C. 1993).

administrative bodies.[164] A second theory is that the judiciary fears that calling too many witnesses to help the court understand the case may unintentionally undermine the agreement and cause the defendant to withdraw its consent to the settlement.[165] A third explanation for the reluctance is that courts are aware that "facilitating the settlement of the case" is a stated objective under Rule 16 of the Federal Rules of Civil Procedure.[166] Regardless of the reasons for the courts' hesitation to review consent decrees, the lack of independent evaluation by courts contradicts the intent of the legislature in enacting the Tunney Act.[167]

In addition to the specific reasons indicated by the legislative history of the Tunney Act, there are a number of features inherent in the antitrust settlement process that support the demand for a thorough and intensive review.[168] First, consent decrees often set an example for the rest of the implicated industry.[169] Others in the affected industry tend to conform to a decree's provisions even though it is not specifically required of them.[170] Second, consent decrees may significantly hamper the deterrent effect of the antitrust laws.[171] This is largely because consent decrees do not have prima facie effect,[172] thereby practically eliminating the possibility that a private claimant will succeed in a treble damage action against a corporate defendant with deeper pockets.[173] Finally, because a

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[164] *ITT Dividend, supra* note 121, at 610.

[165] *ITT Dividend, supra* note 121, at 610.

[166] FED. R. CIV. P. 16. In Owen Fiss's *Against Settlement,* 93 YALE L.J. 1073 (1984), Professor Fiss argues that settlements are, at best, "a capitulation to the conditions of mass society and should be neither encouraged nor praised." *Id.* at 1075. Adjudication, unlike settlements, supplies us with rules and precedents and guides future behavior. Furthermore, adjudication has a unique purpose in that it is a reasoned elaboration and expression of societal values. For a discussion of Owen Fiss's article, see David Luban, *Settlements and the Erosion of the Public Realm,* 83 GEO. L.J. 2619 (1995).

[167] *See supra* Section IV.B.

[168] *Scope of Judicial Review, supra* note 34, at 163-65.

[169] *Scope of Judicial Review, supra* note 34, at 163-65.

[170] *Scope of Judicial Review, supra* note 34, at 163 ("[C]onsent decrees often create a 'follow-the-leader' effect in a particular industry, effectively setting the standard of conduct for the entire industry.").

[171] *Scope of Judicial Review, supra* note 34, at 163.

[172] Tunney Act, 15 U.S.C. § 16(a).

[173] Due to the protracted and expensive nature of antitrust litigation, few private plaintiffs are able to support the expense of litigating against corporate defen-

consent decree is often the result of a long and expensive investigation by the government, "'it is both logical and necessary that the end result be as carefully considered as possible.'"[174]

D. *Separation of Powers*

On appeal, Microsoft claimed that Judge Sporkin's broad reading of the Tunney Act constituted an overstepping by the judiciary into the prosecutorial discretion of the executive branch.[175] The Framers of the United States Constitution purposely provided for allocation of national authority among the legislative, executive and judicial branches. That desire for separation is evidenced by the treatment of each branch in Articles I, II and III of the Constitution. However, this separation was not intended to be airtight.[176] A system of checks and balances was deliberately built into the governmental structure to ensure against excessive concentrations of power.[177] In *Nixon v. Administrator of General Services*,[178] the Supreme Court rejected the idea that the Constitution contem-

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dants and their deep pockets. *See* 119 CONG. REC. S3451 (1973) ("[F]ew private plaintiffs are able to sustain a case in the absence of parallel litigation by the Justice Department.") (statement of Sen. Tunney).

[174] *Scope of Judicial Review, supra* note 34, at 34 n.78 (quoting 119 CONG. REC. S3452 (1973) (statement of Sen. Tunney)).

[175] Motion for Expedited Consideration and for Briefing Schedule, *Microsoft I*, 159 F.R.D. 318 (D.D.C. 1995) (No. 94-1564), *rev'd*, 56 F.3d 1448 (D.C. Cir. 1995). In this motion, Microsoft joined the Motion for Expedited Consideration and for Briefing Schedule filed by the United States on the same day, February 16, 1995. The motion made by the United States sets forth the reasons for the appeal of Judge Sporkin's rejection of the proposed consent decree, namely that Judge Sporkin misconstrued the permissible scope of judicial review under the Tunney Act.

[176] THE FEDERALIST No. 48 (James Madison).

[177] THE FEDERALIST No. 51 (Alexander Hamilton or James Madison). The text reads: "To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be *the means of keeping each other in their proper places.*" *Id.* at 335-36 (Sherman F. Mitchell ed., 1937) (emphasis added). For supporting cases, see generally Buckley v. Valeo, 424 U.S. 1 (1976); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

[178] 433 U.S. 425 (1977).

plates a complete division of authority among the three branches.[179] Instead, the Supreme Court supports a "more pragmatic, flexible approach . . . ."[180]

Similarly, Judge Sporkin's exercise of the provisions of the Tunney Act is indicative of the flexibility necessary to provide a system of checks and balances. It is indisputable that a key element of the executive branch's constitutional power is the power to enforce the law,[181] which includes the power to investigate and prosecute violations of the law. However, the Supreme Court appears willing to allow certain infringements upon that power. For example, the statute in question in *Morrison v. Olson* required the Attorney General to apply to a special federal court for a special prosecutor to investigate allegations of wrongdoing by executive branch members.[182] Once appointed, the special prosecutor could be removed by the Attorney General only under very limited circumstances. Three former government officials who were subpoenaed to testify before a grand jury brought suit challenging the authority of the special prosecutor. The Supreme Court decided that the law did not unconstitutionally usurp executive

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[179] *Id.* In *Nixon*, the Court rejected a separation of powers constitutional challenge to the Presidential Recordings and Materials Preservation Act of 1974, enacted by Congress to ensure custody of documents and tape recordings created during the tenure of former President Richard Nixon.

[180] *Id.* at 442. Similarly, in a more recent case, Mistretta v. United States, 488 U.S. 361 (1989), the Supreme Court recognized that a "twilight area" exists where the powers of the three branches are mixed. *Id.* at 386.

Legal scholars and the Supreme Court have long attempted to make sense of the separation of powers doctrine. *See, e.g.,* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 574 (1954) (refusing to implement the President's order to seize steel mills because Congress, and not the President, is vested with the lawmaking function); *Humphrey's Ex'r*, 295 U.S. 602 (1935) (limiting the President's power to remove members of the FTC). It is, admittedly, an area of contested constitutional meaning. Nevertheless, a complete discussion of this debate is beyond the scope of this Comment. For a more comprehensive discussion of these issues, see Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175 (1990); Mathew James Tanielian, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961 (1995); Keith Werhan, *Normalizing the Separation of Powers*, 70 TUL. L. REV. 2681 (1996).

[181] U.S. CONST. art. II, § 3.

[182] 487 U.S. 654 (1988). Ironically, Judge Silberman, who reversed Judge Sporkin in *Microsoft II* claiming that there had been a separation of powers violation, was himself reversed in *Morrison* by the Supreme Court, which determined that Judge Silberman's finding of a separation of powers violation was unfounded.

power because the infringement was slight and did not disrupt the proper balance between the coordinate branches of the government.[183] Similarly, even if, arguendo, the rejection of the Microsoft settlement slightly infringed upon the executive branch's constitutionally assigned functions, namely prosecuting antitrust cases, this intrusion is justified by the need to ensure the propriety surrounding government settlements with large and wealthy corporations.[184]

Although the Supreme Court's modern separation of powers jurisprudence has been somewhat inconsistent,[185] Justice Kennedy's concurrence in *Public Citizen v. Department of Justice*[186] attempts to set forth the standard of review for cases in which a separation of powers violation has been asserted. A balancing approach is used by the Court to determine whether the constitutional powers of one of the three branches has been infringed.[187] In evaluating the alleged infringement of the President's constitutional powers in *Public Citizen*, Justice Kennedy asserted that the primary focus is whether the President has been prevented "from accomplishing [his] constitutionally assigned functions."[188] If infringement is found, the next step for the Court is to determine whether "the extent of the intrusion on the President's powers 'is justified by an overriding need to promote objectives within the constitutional authority of Congress.'"[189] Justice Kennedy noted that the Court was especially likely to allow the alleged infringement if the power at issue was not explicitly assigned to a branch by the language of the Constitution, but merely thought to be within the general grant to the executive branch.[190]

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[183] *Id.* at 694-96.

[184] *See supra* Section IV.B.

[185] *See supra* note 180.

[186] 491 U.S. 440 (1989) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J., concurring).

[187] *Id.* at 484.

[188] *Id.* (quoting Morrison v. Olson, 487 U.S. 654 (1988)).

[189] *Id.*

[190] *Id.* at 485. In contemplating the balancing test used by the Supreme Court in separation of powers cases, Justice Kennedy noted that "[w]here a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself." *Id.* at 486.

Utilizing the balancing test set forth by Justice Kennedy, Judge Sporkin's rejection of the Microsoft consent decree falls within the realm of constitutionality because such judicial intervention does not interfere with the executive branch's constitutionally assigned power to enforce the law. Judicial intervention in settlements has long been practiced and, in fact, is promoted explicitly in the Federal Rules of Civil Procedure.[191] Rule 16 gives the court discretion in promoting the settlement of cases, stating: "In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference and conferences before trial for such purposes as facilitating the settlement of the case."[192]

Furthermore, the argument for deference made by the Justice Department and Microsoft fails to consider the courts' inherent equitable power to reject the entry of judgments that contravene the public interest.[193] Although negotiations involve administrative decisions by the government, a court's entry of a consent decree is a judicial act which is both constitutional[194] and statutory[195] in nature.[196] Thus, an intensive review of a consent decree by a district court may be supported apart from the Tunney Act.[197] The court's intrinsic

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[191] FED. R. CIV. P. 16(a)(5).

[192] FED. R. CIV. P. 16(a).

[193] *Scope of Judicial Review, supra* note 34, at 168-69; *see* United States v. Swift & Co., 286 U.S. 106 (1932). In *Swift*, a case decided long before the passage of the Tunney Act which dealt with the modification of a continuing decree, the Supreme Court found that a court's power to modify the decree, even if not expressly reserved in the decree, is inherent, stating: "All the parties to the consent decree concede the jurisdiction of the court to change it." *Id.* at 115.

[194] The Constitution grants courts the power to decide "[c]ases, in . . . Equity, arising under the laws of the United States." U.S. CONST. art. III, § 2.

[195] Section 4 of the Sherman Act, 15 U.S.C. § 4, and Section 15 of the Clayton Act, 15 U.S.C. § 25, direct the court "in equity to prevent and restrain . . . violations of the antitrust laws."

[196] *Scope of Judicial Review, supra* note 34, at 168.

[197] *Scope of Judicial Review, supra* note 34, at 168.

equitable power "over [its] own process[ ], to prevent abuse, oppression and injustice"[198] negates the demand for deference to the Justice Department's wisdom.[199]

CONCLUSION

The language of the Tunney Act, case law and legislative history support Judge Sporkin's pragmatic view of the judiciary's role in reviewing consent decrees in antitrust cases. Despite the expertise and the negotiating skill of the Justice Department attorneys, they are neither infallible nor omniscient.[200] The Tunney Act thus operates as a check against errors made by the Justice Department, for "[i]n approving a particular decree, the Justice Department attorneys may overlook certain issues, ignore certain concerns, or misunderstand certain facts."[201] Indeed, the continuing aggressiveness of Microsoft's practices has left grave questions unanswered about the efficacy of the government's settlement.[202]

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[198] *Scope of Judicial Review, supra* note 34, at 161 n.57 (quoting *Antitrust Procedures and Penalties Act: Hearings on S.782 and S.1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 93d Cong., 1st Sess. 76 (1973)).

[199] *Scope of Judicial Review, supra* note 34, at 169.

[200] *Scope of Judicial Review, supra* note 34, at 162.

[201] *Scope of Judicial Review, supra* note 34, at 177 n.57 (quoting CONG. REC. 31,675 (1972)).

[202] *See supra* note 3.