UNITED STATES V. MICROSOFT CORPORATION

By Paula L. Blizzard

Judicial review of antitrust consent decrees is important for technology companies, particularly those in the computer industry. This is true for several reasons. First, the computer industry is subject to frequent antitrust scrutiny. The computer industry is largely characterized as a network industry, where large networks of compatible products are required for the market to develop and function.[1] Network industries present antitrust concerns because they tend to become concentrated, dominated by the standard-setting product or company, and the compatibility requirements can lead to exchanges between competitors that are indicative of cartel behavior.

Second, computer products have relatively short lifetimes, with new innovations quickly overtaking previous versions. The products are also heavily marketed and advertised. These characteristics lead to considerable press reporting and what is commonly referred to as "hype." This hype can make celebrities out of computer company presidents and bring technology and antitrust issues to the attention of the general population. This in turn puts pressure on the Department of Justice and the Judiciary to deal with the popular issues, which are not always synonymous with the best antitrust issues.

Lastly, full trials on the merits of antitrust actions can be lengthy and expensive. High technology start-up firms cannot afford a lengthy trial to cloud their reputation as well as take the time, money, and attention of top executives. Quick settlements are particularly appealing. Judicial review of such settlements, in an industry characterized by large, dominant firms

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1. The classic example of a network industry is the telephone system. In order for the market to function, the telephones and systems must conform to standards and be compatible from house to house, or else no one will want or be able to use the phones. Network industries have several important antitrust characteristics. Large networks are more attractive to consumers because they appear more stable and less likely to fail or become outdated, and these large networks tend to get larger. Compatibility with other products also increases the attractiveness of the product. Cooperation among producers is often required to achieve this compatibility. For more information on network industries, see Charles E. Biggio, Department of Justice Antitrust Division, Address entitled *Antitrust and Networks* at Antitrust for Hi-Tech Companies (Feb. 2, 1996) (visited Jan. 31, 1998) <http://www.usdoj.gov/atr/speeches/biggiospc.txt>.

and extensive hype, is of significant interest. Companies need to know that a hard-fought settlement will not be thrown out by the courts based on the hype.

I. PROCEDURAL HISTORY AND ANTITRUST ALLEGATIONS

In *United States v. Microsoft Corp.*,[2] the United States Court of Appeals for the District of Columbia Circuit held that the district court exceeded its authority under the Tunney Act[3] in refusing to enter the proposed consent decree between the Microsoft Corporation and the Department of Justice (DOJ). The district court had refused to enter the decree because it determined that the decree was not in the public interest.[4] As required under the Tunney Act, a proposed antitrust consent decree between the government and a private party in a civil proceeding must be found to be in the public interest in order to be entered. The court of appeals reversed, finding both that the district judge had exceeded his authority and that the decree was in the public interest. The decree was entered on remand in August 1995.[5] Recently, the DOJ filed a contempt action against Microsoft for violating the terms of this 1995 consent decree.[6]

The DOJ complaint and proposed settlement were the result of an extensive investigation.[7] The complaint and the proposed consent decree

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2. 56 F.3d 1448 (D.C. Cir. 1995) [hereinafter *Microsoft II*].

3. Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16(b)-(h) (1997).

4. *See* 159 F.R.D. 318 (D.D.C. 1995) [hereinafter *Microsoft I*].

5. *See* United States v. Microsoft Corp., No. 94-1561, 1995 WL 505998 (D.D.C. Aug. 21, 1995).

6. This contempt action is still being litigated and is not the focus of this comment. The action focuses on alleged tying arrangements between Microsoft's Windows operating system and its web browser, Internet Explorer. It also alleges that Microsoft's current non-disclosure agreements are hindering the enforcement of the 1995 decree. For more information on the contempt action, see Department of Justice, *U.S. v. Microsoft* (visited Jan. 31, 1998) <http://www.usdoj.gov/atr/cases3/micros/ms_index.htm> and Microsoft Corp, *Microsoft Feature Story* (visited Jan. 31, 1998) <http://www. microsoft.com/corpinfo/doj/doj.htm>.

7. The DOJ began their investigation in 1993, following a Federal Trade Commission (FTC) investigation that had started in 1990 but ended when the FTC deadlocked 2-2 on whether to bring a complaint. "The Justice Department issued twenty-one civil investigative demands to Microsoft and third parties, interviewed more than one hundred people, and deposed twenty-two individuals. The investigation consumed 14,000 attorney hours, 5,500 paralegal hours and 3,650 economist hours." David Bender, *The Microsoft Antitrust Wars*, INTELLECTUAL PROPERTY ANTITRUST (PLI Patents, Copyrights & Literary Property Course Handbook Series, 1995).

were filed on the same day in August 1994.[8] The complaint charged a violation of section 1 and section 2 of the Sherman Act,[9] alleging both an illegal restraint of trade and a monopolization offense. The substance of the antitrust violations was Microsoft's use of "per-processor" licenses with computer manufacturers. These licenses required the manufacturer to pay Microsoft for each processor sold, regardless of whether it contained a Microsoft operating system. Thus, if a computer manufacturer wished to sell a competing operating system, it had to pay the license fee for both the competing product and the Microsoft product. Given Microsoft's monopoly power in the operating systems market,[10] computer manufacturers could not risk losing their Microsoft license agreements. In addition, the DOJ alleged that Microsoft's non-disclosure agreements with software developers concerning proprietary operating systems data were overly restrictive and anti-competitive.

The proposed consent decree required Microsoft to stop per-processor licensing and instead use per-copy licenses. It additionally prevented Microsoft from tying the license for its operating system to any of its other software products. Microsoft's non-disclosure agreements were also required to be less restrictive and shorter in duration. As is normal for consent decrees, Microsoft did not admit any wrongdoing in any of the areas.

II. OVERVIEW OF TUNNEY ACT

The Tunney Act requires certain actions by both the Executive branch and the courts before any antitrust consent decree can be entered. The Executive branch, in the form of the DOJ and the Federal Trade Commission (FTC), is required to publish for public comment information concerning how and why they have entered into the consent decree. The courts are required to review the consent decree to determine if it is in the public interest.

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8. *See* Department of Justice, *Complaint* (visited Jan. 31, 1998) <http://www.usdoj.gov/atr/cases3/micros/0046.htm>; Department of Justice, *Final Judgment* (visited Jan. 31, 1998) <http://www.usdoj.gov/atr/cases3/micros/0047.htm>. The proposed consent decree and the final judgment eventually entered were identical.

9. 15 U.S.C. §§ 1, 2 (1997).

10. Microsoft has monopoly power in the operating systems market for personal computers where its MS-DOS and Windows products dominate. The DOJ estimated Microsoft's market share in the operating systems market at over 70% worldwide for the previous ten years. *See* Department of Justice, *Complaint*, ¶ 14, 15 (visited Jan. 31, 1998) <http://www.usdoj.gov/atr/cases3/micros/0046.htm>. Microsoft also has significant market power in other areas of the software industry, with products such as Microsoft Word and Excel, and its World Wide Web browser Internet Explorer.

The Tunney Act was passed in 1974 as a means of providing additional scrutiny to antitrust consent decrees agreed to by the government. At the time of passage, approximately eighty percent of the judgments obtained by the Antitrust Division were consent decrees.[11] Prior to enactment of the Tunney Act, courts exercised little power in reviewing decrees. There were several questionable cases that led Congress to consider the issue. In 1967, the DOJ settled a case with a consent decree that was referred to as a "ninety percent capitulation."[12] Then in 1972, a consent decree was clouded by allegations that the government had settled in exchange for contributions to the Republican party, and worries over whether the suit would damage the company's stock price.[13] Consequently, after hearings by Congress, the Tunney Act was enacted in 1974. According to the hearings, the goal of the Tunney Act was to make the courts "an independent force rather than a rubber stamp" in reviewing consent decrees.[14]

The Tunney Act provisions require various steps at different stages of the process. When the consent decree is filed, the government must also file a competitive impact statement describing the alleged violation of the antitrust laws, the relief the consent decree will provide, and any alternatives considered by the government.[15] The government must then publish the consent decree in the Federal Register and elsewhere for a sixty-day comment period, and respond to all the comments.[16]

At the end of the comment period, the court must decide if the consent decree is in the public interest.[17] It may consider the competitive impact of the decree, including termination of the alleged antitrust violations, provisions for enforcement and modification, duration of the relief sought, and the anticipated effects of alternative remedies considered. In addition,

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11. *See* J. Noonan, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility with Executive Discretion*, 35 HASTINGS L.J. 133, 143 (1983).

12. United States v. First National Bank and Trust Co., 280 F. Supp. 260, 263 (E.D. Ky. 1967).

13. *See* United States v. International Telephone and Telegraph Corp., No. 13,320, 1971 U.S. Dist. LEXIS 11506 (D. Conn. Sep. 24, 1971). For a review of the history of antitrust consent decrees leading up to the Tunney Act, see L. Anderson, *United States v. Microsoft, Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review*, 65 ANTITRUST L.J. 1, 6-8 (1996).

14. *The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1008 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93rd Cong. 1 (1973) (statement of Senator J. Tunney).

15. *See* 15 U.S.C. § 16(b) (1997).

16. *See id.* § 16(b), (c) & (d).

17. *See id.* § 16(e).

it may consider anything else that bears on the adequacy of the decree, including the impact on the general public in addition to individuals alleging specific injury from the antitrust violation. One of the public benefits explicitly allowed to be considered is the benefit of carrying the case through to trial.

The method the court may use to make the public interest determination is broad and far-reaching.[18] The court may take expert testimony and request input from any individual or group on any aspect of the decree. It may also authorize participation by interested persons in any appropriate manner. In general, it may take such action in the public interest as the court may deem appropriate.

III. DISTRICT COURT OPINION

The District Court for the District of Columbia conducted a hearing to address the public interest determination in January of 1995. The judge was concerned that the consent decree did not address many of what he believed were Microsoft's anticompetitive practices. In particular, the judge was concerned about vaporware: the practice of announcing a product to consumers before the product is ready. The purpose of a vaporware announcement is to keep consumers from buying competing products and convince them to wait for the announced product. The judge learned about vaporware and its antitrust implications not from the DOJ complaint or other court documents, but from a limited amount of independent research. This independent research appeared to consist mostly of reading the book *Hard Drive*.[19] In a pre-hearing order, the court asked the parties to explain why neither the complaint nor the proposed consent decree addressed vaporware concerns.[20]

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18. *See id.* § 16(f).

19. J. WALLACE & J. ERICKSON, HARD DRIVE: BILL GATES AND THE MAKING OF THE MICROSOFT EMPIRE (1992). "At the first substantive status conference on September 29, 1994, the district judge informed the parties that over the summer he had read a book about Microsoft—*Hard Drive*—because he 'thought it would be a good idea maybe to know as much about Microsoft as probably they're going to know about me.'" [citation omitted by court]. Much of the ensuing discussion focused on accusations against Microsoft contained in the book. The district judge asked whether the government's lawyers had read the book and whether they had investigated the allegations made by its authors." *Microsoft II*, 56 F.3d at 1452-53; *see generally* L. Anderson, *supra* note 13.

20. *See* United States v. Microsoft Corp., No. 94-1564, 1995 WL 61165 (D.D.C. Jan. 19, 1995).

In making the public interest determination, the court relied on the test announced in *United States v. Gillette*:[21] "It is not for the Court to determine whether the settlement is the best possible in the Court's view, but instead whether it is 'within the reaches of the public interest.'"[22] However, it also found that based on the "language of the statute, its legislative history, precedent [and] common sense" the court may look beyond the face of the complaint in evaluating the public interest.[23] In defining the role of the Judiciary, it found that "Congress passed the Tunney Act so that the courts would play an independent role in the review of consent decrees as opposed to serving as a mere rubber stamp."[24]

During the hearing, the judge requested more information than the DOJ was willing to provide. When he asked questions about vaporware, the DOJ "refused to disclose what it knew about the practice or what investigation it had conducted with respect to it."[25] The judge referred to this lack of response as the "Government's 'stonewalling' position."[26] Furthermore, he stated that "this is clearly the kind of case that Congress had in mind when it passed the Tunney Act. ... The picture that emerges from these proceedings is that the U.S. Government is either incapable or unwilling to deal effectively with a potential threat to this nation's economic well-being."[27]

Following the hearing, the district court found that the consent decree was not in the public interest and refused to enter it. It determined: (1) the DOJ had not provided it with sufficient information to make the required public interest determination; (2) the scope of the proposed consent decree was too narrow; (3) the proposed decree was not an effective antitrust remedy; and (4) the proposed enforcement and compliance mechanisms were not sufficient.[28]

IV. COURT OF APPEALS DECISION

Both Microsoft and the DOJ appealed. The Court of Appeals for the District of Columbia Circuit allowed several *amici* to appear in opposition

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21. 406 F. Supp. 713 (D. Mass. 1975).
22. *Microsoft I*, 159 F.R.D. at 329 (quoting *Gillette*, 406 F. Supp at 16).
23. *Microsoft I*, 159 F.R.D. at 330.
24. *Id.* at 329.
25. *Id.* at 335.
26. *Id.* at 338.
27. *Id.* at 337.
28. *See id.* at 332.

to Microsoft and the DOJ.[29] The main issue was whether the district court had exceeded its authority under the Tunney Act in refusing to enter the decree. The court of appeals agreed with the appellants and reversed and remanded.

The court of appeals held that the district court was not permitted to "reach beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made."[30] The court found that "Congress did not mean for a district judge to construct his own hypothetical case and then evaluate the decree against that case."[31] By inquiring after the vaporware allegations, the district court was in essence broadening the complaint beyond what was brought by the DOJ.

The court of appeals based this limitation at least in part on separation of powers grounds. Despite its lack of precedential value, the court chose to quote with approval the dissent of then-Justice Rehnquist in the AT&T antitrust settlement.[32] Rehnquist's dissent "expressed grave doubt as to the Act's constitutionality because without a judicial finding of illegality ... the statute does not supply a judicially manageable standard for review of the decree and the considerations that led the Department of Justice to settle are not amenable to judicial review."[33] Furthermore, the court noted that "even when a court is explicitly authorized to review government action under the Administrative Procedure Act, 'there must be a strong showing of bad faith or improper behavior' before the court may 'inquir[e] into the mental processes of administrative decisionmakers.'"[34] Here, there was no claim of bad faith, and in fact the district judge was inquiring into the minds of the DOJ, pressing them for information about the vaporware investigation. The court further noted that the ability of the dis-

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29. The district court had earlier allowed I.D.E. Corporation, the Computer & Communications Industry Association (CCIA), and several anonymous computer companies represented by the law firm of Wilson Sonsini Goodrich & Rosati to appear as *amici* pursuant to 15 U.S.C. § 16(f)(3) (1997) (authorizing participation by interested persons in any manner and extent which serves the public interest as the court may deem appropriate). The court of appeals, noting that there would otherwise be no appellee, allowed the *amici* to oppose appellants Microsoft and the DOJ. *See Microsoft II,* 56 F.3d at 1455.

30. *Microsoft II,* 56 F.3d at 1459.

31. *Id.*

32. *See generally* Maryland v. United States, 460 U.S. 1001 (1983) (Rehnquist, J., dissenting) [hereinafter *AT&T II*], *aff'g* United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982) [hereinafter *AT&T I*].

33. *Microsoft II,* 56 F.3d at 1459 (citations omitted).

34. *Id.* (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

trict court to review the consent decree in the first place is completely dependent on the DOJ exercise of its prosecutorial discretion.[35]

The court also disagreed with the district court's finding that the consent decree was not an effective antitrust remedy in that it did not effectively pry open the market to competition. Referring again to Rehnquist's *AT&T II* dissent, the court noted that "there are no findings that the defendant has actually engaged in illegal practices."[36] Without a finding that the defendant has done anything wrong, "for the district judge to assume that the allegations in the complaint have been formally made out is quite unwarranted."[37] Thus if the allegations cannot be assumed true, it is hard to see how an effective antitrust remedy for unproved allegations can even be determined.

In summing up its holding, the court of appeals set a narrow standard, based on constitutional grounds, for when a district judge could refuse a consent decree.

> [W]hen the government is challenged for not bringing as extensive an action as it might, a district judge must be careful not to exceed his or her constitutional role. A decree, even entered as a pretrial settlement, is a judicial act, and therefore the district judge is not obliged to accept one that, on its face and even after government explanation, appears to make a mockery of judicial power. Short of that eventuality, the Tunney Act cannot be interpreted as an authorization for a district judge to assume the role of Attorney General.[38]

This "mockery" standard arose in opposition to the district court's demand for additional information about vaporware and its belief that the decree was not an effective antitrust remedy. Both inquires are forbidden under such a mockery standard.

However, the court of appeals did note several inquiries which were appropriate under the Tunney Act. "A district judge pondering a proposed consent decree understandably would and should pay special attention to the decree's clarity."[39] The rationale being that the district judge will be the one presiding over the implementation of the decree and the task needs to be reasonably manageable.

35. *See Microsoft II*, 56 F.3d at 1459-60.
36. *Id.* at 1460-61 (citing *AT&T II*, 460 U.S. at 1004 (Rehnquist, J., dissenting)).
37. *Id.* at 1461.
38. *Id.* at 1462.
39. *Id.* at 1461.

Similarly, the court "would expect a district court to pay close attention to the compliance mechanisms in a consent decree."[40] In the instant case, however, the court did not agree with the district judge that Microsoft's existing legal staff would not be effective compliance monitors. It noted that the district judge "believed the decree should seek to fundamentally alter Microsoft's culture, perhaps even reduce its competitive zeal. Suffice it to say, those objectives exceed any legitimate concerns about actual compliance with the decree."[41]

The DOJ's economics expert had assured the court that the decree appropriately addressed and remedied the anticompetitive effects charged in the complaint.[42] The court of appeals found the expert had provided enough of a factual foundation for the judgment call made by the DOJ. Having not found any of the district court's other rationales to be viable objections, the court found the decree to be in the public interest and ordered it to be entered on remand.[43]

V. DISCUSSION

The court of appeals correctly reversed the district court for exceeding its authority under the Tunney Act, and put forth a narrow standard that effectively reduces the impact of the public interest determination to a negligible level. To place this standard in context, this comment reviews recent public interest determination case law, examines the constitutionality of the Tunney Act, and compares it to the "mockery" standard announced in *Microsoft II*.

A. Public Interest Determination Case Law

Different tests have been developed by the courts in interpreting the Tunney Act. The disparity is in large part due to the undefined terms and lack of guidance on how a public interest determination should be made.[44] For instance, the Act does not give any guidance as to when a consent decree would be in the public interest or when a trial would be better.

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40. *Id.* at 1462.

41. *Id.*

42. *See id.* at 1461.

43. *See id.* at 1462.

44. *See AT&T I*, 552 F. Supp. at 149 (stating that the statute "provides relatively little guidance regarding the meaning of 'public interest' in this context"); 2 AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 348g (rev. ed. 1995) (stating that the statute "does not tell the judge how he is to appraise a settlement without trying the case and without himself allocating the Justice Department's resources.").

The test adopted by the court of appeals is referred to as the "reaches of public interest" or the *Gillette* test:

> It is not the court's duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest.[45]

Such a test gives considerable leeway to the government.

In applying the *Gillette* test, one district court gave even more deferential treatment to the government.[46] It found "one highly significant factor is the degree to which the proposed decree advances and is consistent with the government's original prayer for relief."[47] In that case, the complaint was filed some two years before the consent decree was filed. The rationale was that a settlement that met most of the original goals of the DOJ, as defined in their complaint, arrived at after two years of pretrial discovery and motions, would likely be a reasonable and hard-fought settlement. It is less certain how such a rationale would apply in a case such as *Microsoft II*, where the complaint and the consent decree were filed on the same day.[48]

A more independent test was set forth in the 1982 *AT&T I*[49] decision. The court found that the term "public interest" should be construed in terms of the antitrust laws.[50] Moreover, "if the decree meets the requirements for an antitrust remedy—that is, if it effectively opens the relevant markets to competition and prevents the recurrence of anticompetitive activity, all without imposing undue and unnecessary burdens upon other aspects of the public interest—it will be approved."[51]

The *AT&T I* test requires an independent look at the substance of the allegations and the decree to see if it satisfies the goals of the antitrust laws. This is a much less deferential standard than the previous tests. However, the *AT&T I* court also carefully described how the *AT&T I* case deserved somewhat unusual treatment. First, it noted that AT&T was "the

45. United States v. Gillette, 406 F. Supp. 713, 716 (D.Mass. 1975).

46. *See* United States v. NBC, 449 F. Supp. 1127 (C.D. Cal. 1978).

47. *Id.* at 1144.

48. It has been noted that "the practical effect of the court of appeals decision is to permit the Department of Justice to evade meaningful Tunney Act review by filing a complaint tailored to the negotiated consent decree." James Rob Savin, *Tunney Act '96: Two Decades of Judicial Misapplication*, 46 EMORY L.J. 363, 364 (1997).

49. 552 F. Supp. 131 (D.D.C. 1982).

50. *See id.* at 149.

51. *Id.* at 173.

largest corporation in the world" and there was a large "potential impact of the proposed decree on a vast and crucial sector of the economy."[52] Second, the court was uniquely situated to understand the substance of the case because it had "already heard what probably amounts to well over ninety percent of the parties' evidence both quantitatively and qualitatively, as well as all of their legal arguments."[53] Lastly, the history of the parties and the particular way in which the consent decree was filed did not "foster a sense of confidence that the assessment of the settlement and its implications may be left entirely to AT&T and the Department of Justice."[54]

The district court in *AT&T I* went on to request numerous substantive modifications of the consent decree.[55] The decision was appealed directly to the Supreme Court by various competitors of AT&T and several states.[56] The Supreme Court affirmed the decision without opinion, but three Justices dissented, led by then-Justice Rehnquist, and addressed the unconstitutionality of the Act.[57]

B. Constitutionality of Tunney Act

Rehnquist's dissent in *AT&T II*, while having no precedential value, provides a strong argument that the public interest provisions of the Act are unconstitutional.[58] Rehnquist states that "it is not clear to me that this standard [as set by the district court] or any other standard the District Court could have devised, admits of resolution by a court exercising the judicial power established by Article III of the Constitution."[59] He continues by pointing out that because the case has been settled before trial, "there has been no judicial finding of relevant markets, closed or otherwise, to be opened or of anticompetitive activity to be prevented. The

52. *Id.* at 151-52.

53. *Id.* at 152.

54. *Id.* at 153.

55. These included modifications designed to ensure the newly independent Bells would be financially healthy, prohibitions related to marketing equipment, yellow pages, and electronic publishing, and sua sponte judicial enforcement. For an overview of the AT&T consent decree, see L. Anderson, *supra* note 13, at 20-25.

56. The competitors, as intervenors in the suit, were able to appeal directly to the Supreme Court pursuant to 15 U.S.C. § 29(b) (1997). The states were able to appeal directly on the ground that the decree preempted state regulatory authority.

57. *See AT&T II*, 460 U.S. at 1001 (Rehnquist, J., dissenting).

58. Note that the portions of the Tunney Act requiring actions by the Executive branch, i.e., publishing the decree for public comment and submitting an analysis of alternatives considered, are not at issue. It is only the public interest determination portions that require the Judiciary to act which present separation of powers issues.

59. *AT&T II*, 460 U.S. at 1104.

District Court seems to have assumed first that there was an antitrust violation and second that it knew the scope and effects of the violation."[60] This is the same argument made by the *Microsoft II* court—that it is meaningless for the judge to look for an effective antitrust remedy when he cannot even assume the allegations in the complaint are valid.

The dissent continues by noting that the "question assigned to the district courts by the Act is a classic example of a question committed to the Executive."[61] Such questions have been nonjusticiable since the days of *Marbury v. Madison*.[62] More recently in *Baker v. Carr*,[63] the Court noted that a lack of judicially discoverable and manageable standards, or the impossibility of deciding without an initial policy determination, would also yield nonjusticiable political questions.[64] The dissent notes that

> there is no standard by which the benefits to the public from a 'better' settlement of a lawsuit ... can be balanced against the risk of an adverse decision, the need for a speedy resolution of the case, the benefits obtained in the settlement, and the availability of the Department's resources for other cases.[65]

Similarly, an initial policy decision is required because the entire question of whether to bring a lawsuit at all is within the prosecutorial discretion. Without a judicially manageable standard, and because it requires an initial policy decision, the question of what is in the public interest is nonjusticiable.

C. Mockery Standard

The court of appeals test for determining if a consent decree is in the public interest states that unless the decree makes a mockery of judicial power, it should be entered.[66] The court also makes allowances for issues of compliance mechanisms or clarity, but the central issue is whether the court can examine the effectiveness of the antitrust remedy. Clearly it cannot under the "mockery" standard, nor can it under Justice Rehnquist's constitutional analysis. This standard is significantly narrower than the *AT&T I* standard relied upon by the district court. However, as noted by

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60. *Id.*

61. *Id.* at 1105.

62. 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion.").

63. 369 U.S. 186 (1962).

64. *See id.* at 217.

65. *AT&T II*, 460 U.S. at 1105-06 (Rehnquist, J., dissenting).

66. *See Microsoft II*, 56 F.3d at 1462.

the *AT&T I* court, there is substantial ground to distinguish *AT&T I* from most antitrust consent decrees.[67]

The *Microsoft II* court, by adopting the "mockery" standard and adopting much of Rehnquist's dissent in *AT&T II*, has reduced the public interest determination of the Tunney Act to a negligible inquiry. Under such a standard, the courts have no more power to reject a consent decree than they did prior to passage of the Act. The authority rests on the court's inherent equitable powers to reject settlements that make a mockery of the Judiciary itself—a power which the courts have always had and which applies to every judicial act.

VI. CONCLUSION

In *United States v. Microsoft*, the court of appeals set a narrow standard for when a court can find a decree not to be in the public interest. This standard requires that unless the decree, on its face and even after government explanation, makes a mockery of judicial power, it should be entered. The impact of this standard is that the DOJ has wide ranging latitude to settle cases as it sees best, given its limited resources. This is an appropriate standard. Anything else puts matters of Executive discretion into the hands of the Judiciary. If Congress is concerned with the DOJ's settlement of antitrust cases, then the solution should be with the Executive, rather than with the Judiciary.

This decision also bodes well for technology companies. While some members of the computer industry may have wanted a more robust consent decree against Microsoft, the issue of judicial review took precedence in this case. Companies need to know that the courts will not evaluate proposed consent decrees based on the latest hype or the popular press. The DOJ conducted an extensive investigation of Microsoft and then painstakingly negotiated a consent decree. The district court exceeded its Article II powers and based its findings upon a limited amount of independent research. The latter cannot be allowed to derail the former.

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67. *See AT&T I*, 460 U.S. at 151 ("This is not an ordinary antitrust case.").

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FIRST AMENDMENT