ORAL ARGUMENT SCHEDULED FOR APRIL 24, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 95-5037, 95-5039
Consolidated Cases

UNITED STATES OF AMERICA,

Plaintiff-Appellant (No. 95-5037),

v.

MICROSOFT CORPORATION,

Defendant-Appellant (No. 95-5039).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

PARTIES AND AMICI

The parties to this litigation are the United States of America and Microsoft Corporation.

The following were granted amici status by the district court and similarly have been granted amici status in this appeal:

Computer and Communications Industry Association
I.D.E. Corporation
Wilson, Sonsini, Goodrich & Rosati (Law Firm) on behalf of three anonymous clients.

Additionally, the following submitted comments or pleadings in the district court:

Apple Computer, Inc.

J. Adam Burden
Chan & Jodziewicz (Law Firm)
Lantec
Anthony Martin
Micro Systems Option

RULING UNDER REVIEW

The United States seeks review of Judge Sporkin's Order Re Motion To Approve The Consent Decree (Feb. 14, 1995) (J.A. 1190-91) (no official citation yet available), in which Judge Sporkin refused to approve the proposed Final Judgment.

RELATED CASES

This case was not previously before this Court or any other court. It is related to D.C. Cir. No. 95-5039 (appeal of Microsoft Corporation), with which it is consolidated.

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TABLE OF AUTHORITIES

Authorities upon which we chiefly rely are marked with asterisks.

STATUTES

MISCELLANEOUS

GLOSSARY

AT&T	American Telephone and Telegraph Company
CCIA	Computer and Communications Industry Association
FTC	Federal Trade Commission
IBM	International Business Machines Corporation
PC	Personal Computer

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 15 U.S.C. 4 and 28 U.S.C. 1331 & 1337.

This Court's jurisdiction over the appeal from the district court's order refusing to approve the proposed consent decree rests on 15 U.S.C. 29(a) and 28 U.S.C. 1292(a)(1). Without immediate appeal, the parties will suffer the serious and perhaps irreparable deprivation of the opportunity to settle their case on the negotiated terms, and the government's antitrust enforcement program will be gravely damaged.[1] See

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[1]See Motion For Expedited Consideration And For Briefing Schedule 1-7 (Feb. 16, 1995).

Carson v. American Brands, Inc., 450 U.S. 79, 83-84, 86, 89 (1981); see also United States v. Colorado, 937 F.2d 505, 509 & n.1 (10th Cir. 1991); Sierra Club v. Electronic Controls Design, Inc., 909 F.2d 1350, 1353, 1354 n.3 (9th Cir. 1990); Durrett v. Housing Auth., 896 F.2d 600, 602 (1st Cir. 1990).

The district court order was entered on February 14, 1995, and the United States timely filed a notice of appeal on February 16, 1995.

STATUTORY PROVISIONS

The pertinent statutes, the Sherman Act, 15 U.S.C. 1-2, and the Antitrust Procedures and Penalties Act ("Tunney Act" or "Act"), 15 U.S.C. 16(b)-(h), are reproduced in the addendum to this brief.

STATEMENT OF ISSUES

1. Whether the district court erred as a matter of law in extending its Tunney Act review to competitive issues beyond the adequacy of the relief the government obtained to remedy the violations charged in the complaint.

2. Whether the government had a reasonable basis for concluding that the relief in the consent decree adequately and reasonably remedied the violations alleged in the complaint.

STATEMENT OF THE CASE

A. Proceedings in the District Court

On July 15, 1994, the United States filed a complaint charging Microsoft Corporation with unlawfully maintaining a monopoly in personal computer operating systems and restraining trade in violation of the Sherman Act through certain practices set forth in the complaint (J.A. 1, 10-25). Simultaneously, it filed a proposed

consent decree to settle the case (J.A. 26-40). The United States on August 19, 1994, published the proposed decree and a competitive impact statement in the Federal Register. See 59 Fed. Reg. 42,845, 42,845-57 (1994). Five comments were received (J.A. 120, 137-54), to which the United States responded on October 31, 1994 (J.A. 119-36). Subsequently, in January 1995, three proposed amici (two of which sought party status) submitted comments in opposition to the settlement (J.A. 5-7, 269-603, 794-802), to which the United States responded (J.A. 6, 625-41, 667-752). At the same time, the United States moved entry of the proposed Final Judgment (J.A. 667-69a). The district court (Sporkin, J.) heard oral argument on January 20, 1995 (J.A. 7, 810-961). On February 14, 1995, it entered an order refusing to approve the proposed decree (J.A. 8, 1190-91).

B. Statement of Facts

The consent decree in this case arose from two separate investigations by two separate antitrust enforcement agencies.

In 1990, the Federal Trade Commission began an investigation into possible antitrust violations by Microsoft. That inquiry focused on Microsoft's acquisition and maintenance of monopoly power over personal computer operating systems (J.A. 121-22. When the issue of filing a complaint reached the Commission in 1993, however, the agency deadlocked 2-2 on whether to bring a case much like the one the government brought here. The FTC then suspended its investigation (J.A. 158-60).

Upon learning that the FTC would not proceed, the Department of Justice's Antitrust Division initiated its own investigation (J.A. 122). The starting point was receipt of the Commission's extensive investigatory file, but the Department then

undertook its own investigation. The Department issued 21 Civil Investigative Demands, see 15 U.S.C. 1312, to Microsoft and third parties (J.A. 123, 715). It interviewed over 100 people, including former Microsoft employees, and individuals at roughly 80 companies that make, use, or compete with Microsoft software (J.A. 122, 715). And it took depositions of 22 persons, including Microsoft's Chairman and other top Microsoft executives (J.A. 213-14, 715). The investigation consumed 14,000 attorney hours, 5,500 paralegal hours, and 3,650 economist hours (J.A. 715).

By June 1994, the Department had reached two principal conclusions. First, there was no basis for an antitrust challenge to Microsoft's acquisition of monopoly power in the market for operating system software for IBM-compatible personal computers; the government concluded that this had resulted from Microsoft's obtaining an enormous installed base on millions of personal computers ("PCs") through its successful exploitation of its initial advantage as IBM's chosen PC operating system (J.A. 14, 16, 60-61, 696-97).

Second, the Department concluded that Microsoft had engaged in certain anticompetitive practices that, to some degree, may have contributed to the maintenance of its monopoly power after 1988 and, more significantly, threatened seriously to impede future innovation and competition in operating systems. The central such practice was the per processor license, under which Microsoft licensed certain of its software to manufacturers of PCs at an attractively low royalty paid on all the PCs containing a particular processor (chip), whether or not the machine contained a Microsoft operating system (J.A. 17-19). This license's practical effect was to impose a "tax" on manufacturers' use of competing operating systems and thus

to diminish the viability of any actual or potential competing operating systems (J.A. 17-19, 61-62). The anticompetitive danger of the per processor license was increased by Microsoft's practice of using it in long-term licenses with minimum purchase commitments (J.A. 17-18, 62). Additionally, the Department concluded that Microsoft had attempted to impose unreasonably restrictive non-disclosure agreements on applications software manufacturers who were testing Microsoft's prototype "Chicago" (now known as "Windows 95") operating system, so that they could not develop applications for operating systems of Microsoft competitors (J.A. 20-22, 62-63).[2]

The government was determined to eliminate these practices by negotiating a consent decree if possible or by litigating if necessary. The negotiations were difficult. The United States would not yield on the need to end the anticompetitive practices (J.A. 835-36), while Microsoft consistently maintained that it had not violated the antitrust laws (J.A. 215). Negotiations broke down (J.A. 834-36). Finally, on July 15, 1994, the parties reached an agreement with respect to the practices the government challenged (J.A. 834). The government filed its complaint, stipulation for entry of consent decree, and proposed decree with the district court that day (J.A. 119-20). In the same negotiations, Microsoft and the Directorate-General IV of the European Commission For Competition reached a substantially identical settlement (J.A. 200, 214).

The government's complaint alleged that the anticompetitive practices described above violated sections 1 and 2 of the Sherman Act, 15 U.S.C. 1-2. See

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[2]The government decided that there was no basis at that time to file other charges against Microsoft (J.A. 688). It of course reserves the right to pursue other charges should a basis for doing so develop (J.A. 688, 696, 836).

Complaint ¶¶ 40-44 (J.A. 23). Specifically, the complaint challenged Microsoft's per processor licenses, see id. ¶¶ 19-22 (J.A. 16-17), long-term licenses, see id. ¶¶ 23-24 (J.A. 17), minimum commitment licensing, see id. ¶ 23 (J.A. 17), and unreasonably restrictive non-disclosure agreements, see id. ¶ 34 (J.A. 21).

The proposed decree was designed to eliminate immediately all the anticompetitive practices challenged in the complaint. It prohibits Microsoft from entering into per processor licenses, see Decree ¶ IV(C) (J.A. 32), licenses with a term exceeding one-year (unless the customer opted to renew for an additional year), Decree ¶ IV(A) (J.A. 30-31), licenses containing a minimum commitment, see Decree ¶ IV(F) (J.A. 32), or unduly restrictive non-disclosure agreements of a kind Microsoft introduced, see Decree ¶ IV(K) (J.A. 36-37). The proposed decree includes additional prophylactic relief as well (J.A. 64-65, 67), prohibiting a number of licensing practices, such as exclusivity clauses, tying or line-forcing clauses, and variants of per system licensing, that could be used to achieve effects similar to those achieved by the practices challenged in the complaint, see Decree ¶¶ IV(B), (E), (G), (H) (J.A. 31-35, 68-70).

In keeping with the requirements of the Tunney Act, 15 U.S.C. 16(b)-(h), the United States promptly published the proposed decree in the Federal Register, accompanied by an explanatory competitive impact statement, and invited public comment. See 59 Fed. Reg. 42,845, 42,845-57 (1994). Five members of the public responded during the 60-day comment period, with comments ranging from a citizen's criticism of the government for suing Microsoft to a manufacturer's criticism of the agreement for not requiring the refund of money it had paid Microsoft under a

minimum commitment contract (J.A. 137-54). On October 31, 1994, the United States replied to the five comments (J.A.119-54).

The district court initially scheduled a hearing on the proposed decree for December 15, 1994, but rescheduled it for January 20, 1995 (J.A. 5).

On January 10, 1995, the law firm of Wilson, Sonsini, Goodrich & Rosati, on behalf of three anonymous proposed amici, filed a lengthy (96-pages plus appendices) comment urging the court to reject the decree. The amici asserted, without evidentiary support, that the six-fold increase in Microsoft's installed base during 1988-94 was attributable in large measure to the practices challenged in this case. (J.A. 289, 292, 323-24, 364, 370). Noting the impact of "network externalities" and "increasing returns to scale," they maintained that Microsoft's present installed base made effective rivalry with Microsoft impossible. They further contended that, if the decree is approved as proposed, Microsoft inevitably will leverage this market power into other markets unchecked by the antitrust laws, and they argued that sweeping remedies, possibly including dissolution of Microsoft, were required (J.A. 316-75).

The United States filed a response to the amici's comments and a motion to enter the final judgment (J.A. 667-717), appended to which was the supporting affidavit of Nobel Prize-winning economist Kenneth J. Arrow (J.A. 718-52), which further explained the basis for the government's judgments and determinations in filing the case.[3] Professor Arrow pointed out that the six-fold increase in Microsoft's

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[3]The United States also asked the district court not to accept the Wilson, Sonsini filing, both because it was an inexcusably late comment and because there was no justification under the Tunney Act for the refusal to identify the true parties in interest (J.A. 6, 625-41). Microsoft also filed an opposition (J.A. 6, 615-24). The district court, at the same time it rejected the proposed decree, also accepted the

installed base in the five years following 1988 "is primarily the result of the extraordinary commercial success of the IBM-compatible PC platform, in which Microsoft's product development and marketing played a part." Arrow Dec'l at 11 (J.A. 728). Professor Arrow concluded that Microsoft's per processor licenses (coupled with long terms and minimum commitments) had made only a minor and nonmaterial contribution to its continuing market dominance. See id. at 11-12 (J.A. 728-29). Consequently, Professor Arrow strongly supported entry of the proposed decree on the ground that it would eliminate artificial barriers to the entry of new operating systems and help "maintain the openness of markets so that new technologies can have an opportunity to enter and show their value relative to older ones." Id. at 13 (J.A. 730). Professor Arrow saw no need for, and substantial risk of economic harm in, breaking up Microsoft or imposing other, more drastic remedies than those contained in the proposed decree. See id. at 9-10 (J.A. 726-27). The United States assured the court that, if it were to find that Microsoft had violated the antitrust laws by other conduct and the government had a reasonable chance of proving such a case, the government would not hesitate to invoke the antitrust laws (J.A. 836-37, 950-51).

On January 20, 1995, the district court held a hearing in which the United States and Microsoft urged approval of the decree, and Wilson, Sonsini, CCIA, and I.D.E. Corporation urged disapproval (J.A. 7, 810-961).

On February 14, 1995, the district court entered an order refusing to accept the

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Wilson, Sonsini filing, as well as an even later opposing amicus filing by the Computer and Communications Industry Association ("CCIA"). See Op. at 10-17 (J.A. 1192-93, 1203-11). Microsoft, but not the United States, has appealed from that ruling.

decree, concluding that to do so would not be in the public interest for four reasons (J.A. 8, 1190-91). First, the court held that the United States improperly had failed to inform the court about the details of its investigation and negotiations with Microsoft. See Op. at 29-31 (J.A. 1222-24). Second, the court concluded that the decree was too narrow "on its face," because it did not apply to all Microsoft operating systems. Id. at 31-32 (J.A. 1224-25). Third, the court held that the remedy was ineffective. See id. at 34 (J.A. 1227). The court conceded that the "decree does address those practices" alleged in the complaint. Id. at 33 (emphasis omitted) (J.A. 1226). But, according to the court, the government failed to show that it "will open the market and remedy the unfair advantage Microsoft gained in the market through its anticompetitive practices." Id. (J.A. 1226). In this regard, the court was particularly concerned that the decree did not address accusations of Microsoft's practice of "vaporware," or construction of a "wall" between Microsoft's operating system and applications developers. Op. at 35-42 (J.A. 1228-35). Finally, the court found the decree deficient because it lacked decree-compliance mechanisms beyond the usual ones, which the decree provided. See id. at 40-41 (J.A. 1233-34).

SUMMARY OF ARGUMENT

The district court, in wrongfully denying entry of the decree, converted a Tunney Act proceeding designed to determine whether entry of a negotiated consent decree was within the reaches of the public interest into a sweeping judicial investigation of Microsoft. In so doing, it vastly exceeded its authority and threatened substantial damage to the public interest in effective antitrust enforcement, including potential disruption of, and prejudice to, any ongoing or future enforcement efforts as

well as a greatly decreased likelihood that government antitrust cases can be settled at all.

The primary reason for the district court's refusal to enter the decree was its determination to conduct a broad-ranging inquiry into practices the government did not challenge as violations in the complaint. Consistent with the separate and distinct roles of prosecutor and judge in our constitutional scheme, the Tunney Act authorizes no such inquiry. The Act, which directs the court to focus on how the decree remedies the "alleged violations," 15 U.S.C. 16(e)(1), reflects the time-honored structural limitation that it is not the court's role to determine the scope of any particular case that the government brings against Microsoft or any other defendant. That is clearly a prosecutorial rather than a judicial function. With respect to the content of a proposed decree, the Tunney Act thus limits the court's role to determining whether the government reasonably concluded that the settlement provides an adequate and reasonable remedy for the violations alleged in the complaint.

Countenancing the district court's intrusion into the Justice Department's prosecutorial discretion would destroy the consent decree as an effective tool for public antitrust enforcement. The prospect of protracted Tunney Act proceedings involving public disclosure of investigatory files relating to conduct with which a defendant has not been charged, and to the government's intentions with respect to ongoing or future investigations of such conduct, would surely deter defendants and prosecutors alike from settling antitrust cases. Indeed, this procedure is an invitation to anarchy in the enforcement of the antitrust laws, which depend upon the ability of the

Department of Justice to dispose of most or many cases by the agreement of the parties. This is a result that cannot be reconciled with the intent of Congress or the public interest.

To the extent that the court even focused on the decree as a remedy for the violations the government charged, it merely sought to substitute its assessment of competitive effects for that of the government. Under the public interest standard, however, it must approve the government's proposed relief if it falls "within the reaches of the public interest." United States v. Western Elec. Co. (Triennial Review Opinion), 900 F.2d 283, 309 (D.C. Cir.) (internal quotations omitted) (emphasis added by Court), cert. denied, 498 U.S. 911 (1990).

There is no doubt that the proposed decree met that standard. The United States concluded that Microsoft was engaging in particular unlawful practices that diminished the prospects for innovation and competition. It negotiated a decree providing for complete and prompt termination of those practices. The government complied with the procedures mandated by the Tunney Act and provided a full explanation -- including an affidavit from an internationally recognized economist -- of how the decree effectively remedies the violations alleged. The government is entitled to entry of the decree.

ARGUMENT

THE DISTRICT COURT ERRED BY REFUSING TO ENTER THE PROPOSED DECREE

A. Standard of Review

The proper scope of a district court's review of a proposed consent decree under the Tunney Act is a question of statutory interpretation that is reviewed de novo. See, e.g., FLRA v. Department of the Treasury, 884 F.2d 1446, 1451 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990).

Where a district court's scope of review is properly bounded, courts of appeals generally have reviewed refusals to enter a proposed consent decree for abuse of discretion. See, e.g., Donovan v. Robbins, 752 F.2d 1170, 1177-78 (7th Cir, 1985); cf. Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1120 n.5 (D.C. Cir. 1983), cert. denied, 467 U.S. 1219 (1984). An error of law, however, constitutes an abuse of discretion. See, e.g., Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). And in the context of the Tunney Act, a district court commits an error of law, and thus abuses its discretion, by failing to accord appropriate deference to the government's settlement proposal. See United States v. Western Elec. Co. (Triennial Review Remand), 993 F.2d 1572, 1577-78 (D.C.Cir.), cert. denied, 114 S. Ct. 487 (1993). Similarly, this Court has suggested that the district court's underlying findings are reviewed de novo. See id. (analogizing the deference extended to the government in a Tunney Act proceeding to that accorded to agencies when a court undertakes substantial evidence review).

B. The District Court Exceeded Its Authority Under The Tunney Act In Seeking To Review The Entirety Of The Government's Investigation

Although the district court offered four reasons for its refusal to enter the decree, three of the asserted justifications depend wholly or substantially on its conclusion that the Tunney Act authorizes broad-ranging judicial review of the Department's investigatory process and its exercise of prosecutorial discretion with respect to practices not challenged in the complaint before the court. See Op. at 22-31 (J.A. 1215-24). The Tunney Act authorizes no such inquiry, a conclusion supported fully by the statutory language, its legislative history, and background principles concerning the appropriate role of the Executive and the courts in our constitutional scheme.

Section 16(e) of the Tunney Act requires the court to determine, when the government proposes an antitrust consent decree, that the "entry of such judgment is in the public interest." 15 U.S.C. 16(e). In so doing, 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 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.

Id.

This language directs the district court to assess the effect of the proposed relief as a remedy for the violations alleged in the complaint. Thus, subsection (e)(1), which relates specifically to "the competitive impact of [the] judgment," expressly

focuses on the "alleged violations." 15 U.S.C. 16(e)(1). The "adequacy of [the] judgment" must be measured in light of some goal, and the only one suggested by the subsection is that of remedying the "alleged violations," meaning those alleged in the complaint, see 15 U.S.C. 16(b)(2). Thus, read in context, the "catch-all" phrase at the end of subsection (e)(1), "any other considerations bearing on the adequacy of such judgment," 15 U.S.C. 16(e)(1), denotes the broad range of factors potentially relevant to that inquiry. See, e.g., Ford Motor Co. v. United States, 405 U.S. 562, 575 (1972) (ancillary provisions necessary to make divestiture work as a remedy in merger case); International Salt Co. v. United States, 332 U.S. 392, 400-01 (1947) (permissible to enjoin unlawful conduct enabled by and related to the violation). But it cannot fairly be understood, as the district court here suggested, see Op. at 24 (J.A. 1217), to expand the competitive impact inquiry to cover violations the government did not charge.

Subsection (e)(2) focuses on factors other than the competitive impact of the judgment on the market. Thus, it permits the court to consider whether the proposed remedy impairs important public policies other than competition, see United States v. BNS, Inc., 858 F.2d 456, 462-63 (9th Cir. 1988), and to take account of the impact on particular individuals alleging specific injury "from the violations set forth in the complaint," 15 U.S.C. 16(e)(2). But there is no hint that the Act's reference to "the impact of entry of such judgment upon the public generally," id., is, as the district court concluded, see Op. at 24-25 (J.A. 1217-18), a broad invitation for courts to consider whether the government should have alleged different violations. By its terms the phrase focuses on the "impact" caused by entry of the "judgment." But

entry of the judgment by itself has no impact on practices and markets neither challenged in the complaint nor addressed by the decree nor by any side deal. Moreover, the final phrase of subsection (e)(2) confirms the limited scope of the court's inquiry: the alternative to entry of the decree is "a determination of the issue at trial," 15 U.S.C. 16(e)(2). The "issue" necessarily is defined by the complaint and the relief that could be obtained at trial for the practices alleged therein.

For these reasons, the language of the Tunney Act undermines rather than supports the district court's ruling. The text is not naturally read to authorize a broad-ranging inquiry into the Justice Department's exercise of its prosecutorial discretion not to bring a particular case at a particular time. Rather, the statutory text implies a limitation of the judicial inquiry to the case that the Justice Department did bring.

Any other reading of the Tunney Act would require the surprising conclusion that Congress meant radically to transform the fundamental roles of judges and prosecutors in the Federal system. The Supreme Court long has recognized that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985) (citing, inter alia, Confiscation Cases, 74 U.S. (7 Wall.) 454 (1869)). As the Court explained, "[t]his recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement." Id. at 831. It also is rooted in the Constitution. "[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict --

a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.' U.S. Const., Art. II, § 3." Id. at 832. The district court's holding, which sanctions judicial intrusion into the Justice Department's prosecutorial decisions about what cases not to bring, rests on the implausible assumption that Congress meant to upset this tradition.

Indeed, if the Tunney Act were read to permit an inquiry into the government's exercise of prosecutorial discretion, it would raise difficult, and perhaps insurmountable, questions concerning the Act's constitutionality. Cf. United States v. Nixon, 418 U.S. 683, 694 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."); United States v. Cox, 342 F.2d 167, 171 (5th Cir.) (en banc) ("It follows, as an incident of the constitutional separation of powers, that the courts are not free to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.") (cited approvingly in Nixon, 418 U.S. at 693), cert. denied, 381 U.S. 935 (1965); Community for Creative Non-Violence v. Pierce, 786 F.2d 1199, 1201 (D.C. Cir. 1986) ("The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful executive of the laws . . . ."); In re International Bus. Machs. Corp. (IBM), 687 F.2d 591, 602 (2d Cir. 1982) (refusing to construe the Tunney Act to apply to a voluntary dismissal by the government in part because "[t]he district court's involvement in the executive branch's decision to abandon litigation might impinge upon the doctrine of separation

of powers").[4] Consequently, it would take the most compelling showing of a congressional intent to transform the traditional roles of prosecutor and judge before the district court's interpretation could be adopted as the proper reading of the Tunney Act. For, "[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Edward J. DeBartolo Corp v. Florida Gulf Coast Build. & Const. Trades Council, 485 U.S. 568, 575 (1988); see also United States v. X-Citement Video, Inc., 115 S. Ct. 464, 472 (1994).

As we have shown, however, the language of the Tunney Act demonstrates no congressional intention to mandate such an intrusion into the government's prosecutorial discretion. This is confirmed by the Act's legislative history. In codifying the "public interest" requirement in section 16(e) of the Tunney Act, 15 U.S.C. 16(e), Congress intended only to ensure that courts properly exercised the power they already possessed to make an "independent determination," S. Rep. No. 298, 93d Cong., 1st Sess. 5 (1973), and did not "rubber stamp" the government's proposals, H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974); see also 119 Cong. Rec. 3,452 (1973) (statement of Sen. Tunney). But Congress intended no change in the

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[4]Although in Heckler the Court stated that "Congress may limit an [administrative] agency's exercise of enforcement power if it wishes," Heckler, 470 U.S. at 833, the Court indicated that a more exacting constitutional analysis might apply to substantive limits placed on the prosecutorial discretion of the Executive Branch itself, see id. at 832. And, in Morrison v. Olson, 487 U.S. 654 (1988), the Court, in sustaining the Ethics in Government Act against a number of constitutional challenges, placed particular emphasis on the fact that Congress "specifically prevented [the courts] from reviewing the Attorney General's decision not to seek appointment [of an independent counsel]." Id. at 695.

substantive scope of the public interest test. See H.R. Rep. No. 1463, supra, at 11 ("Preservation of antitrust precedent, rather than innovation in the usage of the phrase, 'public interest,' is, therefore, unambiguous.").

And pre-Tunney Act law, of which Congress was well aware, see H.R. Rep. No. 1463, supra, at 11; Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust and Monopolies of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 147-48 (1973) (testimony of Hon. J. Skelly Wright) [hereinafter Senate Hearings] (discussing pre-Tunney Act law); see also United States v. American Tel. & Tel. Co. (AT&T), 552 F. Supp. 131, 149 n.74 (D.D.C. 1982), aff'd sub. nom. Maryland v. United States, 460 U.S. 1001 (1983) (Mem.), is entirely at odds with the district court's reading of the statute. It was well established prior to the passage of the Tunney Act that, because entry of a consent decree is a "judicial act," United States v. Swift & Co., 286 U.S. 106, 115 (1932), a decree's approval required "a determination by the chancellor that [the proposed decree] is equitable and in the public interest." E.g., United States v. Radio Corp. of Am., 46 F. Supp. 654, 655 (D. Del. 1942), appeal dismissed, 318 U.S. 796 (1943). But under this "public interest" inquiry, courts considered whether the government had acted in good faith, whether the settlement adequately and reasonably remedied the violations specifically alleged in the complaint, and whether the consent decree unnecessarily impaired public policies other than competition. See, e.g., United States v. Ling-Temco-Vought, Inc., 315 F. Supp. 1301, 1308-09 (W.D. Pa. 1970); United States v. CIBA Corp., 50 F.R.D. 507, 513-14 (S.D.N.Y. 1970); United States v. Carter Prods., Inc., 211 F. Supp. 144, 147-48 (S.D.N.Y. 1962). Consistent with the principles articulated in Heckler and

Nixon, there is no suggestion in pre-Tunney Act opinions that a court could consider whether the government should have remedied other practices not challenged in the complaint or violations in other markets except where necessary to fashion an adequate remedy for the violations alleged.

Consequently, the legislative history demonstrates Congress's specific intent to ratify the traditional relationship between court and prosecutor in antitrust consent-decree cases when it enacted the Tunney Act. Those portions of the legislative history relied upon by the district court evidence no contrary congressional understanding. The district court pointed to Deputy Assistant Attorney General Wilson's testimony before the House that the public interest inquiry "'apparently would encompass not only whether the relief is adequate in view of that sought in the complaint, but whether the Government sought appropriate relief in the complaint itself.'" Op. at 26 (quoting Consent Decree Bills: Hearings on H.R. 9203, H.R. 9947, and S. 782 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 87 (1973) [hereinafter House Hearings]) (J.A. 1219). But even on its face, this testimony, which mirrors Senate testimony given by Assistant Attorney General Kauper, see Senate Hearings, supra, at 93, refers only to the relief sought in the complaint, not to the scope of the violations challenged. The full context confirms that Deputy Wilson meant simply that the Act would permit a court to enquire whether the relief sought in the complaint adequately remedied the specific anticompetitive conduct alleged, including whether additional relief should have been included in the complaint to achieve that objective. See House Hearings, supra, at 74 (Wilson); Senate Hearings, supra, at 104-07 (Kauper).

Indeed, Congress was aware that the Justice Department and defendants often file complaints and consent decrees simultaneously, see, e.g., H.R. Rep. No. 1463, supra, at 7, raising the possibility that the prayer for relief in the complaint would be drafted to reflect the proposed decree, see, e.g., Senate Hearings, supra, at 197-99 (statement of Sen. Tunney). Thus, Congress rejected a proposal that the Act apply only when the relief obtained in a decree differed from that prayed for in the complaint. See id. at 176-78, 197-99. But the legislative history is devoid of suggestion that courts were to review the Department's decision concerning which violations should be alleged. On the contrary, Senator Tunney expressly agreed with Assistant Attorney General Kauper that the judge's inquiry properly centered on whether the relief was appropriate to achieve "the goals of the complaint." Senate Hearings, supra, at 106 (questioning by Sen. Tunney); see also House Hearings, supra, at 158-59 (comments of Rep. Rodino) (expressing similar views).[5]

In sum, there is no evidence that Congress "clearly withdrew," Heckler, 470 U.S. at 834, the Justice Department's discretion to be the sole arbiter of what case to bring and when. Not surprisingly, therefore, the interpretation of the statute adopted by the court below has been rejected consistently in post-Tunney Act precedent. See, e.g., BNS, 858 F.2d at 462-63 (explaining that, in assessing the antitrust consequences of a proposed decree, the court may not "'look beyond the strict

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[5]The district court also noted legislative history indicating that the section 16(e) factors were not meant to be exhaustive. Slip op. at 25 n.21 (J.A. 1218); accord AT&T, 552 F. Supp. 149 n.77. But, as explained above, because Congress intended to codify preexisting law concerning the public interest inquiry, the fact that the section 16(e) factors are nonexclusive does not support the court's conclusion that it may inquire into violations not alleged.

relationship between complaint and remedy'" or to "markets other than those alleged in the government's complaint" (quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981))); AT&T, 552 F. Supp. at 150 (explaining that "the Court's determination . . . is concerned solely with remedies"); see also IBM, 687 F.2d at 601-02 (Tunney Act does not apply to voluntary dismissal by the government).[6]

Although the district court cited AT&T for the proposition that courts "have considered markets and practices outside the scope of the complaint," Op. at 26 (J.A. 1219), that case offers no support for its position that Tunney Act review extends to violations that the government did not allege. A court may properly consider other practices and markets when the provisions of the proposed decree themselves address such practices and markets. Thus, the proposed decree in AT&T modified an existing decree so as to permit AT&T to enter a market that the parties believed previously was foreclosed -- the electronic publishing market. The district court, therefore, had to consider the effect of the modification on that market. In making that assessment, which did not rest on competition considerations, the court relied on First Amendment concerns, an analysis consistent with courts' traditional role of ensuring that a decree

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[6]The district court argued that the government's ability to define the scope of the violations challenged in the complaint would give it power to control the court's scope of review. See Op. at 28 (J.A. 1221). But, as this Court has explained, "that kind of authority is inherent in prosecutorial discretion, and it is surely late in the day for it to be challenged by a circuit judge." Ayuda, Inc. v. Thornburgh, 948 F.2d 742, 751 (D.C. Cir. 1991) (citing Heckler), vacated and remanded on other grounds, 113 S. Ct. 3026 (1993), jurisdictional holding readopted, 7 F.3d 246 (D.C. Cir. 1993), cert. denied, 115 S. Ct. 70 (1994). Indeed, such power is regularly exercised when the government decides not to bring a case in the first instance or to dismiss a case voluntarily. See IBM, 687 F.2d at 601-02.

itself does not unnecessarily impair other public policies. See AT&T, 552 F. Supp. at 184-85. Nothing in that holding, however, suggests that, in the absence of decree provisions addressing practices outside the complaint, Tunney Act review properly extends to markets or practices outside of the scope of the government's case except to the extent necessary to remedy the violations specifically alleged.

To hold otherwise would have serious adverse practical consequences for the important values and policies furthered by the traditionally distinct roles of court and prosecutor. Free-ranging demand for disclosure of government thinking on cases that the government did not bring plainly would chill future investigations. And when investigations are opened, the persons or entities subject to a government probe might suffer substantial prejudice from judicial scrutiny of practices that the government has not yet decided to challenge.

The district court's construction of the Tunney Act, moreover, would have a devastating effect on the government's ability to obtain consent decrees. Antitrust defendants who agreed to negotiate would have to be prepared for public disclosure of the details of the government's investigation, including information concerning unproven allegations that the government had decided not to pursue at that time. And the government would have to accept the possibility that information about its internal deliberations would be disclosed, including information about its intentions as to continued investigation or possible future prosecution of other violations.[7] Even if

[7]The Act requires certain government disclosures including a description of the circumstances under which the proposed decree was formulated and an evaluation of alternative remedies actually considered. See 15 U.S.C. 16(b). But these disclosures are limited to the possibility that the government entered into impermissible side-deals with defendants and whether the "proposed relief is sufficient with respect to

the court could formulate judicially manageable standards for reviewing the government's exercise of prosecutorial discretion, see generally Heckler, 470 U.S. at 831; cf. Maryland v. United States, 460 U.S. 1001, 1003-06 (1983) (Mem.) (Rehnquist, J., dissenting), this prospect would "as a practical matter [eliminate the consent decree] as an antitrust enforcement tool, despite Congress' directive that it be preserved." AT&T, 552 F. Supp. at 151 (citing S. Rep. No. 298, supra, at 6; and H.R. Rep. No. 1463, supra, at 6). Given the importance of consent decrees in resolving antitrust cases, such a result would seriously impair antitrust enforcement by the Department of Justice.

Accordingly, the district court in this case overstepped its authority in asserting the right to consider whether the government should have brought a different case.

C. A District Court Applying the Correct Legal Standard Would Find That Entry of this Decree Serves the Public Interest

The district court must approve a proposed government antitrust consent decree under the Tunney Act if the "'settlement is within the reaches of the public interest.'" Triennial Review Opinion, 900 F.2d at 30 (quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981) (internal quotations omitted) (emphasis added by Court)). In making that determination, the court must accord substantial deference to the government's judgments. Thus, the district court's role is not "to make a de novo determination of facts and issues," but

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the conduct alleged in the complaint," S. Rep. No. 298, supra, at 3. As discussed below, there is no evidence of any inappropriate agreements to forgo future investigations, see infra p.29, and the district court did not contend that the government had failed to comply with section 16(b).

"to determine whether the Department of Justice's explanations were reasonable under the circumstances," for "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." Triennial Review Remand, 993 F.2d at 1577 (internal quotations omitted).

In particular, the court must defer to the Department of Justice's assessment of likely competitive consequences. Id. (citing Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983)). In negotiating a consent decree, the Department must make judgments as to the effect of the challenged conduct on the marketplace, and the efficacy of particular remedies to undo the anticompetitive effects of the violations. The Department also must make litigation judgments about the costs, delays, risks and potential benefits of proceeding to trial, weighed against the potential settlement at hand. See United States v. Armour & Co., 402 U.S. 673, 681 (1971). This Court has likened the deference owed the Department of Justice on such issues, which require judgments within its expertise, to the deference owed an administrative agency under a "substantial evidence" standard, with the district court required to defer to the government's assessment unless the court has "exceptional confidence" that the government is wrong. See Triennial Review Remand, 993 F.2d at 1577-78.

1. The Government Reasonably Concluded that the Decree Provides Effective Relief

The record before the district court was more than sufficient to establish that the proposed decree reflects eminently reasonable determinations by the government. The decree, with certainty and without delay, fully stops the anticompetitive practices. In providing such urgently needed complete prospective relief, the decree "'effectively pr[ied] open to competition,'" AT&T, 552 F. Supp. at 150 (quoting International Salt Co. v. United States, 332 U.S. 392, 401 (1947)), the relevant market to the extent that the government reasonably found (as a practical rather than theoretical matter) it had been closed by the challenged practices. This conclusion required entry of the decree.

There is no dispute that for at least a decade Microsoft has been the dominant supplier of operating systems for IBM-compatible personal computers, with a market share consistently above 70% (J.A. 14, 60-61). There is also no dispute that it achieved its monopoly lawfully by exploiting its position as the first and, originally, effective provider of operating systems for IBM-compatible PCs, which quickly became the dominant PCs in America. As amici themselves explained (J.A. 316-17), and as Professor Arrow agreed, see Arrow Dec'l at 5-6 (J.A. 722-23), this software market is characterized by increasing returns and tends quickly toward a single standard.

Microsoft, however, did not confine itself to legitimate exploitation of its natural advantages, but maintained its monopoly through restrictive practices. It introduced "per processor" contracts for major computer makers. As the complaint and competitive impact statement explained, these contracts in effect constituted a tax on the customer's use of any other operating system (J.A. 17-19, 61-62). Professor

Arrow described them as "artificial barriers to the entry and growth of competing operating system vendors." Arrow Dec'l at 2 (J.A. 719). These contracts have the potential to prevent a non-Microsoft operating system from obtaining a large enough installed base of its own to reap the benefits of increasing returns and set a new, non-Microsoft standard (J.A. 16-19, 64, 722-27, 730).

The proposed consent decree secures immediate and complete prospective relief -- at a time when, with Windows '95 on the horizon, such relief is urgently needed. The decree addresses Microsoft's anticompetitive practices with precision, prohibiting not only the offending conduct, but also other licensing practices that could be used with similar effect. The decree flatly prohibits per processor licenses (J.A. 32), and limits Microsoft to per copy licensing, except for strictly defined per system licenses (J.A. 32-35). Moreover, because Microsoft increased the danger of per processor licenses by using them in long-term contracts with minimum commitments, the decree bans minimum commitments and prohibits contracts of longer than one-year duration (with a one-year customer's renewal option) (J.A. 30-31). As Professor Arrow showed, terminating these practices effectively eliminates the threat to competition they pose, because that threat derives overwhelmingly from their future, and not their pre-complaint, impact. See Arrow Dec'l at 11-12 (J.A. 728-29).

In proposing this decree, the government reasonably concluded that, as a matter of practical reality (as opposed to some theoretical possibility), there were no provable, measurable, significant effects of the challenged practices on Microsoft's installed based that might conceivably be the subject of a remedy to be obtained after trial. Microsoft's enormous market share predates the challenged practices and, as

Professor Arrow demonstrated, the subsequent substantial increase in the absolute size of Microsoft's installed base also results to all but a minor extent from natural market forces. See Arrow Dec'l at 11-12 (J.A. 728-29). The challenged contracts, which were not introduced until 1988, did not cover a majority of Microsoft's sales to computer manufacturers until FY 1992, and made an unquantifiable, but likely immaterial, contribution to Microsoft's installed base prior to the filing of the complaint. See id. at 11-12 (J.A. 728-29). Thus, it was entirely reasonable for the government to determine that the real competitive concern here was the threat to future competition.

At the same time, the government, in framing the decree, took proper account of the dangers of intervention to override natural market forces, including those which (as everyone agrees) tend to create monopolies in markets like the market for PC operating systems. The decree is thus consistent with Professor Arrow's admonition against "penalizing market successes that are not the result of anticompetitive practices," Arrow Dec'l at 10 (J.A. 727), and trying to "pick the winner of [a] dynamic [market] process," id. at 9 (J.A. 726). Moreover, the decree leaves the government free to challenge any other Microsoft conduct in this market or other markets that appears warranted by the facts in the future.[8]

The proposed Final Judgment, then, adequately and reasonably remedies the violations alleged. A district court that showed the proper deference to the

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[8]For example, the Department has acknowledged publicly that it is investigating Microsoft's planned acquisition of Intuit Corp., a major maker of applications software, to determine whether the acquisition would violate the antitrust laws (J.A. 1021-22).

government's findings and judgments could not find otherwise. The district court's contrary conclusion rests on fundamental misapprehensions of the record and relevant legal standard and on a failure to accord the government any deference.

2. The Court Gave No Legally Sufficient Reason for Rejecting the Decree

a. The district court's first reason for rejecting the decree was that the parties did not give it adequate information. See Op. at 29 (J.A. 1222). Notably, the district court did not claim any inadequacy in the information regarding the practices challenged in the complaint. Rather, the court complained of insufficient information concerning the details of the government's investigation and its exercise of prosecutorial discretion with respect to practices not challenged in the complaint. See id. at 29-31 (J.A. 1222-24). As we have explained above, see supra pp.13-23, this information was unnecessary to an assessment of whether the proposed decree adequately remedied the violation alleged, and so the court had no authority to demand it. Therefore, the court had no authority to reject the decree because the government refused to provide the requested information.

The district court's opinion also suggested that delving into the Department's investigations and negotiations was necessary because of the possibility that the government improperly bargained away its discretion to bring appropriate antitrust actions in the future. See Op. at 30-31 (J.A. 1223-24). But, as explained above, the Assistant Attorney General in charge of the Antitrust Division specifically represented to the court that no deal, tacit or otherwise, had been struck with respect to future cases (J.A. 827, 836-38, 846, 950-51), and Microsoft's Description of Written or Oral Communications, filed in accordance with section 16(g) of the Act, similarly reveals no

agreement concerning future cases (J.A. 80-82). The court had no reason to doubt the accuracy of these representations and therefore no right to demand more information going beyond them. Accordingly, there was nothing for the district court to review.

b. The court also said that "the decree on its face [is] too narrow" because it does not cover "all of Microsoft's commercially marketed operating systems" nor systems yet to be developed. Op. 31-32 (J.A. 1224-25). To the extent that the complaint could be construed as encompassing other PC operating systems, the decree is patently reasonable in focusing on only the operating systems it identified. The decree reaches all Microsoft PC operating systems that have a significant share of a relevant market, (J.A. 65), as well as any Microsoft operating system marketed as a successor for these operating systems (J.A. 65). Microsoft does sell other operating systems, but, because they have small market shares, the decree reasonably did not address them. As for technologically superior systems that may yet be developed, see Op. at 31-32 & n.25 (J.A. 1224-25), Professor Arrow opined that the possibility of fast-developing technology in markets in which Microsoft lacks the natural advantages from increasing returns offers the greatest likelihood of ending Microsoft's current monopoly, and that "interference to pick the winner [of] this dynamic process is likely to be counterproductive." Arrow Dec'l at 9 (J.A. 726).[9] The court had no basis for rejecting the government's judgment that a reasonable antitrust remedy could properly be limited to the operating systems covered by the proposed decree.

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[9]The objective definitional test of Paragraph II(A) of the decree (J.A. 27) adequately answers the court's "fears [that] there may be endless debate as to whether a new operating system is covered by the decree," Op. at 32 (J.A. 1225) -- an insufficient reason to disapprove the decree in the absence of such debate.

c. The district court also erred in concluding that the government had failed to show that the decree would "remedy the unfair advantage Microsoft [had] gained in the market through its anticompetitive practices" alleged in the complaint. Op. at 33 (J.A. 1226). As we have already explained, see supra p.27, Professor Arrow concluded that the Microsoft practices actually challenged in the complaint "did not have a material impact on the installed base" and hence on Microsoft's maintenance of monopoly power, Arrow Dec'l at 12 (J.A. 729), and nothing in the record shows a material impact. The government understood that, to some unquantifiable extent, these unlawful practices may have increased Microsoft's installed base. But the government's judgment was that such an effect was minor and any proof of past effects would be difficult, given Microsoft's substantial market power unrelated to the challenged practices. The government also believed that immediate opening of the market, well before Microsoft's introduction of Windows '95, was vital (J.A. 62, 693-94). The government, accordingly, reasonably determined that the consent decree it obtained was by far the best conclusion to the case. That judgment was reasonable, and the district court had no sound basis for not entering the decree. Cf. United States v. Gillette Co., 406 F. Supp. 713, 715-16 (D. Mass. 1975) ("The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest. Basically [the court] must look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass.").

The court was also obviously dissatisfied with the government's failure to "address . . . a number of other anticompetitive practices that from time to time Microsoft has been accused of engaging in by others in the industry" -- in particular,

"the practice of vaporware," Op. at 35-40 (J.A. 1228-33), and the absence of a "wall" between Microsoft's operating systems and applications developers, id. at 15 n.15, 35, 42 & n.36 (J.A. 1208, 1228, 1235). This criticism too is unsound.

To the extent that the district court's analysis faults the United States for not including claims involving vaporware or the absence of a wall, it is wrong as a matter of law. As was previously explained, the Tunney Act does not authorize a district court to review that exercise of prosecutorial discretion. See supra pp.13-23.

To the extent the court thought that a prohibition on vaporware and the construction of a wall were essential to the "prying open of the market that has been closed through illegal restraints," Op. at 39 (J.A. 1232), it failed to accord proper deference to the government's sound judgments about the remedial action needed in view of the minor effect the conduct challenged had in closing the market in the past. See supra p.26. To the extent the court thought such prohibitions were necessary to prevent a recurrence of the violations alleged, it again erred. Vaporware has no connection to any of the licensing practices alleged in the complaint (except that it is alleged to be engaged in by Microsoft). Similarly, the presence or absence of a wall between Microsoft's operating systems and applications developers is not remotely connected to the violation that the government charged. The public interest does not require that a decree enjoin all means by which a defendant might violate the antitrust laws. See Hartford-Empire Co. v. United States, 323 U.S. 386, 410 (1945). The government was well within the reaches of the public interest in concluding that the important relief it achieved in the decree -- the immediate termination of every practice challenged in the complaint along with additional prophylactic prohibitions --

afforded an effective remedy for the violations it challenged.

d. Section V of the proposed decree contains compliance mechanisms that have long been standard in government antitrust consent decrees.[10] The government's choice of these time-tested compliance mechanisms in this decree was surely reasonable and within the reaches of the public interest.

The district court's insistence on further compliance mechanisms also is unsound. The fact that Microsoft did not admit to wrongdoing obviously troubled the court. See Op. at 41 (J.A. 1234). But no antitrust consent decree entered in the last 25 years contains an admission of violation.

The district court also found support in Judge Greene's insistence on further compliance mechanisms in the AT&T case. See Op. at 41 (J.A. 1234). Whatever the merits of that action (which the United States and AT&T chose not to contest), it is irrelevant in this vastly different case. As Judge Greene pointed out, the AT&T settlement involved "the largest, most complicated divestiture since the passage of the Tunney Act," with a decree that contemplated a myriad of requirements for AT&T and the divested telephone operating companies. AT&T, 552 F. Supp at 216. Moreover, the district court in that case saw what it considered troubling conduct by

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[10]These mechanisms allow the government to determine compliance with the decree on reasonable notice and without resort to legal process; to inspect and copy all Microsoft documents; to interview any Microsoft employees; and to require Microsoft to submit written reports under oath. See Decree ¶ V(A)-(B) (J.A. 37-38). Moreover, the decree itself, once entered, is a permanent injunction, and violations are punishable by the court's contempt power. See, e.g., United States v. Western Elec. Co., 1991-1 Trade Cas. (CCH) ¶ 69,329, at 65,267-69 (D.D.C. Feb. 15, 1991) ($10 million civil penalty for violation of antitrust consent decree); United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 659 (2d Cir. 1989) (criminal contempt conviction of corporation and employee for violating antitrust decree) (conviction of corporation vacated), cert. denied, 493 U.S. 1021 (1990).

AT&T and the United States in connection with the consent decree settlement of an earlier antitrust case. Id. at 135-38. By contrast, in this case there is no divestiture; the decree only prohibits certain anticompetitive practices; and the district court expressly endorsed the government's good faith when it publicly stated "they [Justice Department] represent the public interest." "They sure did a heck of a job here, and I think the record should indicate that" (J.A. 863).

CONCLUSION

The record before the district court amply established that the proposed Final Judgment was "within the reaches of the public interest," and the district court's justifications for holding to the contrary were legally insufficient. Accordingly, the Court should vacate the district court's Order Re Motion to Approve the Consent Decree and remand with instructions to enter the proposed decree. See Triennial Review Remand, 993 F.2d at 1578; cf. Apache Survival Coalition v. United States, 21 F.3d 895, 906-07 (9th Cir. 1994) (holding that when the district court had abused its discretion by applying the incorrect laches standard, resolving the laches issue on appeal was appropriate because further factual development was unnecessary and doing so furthered judicial economy).

Respectfully submitted.

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STATUTORY ADDENDUM

Antitrust Procedures and Penalties Act ("Tunney Act"), 16 U.S.C. (b)-(h)

§ 16. Judgments

(b) Consent judgments and competitive impact statements; publication in Federal Register; availability of copies to the public

Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

(c) Publication of summaries in newspapers

The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

(i) a summary of the terms of the proposal for consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b) of this section,

(iii) and a list of the materials and documents under subsection (b) of this section which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) Consideration of public comments by Attorney General and publication of response

During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b) of this section. The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

(e) Public interest determination

Before entering any consent judgment proposed 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 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.

(g) Filing of written or oral communications with the district court

Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Inadmissibility as evidence of proceedings before the district court and the competitive impact statement

Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 15a of this title nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

Sherman Act, 15 U.S.C. 1-2

§ 1. 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 one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or 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 one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 28(d)

I hereby certify that the foregoing BRIEF FOR APPELLANT UNITED STATES OF AMERICA contains no more than 12,500 words and fully complies with Circuit Rule 28(d).

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 1995, I caused the foregoing BRIEF FOR APPELLANT UNITED STATES OF AMERICA to be hand-served by courier upon:

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