The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies"

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I. INTRODUCTION

The proposed final judgment between the United States Department of Justice ("DOJ") and Microsoft Corp. ("Microsoft") has been intensely debated. Thousands of public comments[1] have been made, and numerous books and law review articles[2] have been written, on the subject. Much of the debate has focused on whether the proposed final

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1. The DOJ reports that 33,867 comments were filed with them as of March 14, 2003. *See* U.S. Dep't of Justice, Antitrust Division, Highlights, U.S. v. Microsoft Case Filings, Public Comments (Tunney Act), Master Index of Comments on the *United States v. Microsoft* Settlement, *at* http://www.usdoj.gov/atr/cases/ms-master.htm (last visited May 8, 2003). The master list of public comment filings is available at http://www.usdoj.gov/atr/cases/ms-master.htm (last visited May 8, 2003).

2. *See, e.g.*, KEN AULETTA, WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES (2001); JOHN HEILEMANN, PRIDE BEFORE THE FALL: THE TRIALS OF BILL GATES AND THE END OF THE MICROSOFT ERA (2001); Donald J. Boudreaux & Burton W. Folsom, Microsoft *and* Standard Oil*: Radical Lessons for Antitrust Reform*, 44 ANTITRUST BULL. 555 (1999); Kenneth G. Elzinga et al., United States v. Microsoft*: Remedy or Malady?*, 9 GEO. MASON L. REV. 633 (2001); John J. Flynn, Standard Oil *and* Microsoft—*Intriguing Parallels or Limping Analogies?*, 46 ANTITRUST BULL. 645 (2001); Charles M. Gastle & Susan Boughs, Microsoft III *and the Metes and Bounds of Software Design and Technological Tying Doctrine*, 6 VA. J.L. & TECH. 7 (2001); Robert A. Levy, *Microsoft and the Browser Wars*, 31 CONN. L. REV. 1321 (1999); Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1 (2001); J. Gregory Sidak, *An Antitrust Rule for Software Integration*, 18 YALE J. ON REG. 1 (2001); David S. Stone, *Who Really Won The Microsoft Appeal?*, 18 COMPUTER & INTERNET L. 20 (Oct. 2001).

judgment was "in the public interest," under the Antitrust Penalties and Procedures Act ("Tunney Act").[3] The Tunney Act requires the DOJ to propose a final judgment in cases settled by a "consent decree,"[4] accept comments from the public,[5] publish the comments, and submit a written summary of the comments to the adjudicating court.[6] A judge then determines, pursuant to the Tunney Act, whether the remedy being proposed is "in the public interest."[7]

There have been two Microsoft cases leading to final judgments.[8] Throughout the Tunney Act processes in both cases, however, there was little discussion regarding the standards of judicial review that should apply in a Tunney Act consent decree proceeding where no litigation has taken place. There was also little examination of whether the Tunney Act is the appropriate tool for a case in which there has been litigation, findings of fact[9] or conclusions of law,[10] and more than one appeal.[11] Regarding the government's first case against Microsoft ("*Microsoft I*"),[12] this Article will argue that the court used an inappropriate standard of judicial review for proceedings under the

3. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified at 15 U.S.C. § 16(b)–(h) (2000) and scattered sections of 15 U.S.C.).

4. The *Microsoft*-proposed final judgment and competitive impact statements are available at United States v. Microsoft Corporation, 66 Fed. Reg. 59,452-01 (Dep't Justice Nov. 28, 2001).

5. See http://www.dcd.uscourts.gov/ms-major.htm (last modified Feb. 15, 2002) for the "major" public comments in the Microsoft case.

6. 15 U.S.C. § 16(b)–(d).

7. *Id.* § 16(e)–(f). Subsection (e) of the Tunney Act states that "[b]efore 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." *Id.* § 16(e); *see also infra* note 65 (quoting 15 U.S.C. § 16(e)).

8. The first Microsoft case resulting in a final judgment under the Tunney Act, *United States v. Microsoft Corp.*, No. CIV.A.94-1564, 1995 WL 505998 (D.D.C. Aug. 21, 1995), followed reversal of the District Court's rejection of the proposed decree. United States v. Microsoft Corp., 56 F.3d 1448, 1451 (D.C. Cir. 1995) (per curiam). The second Microsoft case resulting in a final judgment under the Tunney Act, *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 150 (D.D.C. 2002) [hereinafter *Microsoft II: Final Judgment*], followed reversal of some of the District Court's finding of violations of the Sherman Act and imposing a remedy of divestiture in *United States v. Microsoft Corp.*, 253 F.3d 34, 46 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001) [hereinafter *Microsoft II: Appeal*].

9. *See* United States v. Microsoft Corp., 65 F. Supp. 2d 1 (D.D.C. 1999) [hereinafter *Microsoft II: Findings of Fact*].

10. *See* United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) [hereinafter *Microsoft II: Conclusions of Law*].

11. *See Microsoft II: Appeal*, 253 F.3d at 46. The DOJ also had moved to have the Supreme Court hear the appeal from the District Court under the Expediting Act, 15 U.S.C. § 29(b) (2000), and was denied. *See* Microsoft Corp. v. United States, 530 U.S. 1301 (2000).

12. United States v. Microsoft Corp., 159 F.R.D. 318, 321 (D.D.C. 1995) [hereinafter *Microsoft I*].

Tunney Act.[13] Regarding the second case against Microsoft ("*Microsoft II*"),[14] this Article will contend that the Tunney Act was misused because it was applied in circumstances where Congress did not intend for it to be applied.[15]

In *Microsoft I*, the court abused the Tunney Act by using it to justify an inappropriate standard of judicial review for proceedings under the Act. The degree of scrutiny that a district court should apply to a consent decree under the Tunney Act was called into question. Despite clear legislative history to the contrary,[16] the court of appeals held that a trial court must give deference to the DOJ and the DOJ's opinion that the remedies provided in the consent decree are in the public interest.[17] This result may aptly be described as the first "Microsoft Fallacy": that the Tunney Act was adopted to require a court to defer to the discretion of the Department of Justice rather than to make its own independent judgment about the propriety of the relief negotiated in its review of antitrust consent decrees.[18]

In *Microsoft II*, following the trial, the DOJ misused the Tunney Act by calling the judgment it proposed to remedy violations of the Sherman Act a "consent decree."[19] An additional abuse occurred when the district court ruled that the proposed settlement was a "consent decree" within the meaning of the Tunney Act and applied the standards of the first "Microsoft Fallacy" in its review of the proposed settlement.[20]

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13. *See infra* Part IV (discussing the standard of judicial review used in *Microsoft I*).

14. *Microsoft II* refers to the litigation initiated in 1998 against Microsoft that resulted in the following decisions: *Microsoft II: Findings of Fact*, 65 F. Supp. 2d 1 (D.D.C. 1999); *Microsoft II: Conclusions of Law*, 87 F. Supp. 2d 30 (D.D.C. 2000); an appeal, *Microsoft II: Appeal*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001); the subsequent remand to Judge Kollar-Kotelly and her final judgment in the case, *Microsoft II: Final Judgment*, 231 F. Supp. 2d 144 (D.D.C. 2002).

15. *See infra* Part VI (discussing the misuse of the Tunney Act).

16. *See infra* Part II (discussing the legislative history of the Tunney Act).

17. *See infra* Part IV (discussing the court's holding in *Microsoft I*).

18. A fallacy is "[a]ny reasoning, exposition, argument, etc., contravening the cannons of logic." FUNK & WAGNALL'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 456 (Comprehensive ed. 1995). The most frequently referenced fallacy in Antitrust is the Cellophane fallacy (the false notion that the existence of substitutes means that no market power exists). *See* Donald F. Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 308–13 (1956) (pointing out, in a seminal piece, the existence of the Cellophane fallacy); *see also* Gene C. Schaerr, Note, *The Cellophane Fallacy and the Justice Department's Guidelines for Horizontal Mergers*, 94 YALE L.J. 670, 676–77 (1985) (comparing the Cellophane fallacy to the DOJ's merger guidelines).

19. *Microsoft II: Final Judgment*, 231 F. Supp. 2d 144, 150 (D.D.C. 2002); *see also infra* Part VI (discussing the decision of the court of appeals in *Microsoft II*).

20. United States v. Microsoft Corp., 215 F. Supp. 2d 1, 5 (D.D.C. 2002) (mem.) [hereinafter *Microsoft II: Memorandum Opinion*].

This result may be described aptly as the second "Microsoft Fallacy": that Congress intended the Tunney Act to be applied to proposed settlements arrived at after litigation of a government antitrust case. This Article will show that the DOJ's proposed final judgment is not a "consent decree" within the meaning of the Tunney Act but rather is merely a proposed judgment subject to the broader equitable authority of the court under § 4 of the Sherman Act.[21]

The position set forth in this Article is simple but has enormous implications for future consent decree cases like *Microsoft I*. This position, if espoused, could also mean reversal for the remedy phase of *Microsoft II* on appeal. Both Microsoft cases are significant for future government cases in which litigation has taken place and a settlement is proposed by the parties to resolve the case. Extending deference to a consent decree negotiated by the DOJ, like the one mandated in *Microsoft I*, rather than making an independent determination of whether the decree is in the "public interest," undermines the central objective Congress sought to achieve by adopting the Tunney Act.

This Article also maintains that the Tunney Act does not apply to cases "where testimony has been taken,"[22] let alone cases litigated to a final judgment finding a violation of the antitrust laws. The language of the Tunney Act, as well as the legislative histories of the Tunney Act and § 5(a) of the Clayton Act,[23] make clear that the Tunney Act does not apply to litigated cases and reserves the right to determine the appropriate remedy under § 4 of the Sherman Act for the courts.[24]

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21. *See infra* Part VII (discussing proper application of the Tunney Act or § 4 of the Sherman Act).

22. 15 U.S.C. § 16(a) (2000).

23. *Id.*; *see also infra* Part II (discussing the legislative histories of the Tunney Act and the § 5(a) of the Clayton Act).

24. Section 4 of the Sherman Act provides that "[t]he several district courts of the United States are invested with jurisdiction to prevent and restrain violation of sections 1 to 7 of this title." 15 U.S.C. § 4. The jurisdiction conferred is that of the courts, not some parties to the case to negotiate a decree, and it is a jurisdiction that includes the prevention of future violations as well as to "pry open to competition in a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause." Int'l Salt Co. v. United States, 332 U.S. 392, 401 (1947). As the Court noted in *International Salt Co. v. United States*:

> The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be

Moreover, prior decisions by the D.C. Circuit, with respect to *Microsoft II*, indicate that the only appropriate course of action in the *Microsoft II* litigation was to schedule a remedy trial under § 4 of the Sherman Act upon remand.[25] Instead, the government and Microsoft negotiated a settlement, which they labeled a "consent decree."[26] The district court, committing reversible error, held that the proposed settlement was a "consent decree" within the meaning of the Tunney Act[27] and proceeded to review the merits of the proposed settlement under the erroneous standards set forth in *Microsoft I* by giving deference to the discretion of the Antitrust Division in arriving at what the court thought was the appropriate remedy.[28]

Making any portion of the remedy phase of litigated antitrust cases, like *Microsoft II*, a Tunney Act proceeding also raises serious constitutional and procedural issues. First, it allows two of the parties to co-opt the judicial function that Congress vested in the courts under § 4 of the Sherman Act[29] and unconstitutionally transfers those powers to the Executive Branch under the inappropriate standard of review adopted in *Microsoft I*. Second, it deprives other parties to the lawsuit of rights guaranteed them by the Federal Rules of Civil Procedure and

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> blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention.

Id. at 400; *see also* United States v. Nat'l Lead Co., 332 U.S. 319 (1947) (holding that courts have a duty to order the most effective remedy possible); United States v. Crescent Amusement Co., 323 U.S. 173 (1944) (holding that a district court has broad discretion to fashion a decree that will be effective).

25. *See Microsoft II: Appeal*, 253 F.3d at 101. The Court "has recognized that a 'full exploration of facts is usually necessary in order (for the District Court) properly to draw (an antitrust) decree' so as 'to prevent future violations and eradicate existing evils.'" United States v. Ward Baking Co., 376 U.S. 327, 330–31 (1964) (quoting Associated Press v. United States, 326 U.S. 1, 22 (1945)), *quoted in Microsoft II: Appeal*, 253 F.3d at 101.

26. *Microsoft II: Final Judgment*, 231 F. Supp. 2d 144, 150 (D.D.C. 2002); *see also infra* Part VI (discussing the decision of the court of appeals in *Microsoft II*).

27. *See* 15 U.S.C. § 16(b)–(h).

28. United States v. Microsoft Corp., No. CIV.A.98-1232, 2002 WL 31654530 (D.D.C. Nov. 12, 2002) [hereinafter *Microsoft II: Review of Proposed Final Judgment*]. In the companion case in which nine dissenting states tried separately the question of remedy, *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 184–85 (D.D.C. 2002), the district court rejected several claims for additional remedies designed to close loopholes and strengthen the decree approved in the DOJ case. It appears that the court gave deference to what it had already deferred to in approving the proposed "consent decree" entered between the United States and Microsoft. *Microsoft Corp.*, 224 F. Supp. 2d at 184–85.

29. 15 U.S.C. § 16(a) (making a final judgment or decree in "any civil or criminal" proceeding brought on behalf of the United States to the effect that a defendant has violated the antitrust laws of the United States "prima facie evidence against such defendant" with the proviso that "this section shall not apply to consent judgments or decrees entered before any testimony has been taken").

the mandate of the court of appeals.[30] Third, inappropriately applying the Tunney Act diminishes the authority of the courts to determine an appropriate remedy by reducing a court's role from active participant in defining the remedy, to passive on-looker in deciding whether the DOJ's judgment is in the public interest. On appeal, rather than deferring to the findings of the trial court under the "clearly erroneous" standard of Rule 52 of the Federal Rules of Civil Procedure,[31] a court reviewing the trial court's remedy determination would apply the standard of whether the district court has given due deference to the DOJ's proposed judgment. Fourth, characterizing the proposed settlement of a case after litigation has taken place as a Tunney Act proceeding may deprive subsequent treble damage action plaintiffs of the use of the "final judgment or decree" in subsequent litigation, in violation of the express language of § 5(a) of the Clayton Act.[32]

For these reasons, it is disconcerting that the DOJ and the district court in *Microsoft II* have chosen to invoke the Tunney Act for a settlement initially proposed by only two of the parties where the purported "consent decree" is submitted after a trial finding violations of the Sherman Act on the merits. The DOJ's claim and the district court's finding that the proposed decree in *Microsoft II* is a "consent decree" within the meaning of the Tunney Act and § 5(a) of the Clayton Act appear to be clearly unlawful on jurisdictional grounds, aside from the questionable terms of the decree.

This Article first examines the legislative history of the Tunney Act to determine the intent behind the Act's regulation of the consent decree process.[33] Second, this Article, in order to determine whether light was shed on the present issue, examines prior cases, in which it was unclear whether the Tunney Act should be applied.[34] To highlight the consequences of the misapplication of the Tunney Act in the subsequent Microsoft litigation, this Article also examines the misapplication of the Tunney Act in the *Microsoft I* consent decree proceedings.[35] This Article then examines the consequences of misapplying the Tunney Act

30. *See infra* Part VI.E–F (including the right to participate in the court's determination of the appropriate remedy and the right of treble damage action plaintiffs to use a final decree as prima facie evidence of a violation).

31. FED. R. CIV. P. 52.

32. Private parties are precluded from using Tunney Act proceedings as evidence in an action under the antitrust laws. *See* 15 U.S.C. § 16(a), (h).

33. *See infra* Part II (discussing legislative history of the Tunney Act).

34. *See infra* Part III (discussing judicial decisions addressing the issue of whether the Tunney Act applies to consent decree proceedings).

35. *See infra* Part IV (discussing the misapplication of the scope of judicial review in *Microsoft I*).

to the *Microsoft II* settlement.[36] Finally, this Article provides a framework for determining in which instances the Tunney Act is applicable and those in which it is not.[37] This Article concludes that the Tunney Act applies to government settlements filed with the court before trial commences, and that § 4 of the Sherman Act and the court's equitable powers under that section apply to litigated cases thereafter.[38] Regardless whether the proceeding is a legitimate settlement by consent decree or a proceeding after litigation has taken place, no deference is due to the DOJ, whether the court applies the Tunney Act's "public interest" standard or the Sherman Act's standard for equitable relief—that the injunction "prevent and restrain" violations of the Act.

II. LEGISLATIVE HISTORY

The genesis of the Tunney Act is derived from hearings on the nomination of Richard Kleindienst to the position of United States Attorney General.[39] These hearings quickly became known as the ITT (International Telephone & Telegraph Corp.) hearings because the major issue in Kleindienst's nomination became the settlement by consent decree of the ITT/Hartford merger case, which occurred before any litigation had taken place.[40] The merger occurred after a

36. *See infra* Part V (discussing the consequences of the misapplication of the Tunney Act in *Microsoft II*). The authors first made these arguments in the context of a memo to Judge Kollar-Kotelly. Because the Judge's clerk told the authors that the Judge did not wish to see any letters, and because the Judge had denied any and all motions to intervene or file amicus curiae, the authors submitted their memo to the DOJ to forward to Judge Kollar-Kotelly. The DOJ denied the request, stating that it did "not believe such action would be appropriate." The authors then submitted the memo, along with all correspondence from the DOJ, to plaintiffs in California suing Microsoft under state antitrust laws. The California plaintiffs filed a motion to intervene as a matter of right before Judge Kollar-Kotelly, who denied their motion. *See Microsoft II: Memorandum Opinion*, 215 F. Supp. 2d 1 (D.D.C. 2002). The authors' submissions were solely of their own volition and were not solicited, encouraged, supported, or paid for by any person, corporation, think tank, or other entity with any relationship to any litigation, legislation, ideology, or legal or economic issue of any kind related to this topic. All correspondence is on file with the authors.

The press largely ignored the filing, in many instances incorporating it into discussions of the Tunney Act proceeding. *See, e.g.*, Jonathon Krim, *Interested Parties Weigh in on Proposed Microsoft Settlement*, WASH. POST, Jan. 31, 2002, at E4, *available at* 2002 WL 10944671.

37. *See infra* Part VI (discussing what truly constitutes a "consent decree" within the meaning of the Tunney Act).

38. *See infra* Part VII (suggesting what the proper application of the Tunney Act or § 4 of the Sherman Act would entail).

39. Natalie L. Krodel, Comment, *The Tunney Act: Judicial Discretion in* United States v. Microsoft Corporation, 62 BROOK. L. REV. 1293, 1315 (1996).

40. United States v. Int'l Tel. & Tel. Corp., No. CIV.A.13320, 1971 WL 549, at *1 (D. Conn. Sept. 24, 1971).

> massive behind-closed-doors campaign [that] resulted in halting the Justice Department's prosecution of the ITT case and its hasty settlement favorable to the company. During these hearings, . . . [Senator Tunney] became concerned with the apparent weakness of the consent decree process which could allow this kind of corporate pressures to be exercised.[41]

The basis of Senator Tunney's aggravation was the ITT antitrust suits brought under § 7 of the Clayton Act[42] by the DOJ in 1969 to prevent ITT's[43] acquisition of three companies.[44] The DOJ lost two of the three suits. In 1971, the DOJ and ITT agreed to a settlement of the remaining suit.[45] ITT was allowed to retain Hartford Fire Insurance Co. but was required to divest several Hartford subsidiaries.[46] The DOJ made no public statement as to the underlying reasons for the settlement. Instead, as was common practice at the time, the DOJ made public only the proposed decree.[47]

The public perceived politics as the underlying motivation for settlement after two significant events occurred. First, President Nixon nominated Richard Kleindienst to be Attorney General of the United States.[48] Kleindienst had been involved in the ITT litigation in his capacity as Deputy Attorney General and questions arose concerning his participation in the settlement of the case.[49] Second, ITT offered to help finance the 1972 Republican National Convention.[50] Although no quid pro quo was proven, the appearance of impropriety sparked significant debate.

Moreover, Kleindienst's confirmation hearings revealed to the public for the first time the underlying rationale for the DOJ settlement with

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41. 120 CONG. REC. 38,585 (1974) (statement of Sen. Tunney).

42. Section 7 of the Clayton Act enables enforcement agencies to challenge stock or asset acquisitions where the "effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (2000).

43. ITT was the nation's ninth largest company at the time of its attempted acquisitions. Krodel, *supra* note 39, at 1314.

44. The companies were Grinnell Corp., Canteen Corp., and Hartford Fire Insurance Co.. The DOJ lost at trial with respect to the Grinnell and Canteen acquisitions. *See* Note, *The* ITT *Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 COLUM. L. REV. 595, 603 (1973).

45. Lloyd C. Anderson, United States v. Microsoft, *Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review*, 65 ANTITRUST L.J. 1, 7 (1996).

46. These subsidiaries, the government contended, were the "prime beneficiaries of the alleged anticompetitive effects of the ITT/Hartford merger." *See id.*

47. *See* Note, *supra* note 44, at 604.

48. *See* Anderson, *supra* note 45, at 7.

49. *Id.*

50. *Id.*; Note, *supra* note 44, at 604.

ITT.[51] In the hearing, Kleindienst asserted that one reason for the settlement was the DOJ's fear that divestiture would cause ITT's stock price to fall, causing hardship to shareholders.[52] Another DOJ concern apparently was that the plummeting stock price would ripple throughout the economy of the United States.[53]

Ralph Nader moved to intervene to ask the court to set aside the consent decree on the ground that it was obtained by "'fraud . . ., misrepresentation, or other misconduct of an adverse party.'"[54] The district court denied Nader's motion, finding that hardship on shareholders was a legitimate DOJ consideration in settling the case.[55] As was true in the consent decree process prior to the enactment of the Tunney Act, third parties could only participate via a motion to intervene or by filing an amicus brief with the court.[56] Such a motion was granted only if the substantial interests of the movant were "less than adequately represented" by the DOJ.[57] Typically, the motion would not be granted. The secret negotiations of the DOJ in the ITT case and the inability of third parties to intervene, when combined with judicial "rubber-stamping" of consent decrees brought before the courts by the DOJ, prompted legislation designed to cure these ills.

The Supreme Court endorsed the view that courts should give deference to the DOJ in the imposition of consent decrees in *Sam Fox Publishing Co. v. United States*.[58] The *Sam Fox Publishing Co.* case confronted the Court with an appeal from an order of the United States District Court for the Southern District of New York, which had denied

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51. *See generally* Anderson, *supra* note 45, at 7.

52. *Id.*

53. *See* Note, *supra* note 44, at 604.

54. United States v. ITT, 349 F. Supp. 22, 24 (D. Conn. 1972) (quoting FED. R. CIV. P. 60(b)(3)).

55. *Id.* at 30–31.

56. Of course, amicus briefs are allowed at the pleasure of the court, while motions to intervene as a matter of right are usually denied. *See infra* note 57 (discussing motions to intervene in antitrust suits).

57. *ITT*, 349 F. Supp. at 27 (internal quotation marks omitted); *see also* United States v. CIBA Corp., 50 F.R.D. 507, 513 (S.D.N.Y. 1970). The court in *United States v. CIBA Corp.* explained:

> It seems apparent from *Cascade* [*Natural Gas Corp. v. El Paso Natural Gas Co.*] and other cases that the interest justifying intervention as of right in an antitrust suit brought by the United States must be substantial, must lie at the center of the controversy, and must be shown clearly . . . to be less than 'adequately represented' by the Department of Justice. This would appear to harmonize fairly the procedural aims of the Rule and the perhaps more fundamental principles governing the role of the Attorney General of the United States in representing the "public interest" in federal antitrust proceedings.

CIBA Corp., 50 F.R.D. at 513.

58. Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689 (1961).

the appellants' motions to intervene as a matter of right in a proceeding to modify a consent decree previously entered in a government antitrust suit.[59] The court upheld the denial of the motion and also added that a court should not entangle itself in modifications of consent decrees, stating that "sound policy would strongly lead . . . [the Court] to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting."[60]

In the Tunney Act, Congress rejected the Supreme Court's notion that courts must give deference to the DOJ when determining if a consent decree is in the public interest. Instead, Congress wanted the courts to make an independent, objective, and active determination without deference to the DOJ. The legislative history is replete with references to Congressional distaste for judicial rubber-stamping of consent decrees. As Senator John Tunney stated:

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

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59. *Id.* at 684.

60. *Id.* Not surprisingly, the DOJ advocated a return to pre-Tunney rubber-stamping in *Microsoft I*:

> Moreover, in making its determination, the Court properly accords significant weight to the United States' predictive judgments as to the efficacy of remedial provisions. Indeed, such deference is proper even outside the consent decree context. *See Ford Motor Co. v. United States*, 405 U.S. 562, 575 (1972) ("'once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor'") (quoting *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961)). Similarly, it is proper to defer to the United States as representative of the public interest when the parties are requesting entry of an agreed-upon judgment.

Mem. of the United States in Supp. of Entry of the Proposed Final J., *Microsoft II: Review of Proposed Final Judgment*, 2002 WL 31654530 (D.D.C. Nov. 12, 2002) (No. CIV.A.98-1232), *available at* http://www.usdoj.gov/atr/cases/f10100/10143.htm#1 (last visited May 8, 2003). Note that both cases cited by the DOJ are pre-Tunney Act cases.

> decree to the court and its subsequent embodiment in a judgment lends a permanence that endures long after the passing of a particular administration of the Department.
>
> For all these reasons, the mandate placed upon the court by this section, even though a general one, carries with it a major significance.[61]

Congress inserted the Tunney Act into § 5 of the Clayton Act, as § 5(b)–(h). Prior to passage of the Tunney Act, the only reference to consent decrees was found in what would be renumbered as § 5(a) of the Clayton Act. That section expressly provides:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided, that this section shall not apply to consent judgments or decrees entered before any testimony has been taken.*[62]

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61. *The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong. 452 (1973). Senator Tunney stated during hearings:

> [T]he concept that the trial court judge ought to be independently involved in making the determination that the proposed decree is in the public interest must be preserved. The purpose of section 2(d) is to insure that the court shall exercise its independent judgment in antitrust consent decrees—and not merely act as a rubberstamp upon out-of-court settlements.

Id. at 3–4. Senator Ed Gurney argued:

> The bill further requires that the court accept a proposed consent decree only after it determines that to do so is in the public interest. This is a particularly important provision, since after entry of a consent decree it is often difficult for private parties to recover redress for antitrust injuries. . . . In some cases, the court may find that it is more in the public interest, for this reason and others, that the case go to trial instead of being settled by agreement.

Id. at 8. Senator Tunney, in response to a proposal by Professor Harvey Goldschmid that the judicial review provision be excised, stated, "It is very important to me that the court not act as a rubber stamp, that it make an independent evaluation, as it does in other kinds of cases." *Id.* at 24. He later added, "we certainly are intending to have the judges do more than they have done . . . because many judges just rubber-stamp the consent decree. That might be just fine for the Antitrust Division, but I am not convinced that it is fine for the public interest." *Id.* at 196; *see* John J. Flynn, *Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals*, 53 IOWA L. REV. 983 (1968) (cited in above hearing); *see also* H.R. REP. NO. 93-1463 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538 ("One of the abuses sought to be remedied by the bill has been called 'judicial rubber-stamping' by district courts of proposals submitted by the Justice Department.").

62. 15 U.S.C. § 16(a) (2000) (emphasis added).

The interrelation between § 5(a) of the Clayton Act and the newly added provisions of the Tunney Act sheds light on what Congress understood consent decrees to mean. The Tunney Act was added to § 5 of the Clayton Act in 1974 and was designed to deal with the settlement of antitrust cases before any litigation had taken place. When the Tunney Act was added, Congress understood § 5(a) to mean that "consent decrees" were antitrust decrees entered prior to litigation of a case and there was no intent to change that meaning by adding the Tunney Act amendments to § 5 of the Clayton Act.[63] This fact is clear from the language of § 5(e)(2) of the Tunney Act amendment to § 5 of the Clayton Act,[64] where a court, as part of its public interest determination of whether to approve a "consent judgment proposed by the United States under this section" is instructed to consider "the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, *to be derived from a determination of the issues at trial.*"[65] Settlements crafted after litigation had taken place, or cases litigated to final determinations of fact and law, as in *Microsoft II*, were not considered "consent judgments" by Congress within the meaning of the Tunney Act.[66] Congress considered only those cases settled prior to litigation,

63. *See infra* note 89 and accompanying text (explaining the historical understanding of consent decrees).

64. 15 U.S.C. § 16(e)(2) (2000).

65. *Id.* (emphasis added).

> 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.

Id. § 16(e) (emphasis added). As further evidence of congressional intent to have the court make an independent evaluation of a proposed consent decree, § 5(f) provides that the court may take the testimony of public officials or expert witnesses, appoint a special master, authorize full or limited participation in the proceedings by interested persons, review any comments filed by the public, or "take such other action in the public interest as the court may deem appropriate." *Id.* § 16(f).

66. Those cases where the government chooses to dismiss the case after litigation has taken place and before judgment has been entered obviously would not be subject to the Tunney Act because dismissal of the action would not constitute a "consent decree" within the meaning of the Act.

such as *Microsoft I*, to be "consent decrees" subject to the requirements of the Tunney Act.[67]

In *Microsoft II*, Judge Kollar-Kotelly ignored the language of § 5(e)(2) of the Tunney Act, which showed that Congress understood the term "consent decrees" to apply only to proposed settlements entered before any litigation of "the violations alleged in the complaint" had taken place.[68] Similarly, Judge Kollar-Kotelly did not examine the extensive legislative history indicating that those proposing and voting for the legislation also understood the concept to be limited to proposed decrees negotiated by the DOJ and an antitrust defendant prior to any litigation taking place.[69] Instead, the court appeared to assume that a proposed decree entered into at any time in the litigation process was a "consent decree" for purposes of the Act. The court did so by

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67. Congress consistently has sought to preserve the right of private litigants to benefit from public antitrust enforcement and maintain the incentive of the threat of treble damage actions to invoke consent decrees and nolo contendere pleas. The 1959 *Antitrust Subcommittee Report* emphasizes the importance of the prima facie effect and its relationship to consent decrees:

> Because of the protracted nature of antitrust litigation, with the expense and complexity of proof of the legal and economic issues involved, it is difficult at best for a private citizen to prosecute to conclusion an action under the antitrust laws. When the private litigant is deprived of the use of the Government's decree as prima facie evidence, moreover, a private action becomes virtually impossible to maintain.

ANTITRUST SUBCOMM., COMM. ON THE JUDICIARY, 86TH CONG., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE 24 (Comm. Print 1959). The *Antitrust Subcommittee Report* credits the effect of § 5(a) (at the time it was numbered § 5) as the reason why consent decrees were entered into so often. *Id.* at ix; *see also* Charles A. Sullivan, *Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 SETON HALL L. REV. 17, 18 n.8 (1983) ("In 1914, § 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1982), was passed providing that plaintiffs in private antitrust suits may use nonconsent 'final judgments' obtained by the United States in civil or criminal antitrust suits as 'prima facie evidence.' The purpose of § 5(a) was clearly to facilitate private actions." (citing 51 CONG. REC. 1962, 1964 (Jan. 20, 1914) (President Wilson's Special Message to Congress))).

68. The Court stated: "Nothing in the language of this subsection [referring to § 5(b)], expressly or impliedly, indicates that the Act's provisions are inapplicable to consent decrees proposed after commencement of trial but in advance of a final judgment." *Microsoft II: Memorandum Opinion*, 215 F. Supp. 2d 1, 6 (D.D.C. 2002). Although that may be true of § 5(b), it is not true of the remaining sections of the Tunney Act. Section 5(e)(2) provides that before entering "any consent judgment . . . under this section," the court may consider "the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, *to be derived from a determination of the issues at trial*." 15 U.S.C. § 16(e)(2) (emphasis added). This language, expressly and impliedly, clearly indicates that Congress understood the meaning of "consent decrees" subject to § 5(b) to be limited to settlement proposals arrived at before trial.

69. *See supra* note 61 and accompanying text (providing a history of the Tunney Act Senate debates). Senator Tunney, when introducing the bill that later became the Tunney Act, defined "consent decrees" as "voluntary settlements negotiated between defendants and the Government and adopted by the court *prior to trial*." *The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong. 450 (1973) (emphasis added).

emphasizing the word "any" in § 5(b) ("any proposal for a consent judgment") without exploring the meaning Congress intended for the words "consent judgment."[70] In what can only be described as a form of circular reasoning, the court ignored the express language of § 5(e)(2),[71] other express language in the Act suggesting a distinction between consent decrees and other judgments and decrees,[72] the views of those proposing and voting for the Act, and the long-standing understanding that consent decrees were settlements proposed prior to any litigation taking place.[73] Even though all consent judgments may be the product of proposed settlements, it is clear that Congress did not understand that all proposed settlements were "consent decrees" for purposes of the Tunney Act.[74]

The court sought to buttress its analysis by arguing that the language of § 5(a), creating the prima facie effect of a final judgment or decree "shall not apply to consent judgments or decrees entered before any testimony has been taken," would be "surplusage" if the "taking of testimony in th[e] case renders it too late for introduction of a proposed 'consent judgment.'"[75] This analysis is curious because the proviso was inserted to distinguish consent judgments entered before testimony has been taken from other forms of "final judgment or decree"[76]—a distinction that, on its face, indicates an intent to distinguish between

70. *Microsoft II: Memorandum Opinion*, 215 F. Supp. 2d at 5.

71. 15 U.S.C. § 16(e)(2).

72. Section 5(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(d), requiring the Attorney General to consider comments by the public, refers to comments on a "proposal for the consent judgment submitted under subsection (b) of this section" (15 U.S.C. § 16(b)), not judgments or decrees filed under this "section." One possible inference from the face of the statutory language is that Congress was distinguishing the type of consent decree filed under § 5(b) from the "final judgments or decrees," whether settlements or litigated decrees, referred to in § 5(a) of the Tunney Act. *See* 15 U.S.C. § 16(a).

73. *See, e.g.*, *infra* notes 81, 86–87, 89, and 93 (discussing the long-standing understanding that consent decrees were considered settlements).

74. To hold otherwise would undermine the long-standing policy of Congress to encourage the settlement of government antitrust cases without a trial because of the threat of treble damage litigants having the benefit of the prima facie effect of § 5(a). By holding that a settlement after full litigation of a government antitrust case is a "consent decree," the threat of § 5(a) is undermined and antitrust defendants can take their chances by fully litigating government cases, settling if they lose, and claiming that the settlement is a "consent decree" in subsequent treble damage litigation. Part VIII of the Final Judgment, in *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 277 (D.D.C. 2002), expressly asserts that position: "Nothing in this Final Judgment is intended to confer upon any other persons any rights or remedies of any nature whatsoever hereunder or by reason of this Final Judgment."

75. *Microsoft II: Memorandum Opinion*, 215 F. Supp. 2d at 6–7.

76. Senator Ed Gurney, a co-sponsor of the bill, expressly stated: "By declining to give it prima facie effect as a matter of law, the attractiveness of consent decrees is thereby preserved." 119 CONG. REC. 24,601 (1973).

proposed settlements before any litigation has taken place and litigated judgments and decrees entered pursuant to negotiated settlements after litigation has taken place. Rather than being "surplusage," the language of the proviso is integral to the distinction between the kind of "consent decrees" Congress intended to be subject to a Tunney Act process and those settlements and litigated decrees entered after trial had begun, which Congress did not intend to be covered by the Tunney Act.[77]

The court also sought to support its circular analysis, and avoid defining the term "consent judgment," by referring to testimony on the Tunney Act by opponents—but not proponents—of the Act.[78] Resort to testimony by those opposed to the Act, rather than those who supported and drafted the Act, is not a persuasive ground upon which to establish the meaning of key concepts used in the statute. The well-established meaning of "consent decree" at the time of the adoption of the Tunney Act was limited to "voluntary settlements negotiated between defendants and the Government and adopted by the Court *prior to trial*."[79] Any other interpretation is inconsistent with the express language of § 5(a) and § 5(e)(2) of the Clayton Act, the express intention of the proponents of the Act, and the well-understood meaning of "consent decree" at the time the Act was adopted.

Congress recognized the consent decree process of settling antitrust cases without litigation as creating "an orbit in the twilight zone between established rules of administrative law and judicial procedures"; the purpose of the Tunney Act was "to substitute 'sunlight' for 'twilight.'"[80] The Tunney Act would accomplish this purpose by regulating and making uniform judicial and public procedures exposing the Justice Department's decision to enter into a

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77. The court appeared to attach some significance to the proximity of the sections in which the terminology "consent decree" was used, principally § 5(a) and § 5(b). *Microsoft II: Memorandum Opinion*, 215 F. Supp. 2d at 7. If proximity were relevant, then that factor would also support an interpretation that the concept "consent decree" means that form of judgment or decree entered into before "any testimony has been taken" and would not include proposed settlements negotiated after testimony has been taken. 15 U.S.C. § 5(a).

78. *Microsoft II: Memorandum Opinion*, 215 F. Supp. 2d at 7–8. Not surprisingly, Judge Kollar-Kotelly cited to the opponents of the Tunney Act, given that they are cited in the DOJ brief. *See* Mem. of Pl. United States in Resp. to the Cal. Pl.'s Mot. for Intervention, or in the Alternative, for Leave to File a Br. Amicus Curiae in the Tunney Act Settlement Proceedings Currently Pending in this Ct. at 14–15, *Microsoft II: Memorandum Opinion*, 215 F. Supp. 2d 1 (D.D.C. 2002) (No. CIV.A.98-1232 (CKK)) [hereinafter DOJ Reply Mem.].

79. *Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong. 450 (1973) (emphasis added).

80. *Antitrust Procedures and Penalties Act*, H.R. REP. NO. 93-1463 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6537 (citation omitted).

proposal for a consent decree before any litigation had taken place.[81] Similar to fully litigated cases, settlements created after litigation had taken place were understood to be subject to judicial review under the standards of § 4 of the Sherman Act, by which a court has the discretion to investigate the merits of the proposed settlement and independently determine the remedy.[82]

There is no indication that Congress intended to eclipse the sunlight of traditional judicial procedures for dealing with settlements after litigation has begun or in fully litigated cases where the determination of remedies belongs to the trial court under § 4 of the Sherman Act with the open and full participation of all the parties to the case. Nor does it appear that Congress sought to remove the significant incentive provided by § 5(a) of the Clayton Act to induce antitrust defendants to enter into settlements "before any testimony is taken."[83] The 1974 House Report on the Antitrust Procedures and Penalties Act specifically limits the purpose of the Tunney Act to consent decree procedures in cases where no testimony has been taken:

> Given the high rate of settlement in public antitrust cases, it is imperative that the integrity of and public confidence in procedures relating to settlements via consent decree procedures be assured. The bill seeks precisely to accomplish this objective and focuses on the various stages of consent decree procedures, including that process by which proposed settlements are entered as a court decree by judicial action.
>
> Ordinarily, defendants do not admit to having violated the antitrust or other laws alleged as violated in complaints that are settled. The antitrust laws express fundamental legal, economic and social policy. Present law . . . encourages settlement by consent decrees as part of the national legal policies expressed in the antitrust laws. Consent decrees, *unlike decrees entered as a result of litigation*, are not available as prima facie evidence against defendants in subsequent private antitrust cases. *The bill preserves these legal and enforcement policies*, and, moreover, expressly makes judicial proceedings brought under the bill as well as the impact statement required to be filed prior

81. The Antitrust Division's Manual for Attorneys describes consent decrees as a means to obtain relief without litigation: "It is often possible to obtain effective relief without taking the case to trial. This Section describes the procedures used by the Antitrust Division in negotiating and entering civil consent judgments under the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16 . . . ." U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL, ch. IV-E (2d ed. 1998), *available at* http://www.usdoj.gov/atr/foia/divisionmanual/ch4.htm (last visited May 8, 2003).

82. *See supra* note 24 (discussing § 4 of the Sherman Act, 15 U.S.C. § 4). There is a parallel provision for claimed violations of the Clayton Act. *See* 15 U.S.C. § 25.

83. 15 U.S.C. § 16(a).

> thereto inadmissible against defendants of the public antitrust action in subsequent antitrust actions, if any. Various abuses in consent decree procedures by the Antitrust Division and by district courts are, however, sought to be remedied as a matter of priority since as the Senate Report on the bill, Senate Report No. 93-298, aptly observed, "by definition, antitrust violations wield great influence and economic power." (p. 5).[84]

If the proposed settlement were a "consent decree" within the Tunney Act, then § 5(h) of the Clayton Act[85] would bar use of the decree and other remedy phase evidence in subsequent treble damage actions. Such a result would violate the express language of § 5(a) and the clear legislative history concerning "decrees entered as a result of litigation."[86] The obvious consequences of treating a settlement negotiated by the government and an antitrust defendant after litigation of a case as a "consent decree" is to remove the incentive Congress thought important to settle a case without litigation and minimize or eliminate the threat of subsequent treble damage plaintiffs' ability to rely upon the prima facie effect of a judgment or decree entered in favor of the government.

Senator Tunney indicated that the procedures set forth applied to consent decrees and not to settlements after litigation took place or judgments were litigated fully.[87] The amendment to § 5 of the Clayton Act left the original § 5 intact, except that the section was renumbered § 5(a), and subsections (b) through (h) were added.[88] There is no evidence of intent to change the meaning of the concept "consent decree"[89] from its original connotation, which refers to settlements prior

84. H.R. REP. NO. 93-1463, pt. 1 (1971), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6536–37 (emphasis added).

85. 15 U.S.C. § 16(h).

86. H.R. REP. NO. 93-1463, pt. I.

87. When asked what would happen if a court refused to enter a consent decree, Senator Tunney replied that the parties "could try to work out a new agreement which would meet with the judge's approval or proceed with the litigation." *See Consent Decree Bills: Hearings on H.R. 9203, H.R. 9947 and S. 782 Before the Subcomm. on Monopolies and Commercial Law of the Comm. of the Judiciary*, 93d Cong. 43 (1973); *see also id.* at 176 (George D. Reycraft states: "The only way I know of to get rid of [antitrust cases] is that you try them, settle them by consent decree, or you dismiss them.").

88. That part of § 5 dealing with suspension of the statute of limitations during the pendency of a government civil or criminal action was separated from § 5(a) and renumbered § 5(i). 15 U.S.C. § 16(i).

89. The Tunney Act understanding of the meaning of the concept "consent decree" is consistent with the historical understanding that a "consent decree" is a decree entered to settle a pending government antitrust case before any testimony is taken in the case and not settlements or decrees entered after testimony is taken. In 1959, the House Committee on the Judiciary defined a "consent decree" as "[a]n order of the Court agreed upon by the representatives of the

to any litigation taking place. Similarly, there is no suggestion that Congress intended to disturb the application of what is now § 5(a) of the Act or the prima facie effect of a final judgment once testimony has been taken.[90] The Senate Report on the bill specifically indicates that the bill was aimed at

> 80 percent of all complaints filed by the Antitrust Division of the Department of Justice [that] *are settled prior to trial* by the entry of a consent decree. The entry of a consent decree is a judicial act which requires the approval of a United States district court. Once entered, the consent decree represents a contract between the government and the respondent upon which the parties agree to terminate the litigation. Pursuant to the terms of the decree, the defendant agrees to abide by certain conditions in the future. However, the defendant does not admit to having violated the law as alleged in the complaint.[91]

Attorney General and of the defendant, without trial of the conduct challenged by the Attorney General in proceedings instituted under the Sherman Act, the Clayton Act or related statutes." *Consent Decree Program of the Department: Hearing Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 86th Cong., at ix (Comm. Print 1959); *see also* Dep't of Justice, Consent Decrees & Procedures, 3 Trade Reg. Rep. (CCH) ¶ 8811, at 13,062 ("A consent decree is a final judgment entered in a government antitrust action for injunctive relief before any testimony has been taken.").

90. Section 5(a) of the Clayton Act originally read:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 5 of the Federal Trade Commission Act [15 U.S.C.S. § 45] which could give rise to a claim for relief under the antitrust laws.

15 U.S.C. § 16 (1914) (current version at 15 U.S.C. § 16(a) (2000)). This is the original language of § 5 of the Clayton Act prior to passage of the Tunney Act. The legislative history clearly indicates a desire to preserve this prima facie effect in litigated cases. *See supra* note 84 and accompanying text (quoting the 1974 House Report on the Antitrust Procedures and Penalties Act).

91. S. REP. NO. 93-298, at 5 (1973) (emphasis added). The legislative history also makes clear that Congress intended to preserve the incentive of the threat that litigating a government antitrust case would provide treble damage claimants with a prima facie case of violation should the government win. By doing so, scarce enforcement resources could be maximized. Permitting an antitrust defendant to litigate an antitrust case and then settle it by a claimed "consent decree," purporting to defeat the prima facie effect of the judgment, would obviously circumvent this clear policy of Congress to limit consent decrees to those judgments entered before any litigation has taken place. Section 5(h) of the Tunney Act, 15 U.S.C. § 16(h), was included in the statute to insure that the competitive impact statement and proceedings under § 5(e) and § 5(f)

The legislative history of the Tunney Act[92] demonstrates that it was designed to provide a procedure for bringing light to the process of judicial adoption of a consent decree entered into in pending civil antitrust cases "before any testimony is taken"[93] by the government and a defendant. It was not intended as a substitute for the normal procedures followed in a fully litigated case resulting in a finding that

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accompanying a consent decree, entered without any evidence having been taken, could not be used as prima facie evidence in subsequent treble damage actions. 15 U.S.C. § 16(e)–(f) (2000). The Congressional purpose was "to retain the consent judgment as a substantial antitrust enforcement tool." S. REP. NO. 93-298, at 7. Section 5(a) of the Act was left unchanged, meaning that in those cases settled or carried to judgment after "testimony has been taken" the prima facie effect of § 5(a) still applied.

92. When the California plaintiffs filed their motion to intervene as a matter of right, the DOJ replied that the legislative history undermined their position that a consent decree could only be entered into before testimony has been taken:

> The legislative history of the Tunney Act itself also undermines Movants' "historical understanding." Although it contains numerous indications that Congress had focused its attention primarily on consent decrees entered before trial, as most are, that history also includes references to settlements reached later in the judicial process, and there is no indication that Congress intended to exclude such settlements from Tunney Act coverage. For example, Representative [Edward] Hutchinson, then the ranking minority member of the House Judiciary Committee and of its Monopolies and Commercial Law subcommittee, inserted into a hearing record an argument against encouraging federal judges to review Department of Justice decisions accepting less than full relief for alleged violations. In the course of that argument, he plainly recognized the possibility that circumstances arising during prosecution of a case might make settlement seem appropriate. And Thomas E. Kauper, then Assistant Attorney General, Antitrust Division, specifically noted in his testimony before the Senate subcommittee considering the legislation that "a consent decree . . . may come after trial, even." Thus, contrary to Movants' contention, the historical record confirms that the unambiguous language of the Tunney Act means what it says: "*[a]ny* 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 law," 15 U.S.C. § 16(b) (emphasis added), is within the scope of that Act.

DOJ Reply Mem., *supra* note 78, at 14–15. However, the citations the DOJ used to support its position are dubious. The two individuals they cite, Representative Edward Hutchinson and Assistant Attorney General Thomas Kauper, opposed the bill. It seems inappropriate to use a bill's detractors to interpret what the bill means and claim their opposition is legitimate "legislative history." Moreover, on the pyramid of legislative history reconstruction, the opinion of a non-legislator is somewhere on the periphery. That is, typically the plain language of the bill is examined, followed by Conference Reports, then House and Senate Reports, etc. Usually the words of those subject to the bill are less than authoritative.

93. The earliest consent decrees make clear that they were consent decrees because testimony had not been taken. *See, e.g.*, United States v. Columbia Gas & Elec. Corp., 28 F. Supp. 168 (D. Del. 1939) (noting that the decree was entered into without the taking of testimony); United States v. Sugar Inst., Inc., 15 F. Supp. 817 (S.D.N.Y. 1934) (reaching final judgment without hearing testimony); United States v. Radio Corp. of Am., 3 F. Supp. 23 (D. Del. 1933) ("And it appearing that by reason of the consents of the defendants to this decree and the acceptance of the same by the petitioner *it is unnecessary to proceed with the trial of the cause or to take testimony therein or that any adjudication be made by the Court of the issues presented by the pleadings herein* . . . .") (emphasis added).

an antitrust defendant has violated the antitrust laws. To hold otherwise would raise serious constitutional issues of the Executive Branch invading powers expressly conferred on the judiciary by § 4 of the Sherman Act.[94] Consequently, the jurisdiction of the *Microsoft II* court to consider the appropriate remedies to be entered in the case should not have been premised upon a Tunney Act proceeding but, rather, should have been predicated on § 4 of the Sherman Act and the Federal Rules of Civil Procedure.

III. JUDICIAL DECISIONS

Several courts have been confronted with the issue of whether the Tunney Act applies to "consent decree" proceedings. Although the answers have been divergent, no court has said that the Tunney Act applies where testimony has been taken.[95]

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94. In a dissent from the appeal of Judge Greene's modification of the proposed "consent decree" in *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983) [hereinafter *AT&T*], a consent decree entered into after considerable litigation of the issues in the case and before the trial court ruled on the merits of the case, Chief Justice Rehnquist noted that the Tunney Act standard for reviewing the proposed decree was both broad and vague. *See* Maryland v. United States, 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting). The dissent went on to observe: "It is not clear to me that this standard, or any other standard the District Court could have devised, admits of resolution by a court exercising the judicial power established by Art. III of the Constitution." *Id.* (Rehnquist, J., dissenting).

The problem of judicial review of true consent decrees under the Tunney Act standards existing in the "twilight" between the administrative and judicial process still persists in important cases like *Microsoft I* because the requirements of the Administrative Procedure Act for a hearing and a record of the negotiations of the specific terms of the decree do not apply, and the negotiation process can still be carried out in secret, as they were in *Microsoft I* and *II*. The court ends up with a proposed remedy and any subsequent hearings focus on the "is" of the proposed decree and not the "ought" of what the court should implement as the appropriate remedy. In cases where no litigation on the merits, much less a final decision, has occurred, a court appropriately might give some deference to the prosecutorial discretion of the Executive Branch to settle the proposed litigation under the "public interest" standard of § 5(e) of the Tunney Act. The court could also seek additional assistance in evaluating the merits of the proposed decree as provided by § 5(f) of the Tunney Act. Because *Microsoft II* was not a case where a Tunney Act "consent decree" could be entertained, and the court had a litigated record, findings of fact, and conclusions of law from which to fashion a remedy, it was inappropriate for the court to defer to the negotiating skills and stamina of the DOJ and the defendant. Deference to prosecutorial discretion, once the case is litigated, improperly invades the discretion committed to the courts by Congress under § 4 of the Sherman Act. *See* United States v. Nixon, 418 U.S. 683, 703–05 (1974); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see also infra* Part VI.B (discussing the application of consent decrees under separation of powers principles).

95. The American Antitrust Institute asked Senator Tunney to file comments in the *Microsoft* proceeding. His comments note that Microsoft failed to comply with the reporting provisions of the Tunney Act. *See* Aff. of John V. Tunney, *available at* http://www.dcd.uscourts.gov/ms_tuncom/major/mtc-00032065.htm (last visited Apr. 29, 2002). He, however, was not asked

A. Pre-Tunney Act Use of the Term "Consent Decree"

Numerous pre-Tunney Act decisions addressed the meaning of the term "consent decree." Typically, the issue would arise under § 5 (now § 5(a))[96] of the Clayton Act. Section 5(a) of the Clayton Act recognizes the distinction between litigated judgments and consent decrees entered before testimony is taken by making the former prima facie evidence of a violation for subsequent treble damage actions. In contrast, consent decrees entered before testimony has been taken are not made prima facie evidence in subsequent treble damage actions. Decrees entered on a stipulation of facts, for example, have been held to be settlements and not "consent decrees" entitled to exemption from § 5(a) of the Clayton Act.[97] Guilty pleas have also been given prima facie effect.[98] Prior to the adoption of the Tunney Act, courts treated consent decrees as something less than a litigated judgment.[99]

Inconsistent usage of the term, however, has raised questions as to whether consent decrees could occur after litigation has begun and before a final judgment has been rendered. For example, the DOJ has argued that the phrase "before any testimony has been taken," would be surplusage if Congress had adopted the view that consent decrees could only be proposed prior to litigation but not after litigation begins and prior to final judgment.[100] The DOJ also argued:

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whether the Act was applicable to the *Microsoft* case given that findings of fact and conclusions of law had already been entered.

96. 15 U.S.C. § 16(a).

97. Gurwitz v. Singer, 218 F. Supp. 686, 689 (S.D. Cal. 1963) ("Inasmuch as there is a clear distinction between consent decrees and decrees rendered upon findings and conclusions based upon stipulated facts, it must be assumed that Congress deliberately eliminated from items to be excluded judgments or decrees rendered pursuant to findings of fact and conclusions of law based on stipulated facts.").

98. *See* Panache Broad. of Pa., Inc. v. Richardson Elecs., 1992 U.S. Dist. LEXIS 13069, at *61 (N.D. Ill. 1992).

99. *See, e.g.*, United States v. ITT Cont'l Baking Co., 420 U.S. 223, 236 n.10 (1975) ("Consent decrees and orders have attributes both of contracts and of judicial decrees or . . . administrative orders. Although they are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the court or administrative agency."); United States v. Armour & Co., 402 U.S. 673, 681 (1971) ("Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense and inevitable risk of litigation.").

100. *See* DOJ Reply Mem., *supra* note 78, at 12. This was one of the arguments adopted by Judge Kollar-Kotelly when holding that the proposed settlement in *Microsoft II* was a "consent decree" within the meaning of the Tunney Act. *Microsoft II: Memorandum Opinion*, 215 F. Supp. 2d 1, 5 (D.D.C. 2002).

> [C]ourts prior to enactment of the Tunney Act routinely used the term "consent decree" to refer to negotiated judgments entered after the taking of testimony—and even after affirmed liability findings. For example, in the well-known antitrust case *United States v. Paramount Pictures, Inc.*, the court entered findings of fact, conclusions of law, and a decree, after trial. The Supreme Court affirmed as to certain liability findings, reversed as to others, and remanded for further proceedings. Then, "[u]pon remand, certain of the defendants entered into *consent decrees* with the government; as to the others, lengthy hearings and deliberations [were] had." The Supreme Court itself, in *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, referred to a decree it had rejected (for failure to comply with its mandate) as a "consent decree" even though it had been agreed to following a trial on the merits and a Supreme Court determination of liability.[101]

The position taken by the DOJ is misleading. First, *United States v. Paramount Pictures, Inc.*[102] and *Utah Public Service Commission v. El Paso Natural Gas Co.*[103] are pre-Tunney act cases;[104] it is difficult to see where the casual use of the term "consent decree" has any bearing on what Congress meant by "consent decree," when it passed the Tunney Act many years later.[105] Second, the argument ignores the significant legislative history discussed above.[106] Third, the leading cases cited to by the DOJ in support of its position, that post-litigation settlements are consent decrees, in fact, were not considered consent decrees because they were given prima facie effect in subsequent treble damage actions.

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101. DOJ Reply Mem., *supra* note 78, at 13–14 (emphasis in original) (citations omitted).

102. United States v. Paramount Pictures, Inc., 70 F. Supp. 53 (S.D.N.Y. 1946), *aff'd in part, rev'd in part, and remanded by* 334 U.S. 131 (1948).

103. Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co., 395 U.S. 464 (1969) [hereinafter *El Paso II*].

104. *See infra* notes 102–12 (discussing *Paramount Pictures* and its progeny); *infra* Part III.B (discussing the litigation El Paso Natural Gas Co.).

105. The "consent decree" has been described by Congress as "an order of the court agreed upon by representatives of the Attorney General and of the defendant, without trial of the conduct challenged by the Attorney General, in proceedings instituted under the Sherman Act, the Clayton Act, or related statutes." ANTITRUST SUBCOMM., COMM. ON THE JUDICIARY, 86TH CONG., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE, at ix (Comm. Print 1959). The Supreme Court has explained that, with a consent decree, parties

> waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

106. *See supra* Part II (discussing the legislative history of the Tunney Act).

The case of *United States v. Paramount Pictures, Inc.*, whose progeny is cited extensively by the DOJ, hardly could stand for the proposition that decrees entered into after trial are consent decrees within the meaning of the Tunney Act and devoid of prima facie effect because the *Paramount* decree was given prima facie effect in subsequent litigation. For example, in *Harrison v. Paramount Pictures, Inc.*,[107] the court instructed the jury as to the existence of the *Paramount* decree:

> [I]f the real purpose here was simply to favor the Warner theatre, which was the Ardmore Theatre, for various reasons—you have heard about the situation in Philadelphia where Warner had a tremendous buying power, as did the Warner theatres all over the country, and the condition of the whole industry, and the fact that these monopoly powers undoubtedly did, or at least were found by the decree of the court to exist—and if the sole purpose was not a reasonable business purpose but was merely to keep a favored theatre ahead of a competitor, then you could find that the clearances were unreasonable. That is one of the things you must ask yourselves.[108]

The prima facie effect of the *Paramount* decree was also an issue in *Partmar Corp. v. Paramount Pictures Theatres Corp.*[109] Although the Supreme Court limited the admissibility of the decree in evidence to issues actually determined in the prior litigation, the court did *not* state that because the decree was entered post-litigation that such a decree lacks prima facie effect on the issues litigated.[110] Thus, because the decree was given prima facie effect for § 5(a) purposes,[111] it was not

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107. Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Penn. 1953). In fact, the decree opened the floodgates for litigation against the motion picture industry. In 1951, 129 of the 367 private antitrust suits brought were against the movie industry. *See* Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1043 n.219 (1952).

108. *Harrison*, 115 F. Supp. at 314. The plaintiff's action, however, was dismissed based upon standing arguments. *Id.* at 315.

109. Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89, 92 (1954).

110. *See id.* at 100–01. The prima facie effect of the decree entered only establishes the illegality of the conduct litigated and found unlawful. *See infra* note 216 and accompanying text (emphasizing how a primary goal of antitrust laws is to root-out illegal conduct). It does not necessarily establish the additional elements a damage litigant must prove, like being within the "target area" of the violation, a factual connection between the violation shown and the injury to the plaintiff; demonstrating that the injury is the sort prohibited by the antitrust laws; and showing with sufficient certainty the amount of injury or damage. *See* LAWRENCE A. SULLIVAN & WARREN GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK § 17.2 (2000).

111. The prima facie effect to be given to the *Paramount* decree was a hotly contested issue. *See, e.g.*, Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 539–44 (1954); Paramount Film Distrib. Corp. v. Vill. Theatre, Inc., 228 F.2d 721, 726–27 (10th Cir. 1955); Loew's, Inc. v. Cinema Amusements, Inc., 210 F.2d 86, 90 (10th Cir. 1954), *cert. denied*, 347 U.S. 976 (1954); T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 269–70

considered a "consent decree" within the meaning of § 5(a) of the Clayton Act, nor would it have been for purposes of the Tunney Act.[112]

B. Cascade Natural Gas Corp. v. El Paso Natural Gas Co.

Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,[113] also a pre-Tunney Act decision, is sometimes cited for the proposition that the DOJ can enter a consent decree at any time.[114] *Cascade* involved the review of a settlement proposal and motions to intervene pursuant to a Supreme Court mandate that complete divestiture of illegally acquired assets take place, not the review of a consent decree. The proposed settlement reached after the reversal in *Cascade* was reversed once again for a failure to comply with the Supreme Court's mandate.[115] The Court recognized that the DOJ had authority to settle but that judicial power could not be circumscribed by the process of settlement, much less a consent decree:

> We do not question the authority of the Attorney General to settle suits after, as well as before, they reach here. The Department of Justice, however, by stipulation or otherwise has no authority to circumscribe the power of the courts to see that our mandate is carried out. No one, except this Court, has authority to alter or modify our mandate. . . . Our direction was that the District Court provide for 'divestiture without delay.' That mandate in the context of the opinion plainly meant that Pacific Northwest or a new company be at once restored to a position where it could compete with El Paso in the California market.[116]

Despite this clear holding in *Utah Public Service Commission v. El Paso Natural Gas Co.*, Judge Kollar-Kotelly relied upon the case and

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(S.D.N.Y. 1953); *see also In re* Airport Car Rental Antitrust Litig., 474 F. Supp. 1072, 1110–11 n.46 (N.D. Cal. 1979) (noting that the government decree a had prima facie effect in the subsequent private actions against Paramount but that the plaintiffs in each case were required to show that their particular businesses had been injured by the defendant's actions).

112. The DOJ also engaged in an elaborate word count strategy, noting that the Fifth Circuit and others referred to the decree as a "consent decree." Strangely, the Supreme Court only referred to the decree as a "consent decree" once, calling it strictly a decree the remaining twenty-eight times. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). Of course, these word counts are meaningless in interpreting the language of the Tunney Act, given that the cases are pre-Tunney Act.

113. Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967).

114. *See* 2 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 348a (1995) (citing *Cascade* for the proposition that consent decrees may occur after an adjudication of liability).

115. *El Paso II*, 395 U.S. 464 (1969). Professor Flynn appealed the settlement as amicus curiae on the ground that the proposed settlement violated the Supreme Court's prior mandate ordering complete divestiture.

116. *Id.* at 467 (quoting *Cascade*, 386 U.S. at 136) (citations omitted).

Judge Skelly Wright's characterization of it as "perhaps the leading atrocity of the whole litany of antitrust suits"[117] to hold that the Act "is only effective if the proposed legislation is understood to apply to settlements entered after testimony has been taken; otherwise, the *El Paso Natural Gas* litigation would serve only to exemplify a problem that the proposed legislation would not have resolved."[118]

The difficulty with the analysis of *El Paso Natural Gas* is that the case turned on the adequacy of the remedy imposed after: (1) the Supreme Court reversed a finding that the Federal Power Commission had primary jurisdiction over the merger;[119] (2) the district court dismissed the antitrust challenge to the merger on the merits; and (3) the Supreme Court reversed the district court's dismissal of the complaint[120] for failure to comply with the Court's finding that the merger was unlawful and order that divestiture be granted "without delay."[121] The decree that was then entered, pursuant to the Supreme Court order, became the subject of further review by the Supreme Court. The Court first held that the parties were improperly denied intervention and that the decree did not comply with the Court's order that the division of reserves fulfill its mandate for fairness.[122] On remand, the district court then entered an order choosing an applicant to acquire the divested reserves and assets.[123] The Supreme Court subsequently found that this order also failed to comply with its outstanding mandate for complete divestiture and failed to apportion fairly the divested assets between El Paso Natural Gas Co. and the new company established by the lower court's order.[124]

Consequently, the *El Paso Natural Gas* case involved a decree implementing a judgment of the Supreme Court, which was entered after a lower court's dismissal of a DOJ complaint, finding the merger unlawful. Notably, *El Paso Natural Gas* was not a case where there had been a litigated finding of illegality by the trial court, but there was a finding of illegality by the Supreme Court. Moreover, because Congress enacted the Tunney Act after the Supreme Court decided the *El Paso Natural Gas* case, reliance on the case to imply that the Tunney

117. 119 CONG. REC. 24,598 (1973).

118. *Microsoft II: Memorandum Opinion*, 215 F. Supp. 2d 1, 8 (D.D.C. 2002) (quoting 119 CONG. REC. 24,598).

119. California v. Fed. Power Comm'n, 369 U.S. 482 (1962).

120. United States v. El Paso Natural Gas Co., 376 U.S. 651, 652, 662 (1964).

121. *Id.* at 662.

122. Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 136 (1967).

123. *El Paso II*, 395 U.S. 464, 468 (1969) (describing the district court's order).

124. *Id.* at 469.

Act applies to proposed settlements entered after a litigated finding of illegality is misplaced.[125]

C. United States v. AT&T

In *United States v. AT&T*,[126] after the enactment of the Tunney Act, Judge Greene was confronted with an attempt to circumvent the district court's power[127] to determine the appropriate remedy in an antitrust case after litigation had taken place but before judgment had been entered finding a violation.[128] After several weeks of trial, but before the case was submitted for a verdict, the United States and AT&T entered into a settlement agreement.[129] The parties then presented the settlement to a New Jersey district court, where a previous consent decree against AT&T had been entered, and simultaneously moved to dismiss the case pending before Judge Greene.[130] The parties claimed that the settlement was an amendment to the earlier consent decree and that the Tunney Act did not apply to the agreement because it was not a consent decree but rather an amendment to a pre-existing decree.[131] Judge Greene refused to dismiss the action pending in his court.[132]

Judge Greene then was confronted with the issue of the appropriate standard to apply to a case not litigated to judgment where the only parties to the case proposed a settlement.[133] He found it "unnecessary

125. If the Tunney Act had been in place, the process for review of the decree entered on remand after the reversal in *United States v. El Paso Natural Gas Co.* and the trial court's jurisdiction would have been based on § 15 of the Clayton Act, 14 U.S.C. § 25, because the decree was one entered pursuant to a Supreme Court mandate in a merger case challenged under § 7 of the Clayton Act. Judge Kollar-Kotelly's noting that the Court in *Cascade* held that the DOJ could settle suits both before and after they reached the Supreme Court, does not resolve the issue of whether the jurisdiction and the process to be followed by a court reviewing such a settlement is that mandated by the Tunney Act, by § 4 of the Sherman Act, or by § 15 of the Clayton Act. *See Microsoft II: Memorandum Opinion*, 215 F. Supp. 2d 1, 8 n.6 (D.D.C. 2002). In *Microsoft II*, it is clear from the face of the Tunney Act, the legislative history, and § 5(a) of the Clayton Act that the only basis for the court's jurisdiction to enter a final judgment and decree is § 4 of the Sherman Act. To hold otherwise would effectively read § 4 out of the Sherman Act and render § 5(a) and § 5(e)(2) of the Clayton Act meaningless.

126. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

127. *AT&T* was, like *Microsoft II*, an attempt by the DOJ to circumvent the power of the court to determine an appropriate remedy.

128. *AT&T*, 552 F. Supp. at 150.

129. *Id.* at 140–41.

130. *Id.*

131. *Id.* at 144. Judge Greene appropriately described the maneuver as "disingenuous." *Id.* at 145.

132. *Id.* at 141.

133. *Id.* at 143.

for the court to pass specifically upon the technical applicability of the Tunney Act."[134] Instead, the judge entered an order under the general equitable powers of the court applying the process set forth by the Tunney Act to the settlement because the case had *not* been litigated to the point of a judicial finding of liability.[135] In doing so, Judge Greene recognized a significant implication of using the Tunney Act standard, even though it was not clear that the Act should be followed in the circumstances:

> Where . . . a court is evaluating a settlement, it is not as free to exercise its discretion in fashioning a remedy *as it would be upon a finding of liability*. For when parties enter into a consent decree, they waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. . . . Naturally, the agreement reached normally embodies a compromise; in exchange for the cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. If courts acting under the Tunney Act disapproved proposed consent decrees merely because they did not contain the exact relief *which the court would have imposed after a finding of liability*, defendants would have no incentive to consent to judgment and this element of compromise would be destroyed. The consent decree would thus as a practical matter be eliminated as an enforcement tool, despite Congress' directive that it be preserved. . . . It follows that a lower standard of review must be applied in assessing proposed consent decrees than would be appropriate in some other circumstances. . . . For these reasons, it has been said by some courts that a proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within

134. *Id.* at 145.

135. *Id.* Judge Kollar-Kotelly did not discuss Judge Greene's opinion in her decision holding that the proposed settlement in *Microsoft II* was a consent decree despite its obvious relevance to the question before the court. Instead, her opinion discussed the dissenting opinion of Justices Rehnquist, Burger, and White from the Supreme Court's affirmation of Judge Greene's order on appeal. *Microsoft II: Memorandum Opinion*, 215 F. Supp. 2d 1, 5–6 (D.D.C. 2002). Like Judge Greene, the dissenting Justices assumed that the concept of "consent decree" only applied to settlements arrived at before litigation had taken place. Judge Kollar-Kotelly, after holding that the opinion of dissenting justices was not binding on her, noted that the dissenters did not distinguish between pre-trial settlements and post-trial settlements and held that the dissenting opinion "does not itself render the Tunney Act inapplicable to these proceedings." *AT&T*, 552 F. Supp. at 151–53. Such reasoning constitutes a series of multiple negatives: a decision not binding on the court is relied upon for not distinguishing between pre- and post-trial settlements to determine that the Tunney Act is not inapplicable to the case before the court. Such reasoning, of course, does not establish the affirmative proposition that the Tunney Act is applicable to the proceeding before the court.

> the range of acceptability or is "within the reaches of the public interest."[136]

Unlike the *AT&T* case, *Microsoft II* has been carried to a litigated finding of liability—there are findings of fact and law from which the court can determine the appropriate remedy.[137] The DOJ and Microsoft portrayed their proposal as a "consent decree" and assumed that the process for the court to follow was that mandated by the Tunney Act. The case, however, is a fully litigated case carried to final judgment, there were other parties to the case, and it was a case subject to a mandate by the court of appeals that a trial be held on the merits of a proposed remedy.[138] Under the standards set forth by Judge Greene, it is clear that *Microsoft II*, or any similar case in the future, is not an appropriate case for use of Tunney Act standards because the case is one litigated to final judgment.

In *Microsoft II*, the district court cited Judge Greene's opinion in the *AT&T* case for the proposition that a "proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is within the reaches of public interest."[139] Judge Greene, however, was careful to condition this observation with the caveat, "[w]here, as here, a court is evaluating a settlement, it is not as free to exercise its discretion in fashioning a remedy as it would be upon a finding of liability."[140] Moreover, under the mandate of the court of appeals in *Microsoft II*, the

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136. *AT&T*, 552 F. Supp. at 151 (citations omitted) (emphasis added). Judge Greene went on to observe that, even under the lower standard implied by following the Tunney Act standard, a court should not revert to the role of being a "rubber stamp" for the settlement arrived at by parties that had prevailed prior to the Tunney Act. *Id.* Among the reasons for an independent evaluation by the court under this lower standard, the court cited the importance of the case to the economy, the familiarity of the court with the facts because the case had been partially litigated, and the questionable circumstances that had taken place in the process by which the case was settled. *Id.* at 151–53. Judge Green conditioned court approval on several modifications of the decree and on-going judicial supervision of the implementation of the decree, thereby asserting the independent power of the court to determine the final decree. *Id.* at 153.

137. *See Microsoft II: Conclusions of Law*, 87 F. Supp. 2d 30 (D.D.C. 2000); *Microsoft II: Findings of Fact*, 65 F. Supp. 2d 1 (D.D.C. 1999).

138. *See Microsoft II: Appeal*, 253 F.3d 34, 46 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001).

139. *Microsoft II: Final Judgment*, 231 F. Supp. 2d 144, 153 (D.D.C. 2002) (quoting *AT&T*, 552 F. Supp. at 151). The court also cited *United States v. Bechtel Corp.*, 648 F.2d 660 (9th Cir. 1981), a case involving a consent decree entered without any litigation where the defendant was seeking to escape entry of the decree after completion of the required Tunney Act proceedings, for the proposition that it must defer to the DOJ. *Microsoft II: Memorandum Opinion*, 215 F. Supp. 2d 1 (D.D.C. 2002). The case is similar to the first "Microsoft Fallacy" on the scope of the trial court's discretion, but at least involved a consent decree entered before any litigation had taken place and not a settlement entered after litigation to a final judgment of illegality had taken place.

140. *AT&T*, 552 F. Supp. at 151.

presence of other parties to the case who objected to the proposed settlement required that the remedy phase of the case be tried in open court with a full opportunity for all parties to cross-examine witnesses and present their own proposals for an appropriate remedy in a single proceeding.[141]

IV. ABUSE OF THE TUNNEY ACT: MISAPPLICATION OF THE SCOPE OF JUDICIAL REVIEW IN *MICROSOFT I*

The first misapplication of the Tunney Act in the *Microsoft* series of cases took place in 1995. In 1994, the DOJ brought a civil complaint against Microsoft under § 1 and § 2 of the Sherman Act, alleging in part that Microsoft had unlawfully maintained a monopoly of operating systems for IBM-compatible personal computers ("PCs").[142] The DOJ claimed that Microsoft had restrained trade of the PCs unreasonably through certain anticompetitive marketing practices.[143] These practices included imposing a per-processor licensing fee that required original equipment manufacturers to pay Microsoft a royalty for each computer produced—regardless whether or not a Microsoft operating system was on it—and overly restrictive nondisclosure agreements with certain independent software vendors ("ISVs"), which limited the ISVs' ability to provide software for competing operating systems.[144] The complaint was filed with a consent decree.[145] The consent decree prohibited Microsoft from engaging in these practices in the future.[146]

The DOJ moved for entry of the decree in January 1995.[147] Judge Sporkin found that the consent decree was not in the public interest.[148] Specifically, Judge Sporkin was concerned about four things:

141. *See infra* Part VI.E (discussing the failure of the District Court in *Microsoft II* to adequately protect the right of the parties to propose remedies).

142. *See Microsoft I*, 159 F.R.D. 318, 322 (D.D.C. 1995).

143. *Id.* at 322–24.

144. *Id.*

145. *See* Proposed Final Judgment and Competitive Impact Statement; United States of America v. Microsoft Corporation, 59 Fed. Reg. 42,845 (Dep't Justice Aug. 19, 1994).

146. *Id.* at 42,845–46. The consent decree expired in the midst of the February 2000 *Microsoft II* remedy hearing without much fanfare. *See id.* at 42,857 (stating that the final judgment will expire seventy-seven months after entry).

147. *See Microsoft I*, 159 F.R.D. at 321.

148. *Id.* at 332.

(1) procedure;[149] (2) scope of the decree;[150] (3) effectiveness of the remedy;[151] and (4) compliance.[152]

The D.C. Circuit reversed Judge Sporkin's decision in *Microsoft I* and remanded the case to a different judge, Judge Jackson, believing that Judge Sporkin would not be impartial on remand.[153] The court then linked Tunney Act review to a standard of deference granted to

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149. The court believed that it should have been apprised of the following:

> (1) The broad contours of the investigation *i.e.*, the particular practices and conduct of the defendant that were under investigation along with the nature, scope and intensity of the inquiry;
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> (2) With respect to such particular practices and conduct, what were the conclusions reached by the Government;
>
> (3) In the settlement discussions between the Government and defendant: (a) what were the areas that were discussed, and (b) what, if any, areas were bargained away and the reasons for their non-inclusion in the decree;
>
> (4) With respect to the areas not discussed at the bargaining table or not bargained away, what are the plans for the Government to deal with them *i.e.*, is the investigation to continue, and, if so, at what intensity, or if the investigation is to be closed, then the Government must explain why it is in the public interest to do so. Basically, other than being told the Government spent a great deal of time on a wide-ranging inquiry and that the defendant is a tough bargainer, the Court has not been provided with the essential information it needs to make its public interest finding.

Id.

150. *See id.* at 333.

> The Court finds the decree on its face to be too narrow. Its coverage is restricted to PCs with x86 or Intel x86 compatible microprocessors. The decree covers only MS-DOS and Windows and its predecessor and successor products. Neither party has even addressed the Court's concern that the decree be expanded to cover all of Microsoft's commercially marketed operating systems. Given the pace of technological change, the decree must anticipate covering operating systems developed for new microprocessors.... In addition, taking into account Microsoft's penchant for narrowly defining the antitrust laws, the Court fears there may be endless debate as to whether a new operating system is covered by the decree.

Id. (footnotes omitted).

151. *See id.* at 333–36. Judge Sporkin believed the remedy to be ineffective because it did not "effectively pry open to competition a market that has been closed by defendant['s] illegal restraints." *Id.* at 333 (quoting *AT&T*, 552 F. Supp. 131, 150 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983)). Judge Sporkin was concerned that the decree did nothing to address the allegation that Microsoft had engaged in vaporware—the practice of prematurely announcing a new product to ensure that customers do not switch to a competitor's wares. *Id.* at 334–36.

152. The court noted that Microsoft was not obliged to develop internal compliance mechanisms to monitor the consent decree. *Id.* at 336.

153. United States v. Microsoft Corp., 56 F.3d 1448, 1463–65 (D.C. Cir. 1995) (per curiam) [hereinafter *Microsoft I: Appeal*]. Interestingly, the *Microsoft* case is now on its third district judge, the previous two being eliminated by the D.C. Circuit for precisely the same reason. *See* Simon Moores, *Has Mr. Toad Learned His Lesson Yet?*, COMPUTER WKLY., Nov. 14, 2002, at 38 (discussing the third judge in the *Microsoft* case).

administrative agencies.[154] Rather than making an independent determination as to whether the consent decree was "in the public interest," the standard mandated by Congress in the Tunney Act,[155] the "appropriate" standard according to the court, was a deferential one:

> The court should also bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities "is the one that will best serve society," but only to confirm that the resulting settlement is "'within the *reaches* of the public interest.'" Thus, a court should not reject an agreed-upon modification unless "it has exceptional confidence that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency."[156]

Thus, the court of appeals transformed the DOJ into an administrative agency and endowed it with deference before reviewing courts—a power neither typical to administrative agencies nor conferred by the Tunney Act itself. Consequently, a district judge confronted with a Tunney Act proceeding has minimal duties in the eyes of the court of appeals. A district judge should only determine whether ambiguity exists and, perhaps, "hesitate" or momentarily pause before signing a consent decree when the objections of the victims of the conduct being prohibited are still heard and the obvious plight of future victims is in sight.[157]

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154. *See id.* at 1459–60. "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.'" *Id.* at 1459 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

155. The "public interest" standard that the court is required to apply under § 5(e) of the Tunney Act expressly states that the court "may" consider: (1) the "competitive impact" of the proposed consent judgment, "including termination of alleged violations"; (2) decree provisions "for [the] enforcement and modification, duration or relief sought;" (3) the "anticipated effects of alternative remedies actually considered"; (4) other considerations "bearing upon the adequacy" of the proposed decrees; (5) the impact of the proposed decree "upon the public generally" and upon "individuals alleging specific injury"; and (6) the "public benefit, if any, to be derived from a determination of issues at trial." 15 U.S.C. §16(e) (2000).

156. *Microsoft I: Appeal*, 56 F.3d at 1460 (per curiam) (emphasis in original) (citations omitted).

157. *See id.* at 1462 (per curiam). The court explained:

> If the decree is ambiguous, or the district judge can foresee difficulties in implementation, we would expect the court to insist that these matters be attended to. And, certainly, if third parties contend that they would be positively injured by the decree, a district judge might well hesitate before assuming that the decree is appropriate.

Id. (per curiam).

Clearly, from the language of the Tunney Act and its legislative history, this is precisely the sort of deferential standard the drafters of the Tunney Act did *not* want.[158] The language of the Act expressly provides that the *court*, not the DOJ, shall determine whether or not the consent decree is in the public interest.[159] The language of the Act also indicates that the court may consider numerous factors in its determination, including whether the consent decree terminates the alleged violations, if it provides mechanisms for enforcement, the duration of relief sought, and the "anticipated effects of alternative remedies actually considered."[160] In addition, § 5(f) provides extensive powers for the court to explore the merits of the proposed decree, powers that would be irrelevant if the court is required to defer to the decision making of the DOJ.[161] In short, Judge Sporkin's concerns raised issues well within the scope of the Tunney Act.

Moreover, the legislative history of the Tunney Act is filled with statements decrying judicial rubber-stamping of consent decrees.[162] To ignore this substantial legislative history and the express language of § 5(e) in favor of a deferential standard is to place the D.C. Circuit in the position of an activist court rewriting legislation. Despite the Tunney Act authors' and Congress's clear intent to insure that the courts have discretion and an active role in the determination of the public interest,[163] the D.C. Circuit chose to ignore legislative intent and cast

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158. Senator Gurney, for example, made clear that the court's function in reviewing a proposed consent decree was for the court to make its own determination as to whether the decree was in the public interest:

> The bill further requires that the court accept a proposed consent decree only after it determines that to do so is in the public interest as defined by the antitrust laws of the United States. The bill specifies criteria the court may consider in deciding whether the judgment would in fact be in the public interest so defined. This is a particularly important provision, since after entry of a consent decree it is often difficult for private parties to recover redress for antitrust injuries.

119 CONG. REC. 24,600 (1973).

159. 15 U.S.C. § 16(e). Section 16(e) states: "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." *Id.* (emphasis added).

160. *Id.*

161. 15 U.S.C. § 16(f).

162. *See supra* note 61 and accompanying text (discussing Congress's desire to eliminate courts' rubber-stamping of consent decrees proposed by the DOJ).

163. The affirmative purpose of requiring the filing of a competitive impact statement, providing for public comment, and delaying entry of the decree for sixty days was to provide the court with sufficient information to make an intelligent determination of whether the decree was in the public interest. As Senator Gurney, a co-sponsor of the legislation, stated:

> The extra time and additional information that the bill thus requires is for the purpose of encouraging, and in some cases soliciting, additional information and public

judicial review of consent decrees back to the days when rubber-stamping was prevalent.[164] Moreover, the standard adopted reopens the potential for political abuse in the settlement of antitrust cases by closed-door negotiation and the settlement of significant cases—one of the very abuses Congress sought to end with the passage of the Tunney Act.[165] It is difficult to conceive of a more patent re-write of a law Congress intended to prevent judges from rubber-stamping consent decrees negotiated by the DOJ. The precedent established by *Microsoft I* constitutes a clear abuse of the Tunney Act—the first "Microsoft Fallacy"—and should be rejected by any other court called upon to interpret the scope of judicial review of consent decrees proposed by the DOJ under the Tunney Act.

V. INTERMISSION: TRIAL, REMAND, AND THE SECOND MICROSOFT FALLACY

Soon after *Microsoft I*, the DOJ and Microsoft became entangled in a series of trials and "errors." Specifically, the DOJ brought a contempt action against Microsoft for tying its Internet browser to its operating system, in claimed violation of the *Microsoft I* consent decree.[166] Judge Jackson, the second of the three judges to oversee the *Microsoft* line of cases, interpreted the decree as one designed to prohibit unlawful tying arrangements under general antitrust tying standards, and issued a preliminary injunction prohibiting Microsoft from tying its Internet Explorer application with its Windows operating system.[167] The court

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> comment that will assist the court in deciding whether the decree should be granted. . . .
>
> The bill further requires that the court accept a proposed consent decree only after it determines that to do so is in the public interest as defined by the antitrust laws of the United States.

119 CONG. REC. 24,600 (1973).

164. *See* James Rob Savin, *Tunney Act '96: Two Decades of Judicial Misapplication*, 46 EMORY L.J. 363, 366–71 (1997) (discussing the standard of review prevalent before the Tunney Act was passed); *see also supra* note 61 and accompanying text (discussing Congress's desire to eliminate the courts' rubber-stamping of consent decrees proposed by the DOJ).

165. *See supra* notes 80–81 and accompanying text (discussing Congress's intent to expose the settlement process to public scrutiny).

166. United States v. Microsoft Corp., 980 F. Supp. 537, 539 (D.D.C. 1997).

167. *Id.* at 542–44. Judge Jackson found the term "integrated products," in the following language of the consent decree, ambiguous when it came to bundling Microsoft's operating system with its Internet browser program:

> Microsoft shall not enter into any License Agreement in which the terms of that agreement are expressly or impliedly conditioned upon: (i) the licensing of any other Covered Product, Operating System Software product or other product (provided, however, that this provision in and of itself shall not be construed to prohibit Microsoft from developing integrated products).

of appeals reversed.[168] Prior to the decision by the court of appeals, however, the DOJ brought a monopolization, attempted monopolization, and exclusive dealing and tying case against Microsoft.[169] The result was a trial with conclusions of law, findings of fact, and yet another appeal.[170] Ultimately, the D.C. Circuit upheld the majority of the findings of facts and conclusions of law by Judge Jackson on monopolization, but reversed Jackson's attempted monopolization and tying analyses and his remedy ordering structural relief.[171] The D.C. Circuit, citing improper communications with the press prior to issuance of Judge Jackson's opinion, remanded the case for determination of remedy to Judge Kollar-Kotelly.[172] Of particular note was the displeasure of the D.C. Circuit that Judge Jackson failed to hold a remedy hearing prior to ordering divestiture of Microsoft's operating system from the rest of the company.[173]

On remand, Judge Kollar-Kotelly, after and because of the events of September 11, 2001, strongly urged the parties to settle.[174] The DOJ and nine states eventually settled with Microsoft.[175] The parties negotiated the settlement in secret and presented the agreement to Judge

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Id. at 539 n.2, 541. But, he found that the bundling likely violated the general antitrust law prohibition against tying arrangements under § 1 of the Sherman Act. *Id.* at 542–45.

168. United States v. Microsoft Corp., 147 F.3d 935, 938 (D.C. Cir. 1998).

169. The DOJ filed the monopolization complaint on May 18, 1998. Complaint, *Microsoft I*, 159 F.R.D. 318 (D.D.C. 1995) (No. 98-1232), *available at* http://www.usdoj.gov/atr/cases/f1700/1763.htm (last visited May 8, 2003). The D.C. Circuit ruled in the *Microsoft I* matter on June 23, 1998. *Microsoft Corp.*, 147 F.3d at 935.

170. *See Microsoft II: Appeal*, 253 F.3d 34 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001).

171. *See id.*

172. *Microsoft II: Final Judgment*, 231 F. Supp. 2d 144 (D.D.C. 2002).

173. *Microsoft II: Appeal*, 253 F.3d at 101–03.

174. *See* Order Filed Sept. 28, 2001, at 1–2, *Microsoft II: Review of Proposed Final Judgment*, No. CIV.A.98-1232 (CKK), *New York v. Microsoft*, No. CIV.A.98-1233 (CKK) (D.D.C. Sept. 28, 2001), *available at* http://www.dcd.uscourts.gov/98-1232gg.pdf (last visited May 8, 2003). The order gave the parties until October 12, 2001, to settle the cases on their own. *Id.* at 2. Failing that, the court required that the parties submit the name of a mediator. *Id.* Judge Kollar-Kotelly's primary concern was September 11: "In light of the recent tragic events affecting our Nation, this Court regards the benefit which will be derived from quick settlement of this case as increasingly significant." *Id.* at 1. In the realm of antitrust remedy, the remedy's short-term effect on the economy is of no consequence.

> Economic hardship can influence choice only as among two or more effective remedies. If the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences. This proposition is not novel; it is deeply rooted in antitrust law and has never been successfully challenged.

United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 327 (1961).

175. The following states settled with Microsoft: Kentucky, New York, Ohio, Louisiana, Maryland, Michigan, North Carolina, Wisconsin, and Illinois. *See Microsoft II: Final Judgment*, 231 F. Supp. 2d at 151 n.1. The District of Columbia and the states of California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, and Utah continued to litigate.

Kollar-Kotelly as a consent decree[176] under the Tunney Act but did not have trial staff sign it.[177] The split between the plaintiffs and the remedy hearing required to litigate the non-settling states' case caused Judge Kollar-Kotelly to bifurcate the trial of the litigating states and the settlement between Microsoft and the DOJ into two separate proceedings.[178] The bifurcation of the remedy proceeding, as will be shown below, only further complicated the already complex problem of determining the appropriate remedy for the violation established in *Microsoft II*.[179] Instead of holding a unified trial on the appropriate remedy, the court reviewed the DOJ's "consent decree" with Microsoft under the standards of the first "Microsoft Fallacy," deferring at every turn to the discretion of the DOJ, to enter the settlement despite occasional indications of reservation by the court.[180] Thus, the first "Microsoft Fallacy" was married to the second "Microsoft Fallacy," to rubber-stamp a settlement proposal entered into by secret negotiations after fully litigating the case to a final judgment.

VI. MISUSE OF THE TUNNEY ACT: THE DOJ-PROPOSED FINAL JUDGMENT MISLABELED A "CONSENT DECREE" IN *MICROSOFT II*

The issues raised by the review process followed by the district court and its holding—that the proposed remedy filed by the DOJ, Microsoft, and nine states was a "consent decree" for Tunney Act purposes in the remedy phase of *Microsoft II*—are more than a mere procedural quibble. They raise serious jurisdictional questions and portend consequences that will make any decree entered pursuant to the process, which now appears to be in place, vulnerable to an appeal and reversal. Moreover,

176. *See supra* notes 68–79 and accompanying text (examining Judge Kollar-Kotelly's decision to treat the proposed settlement as a consent decree).

177. *See* John Wilke, *Hard Drive: Negotiating All Night, Tenacious Microsoft Won Many Loopholes*, WALL ST. J., Nov. 9, 2001, at A1. It is unusual for trial staff not to have a single signature on any of the filed settlement documents apart from the competitive impact statement. For an example, consider the pleadings and settlement documents from *United States v. Rochester Gas & Electric Corp.*, 4 F. Supp. 2d 172 (W.D.N.Y. 1998) (No. 97-CV-6294T), which are available at http://www.usdoj.gov/atr/cases/indx23.htm. (last visited May 8, 2003).

178. *See* United States v. Microsoft, No. CIV.A.98-1232, 2002 WL 319784, at *1 (D.D.C. Jan. 28, 2001).

179. *See supra* note 14 (discussing the components of the *Microsoft II* litigation).

180. At the outset of her opinion and in reliance on the first *Microsoft* case, Judge Kollar-Kotelly stated that "the Court must recall that its 'authority to review the [proposed] decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place.' Accordingly, the Court must accord deference to the 'government's predictions as to the effect of the proposed remedies.'" New York v. Microsoft, 231 F. Supp. 2d 203, 209 (D.D.C. 2002) (internal citations omitted) (quoting *Microsoft I: Appeal*, 56 F.3d 1448, 1461–62 (D.C. Cir. 1995) (per curiam)).

the court's holding establishes an improper precedent for litigated antitrust case remedy proceedings and the effective use of consent decrees in the future. These issues are addressed below.

A. The Law of the Case

The refusal of Judge Kollar-Kotelly to hold a unified and open hearing where all parties would have had an equal opportunity to present proposed remedies, due to the DOJ's misapplication of the Tunney Act, replicated the error previously committed by Judge Jackson, which the court of appeals found to deprive parties of a hearing on remedy and violated what is now the law of the case. The court of appeals held in remand of the case:

> It is a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings. Any other course would be contrary "to the spirit which imbues our judicial tribunals prohibiting decision without hearing."
>
> *A party has the right to a judicial resolution of disputed facts not just to the liability phase, but also as to appropriate relief*.... ("Generally the entry or continuation of an injunction requires a hearing. Only when the facts are not in dispute, or when the adverse party has waived its right to a hearing, can that significant procedural step be eliminated." ... A hearing on the merits—*i.e.*, a trial on liability—does not substitute for a relief-specific evidentiary hearing unless the matter of relief was part of the trial on liability, or unless there are no disputed factual issues regarding the matter of relief.
>
> This rule is no less applicable in antitrust cases. The Supreme Court "has recognized that a 'full exploration of facts is usually necessary in order (for the District Court) properly to draw (an antitrust) decree' so as to 'prevent future violations and eradicate existing evils.'" ... *Hence a remedies decree must be vacated whenever there is "a bona fide disagreement concerning substantive items of relief which could be resolved only by trial."* [181]

Consequently, those parties dissenting from the remedy proposed by the DOJ and Microsoft were entitled to have their own proposals evaluated on the merits by the court at trial because the DOJ proceeding was not a consent decree proceeding and the law of the case mandates that the district court follow such a procedure. The separate trial of the remedy issues presented by the dissenting states, while generating a lengthy record and opinion by the court, was necessarily cabined by the court's

181. *Microsoft II: Appeal*, 253 F.3d 34, 101 (D.C. Cir.) (emphasis added) (internal citations omitted), *cert. denied*, 534 U.S. 952 (2001).

approval of the "consent decree" in the DOJ remedy case.[182] Working from the remedy drafted by the DOJ and Microsoft, which the trial judge determined to be a Tunney Act consent decree subject to review under the standards of the first "Microsoft Fallacy" by the court of appeals, made the dissenting states' separate proceeding a useless exercise. The mandate of the court of appeals and § 4 of the Sherman Act required that Judge Kollar-Kotelly make her own independent judgment of the remedy necessary to prevent and restrain the violations found, with no special deference given to the proposal of the DOJ and some of the parties.[183] Judge Kollar-Kotelly's two-track proceeding violated the express mandate of the court of appeals because the procedure would result in a remedy being imposed in one proceeding under one standard (the Tunney Act) and another being imposed in a second proceeding under the standards of § 4 of the Sherman Act.[184] The court of appeals, in fact, mandated otherwise, however, and the trial court was not free to hold a separate hearing based on the standards of the Tunney Act.[185]

The parties to the case who did not take part in the settlement proposed by some of the others were not only entitled to a trial "concerning the substantive items of relief," proposed by the DOJ, Microsoft, and some states,[186] but also should have been permitted to propose their own remedies in the same trial—independent of those proposed by the government—for the consideration by the court. In this proceeding, the court would determine whether the suggested remedies addressed present violations and prevented future violations of the Act by the defendant. Then the court, under § 4 of the Sherman Act, would determine the appropriate remedy without any special deference given

182. New York v. Microsoft Corp., 224 F. Supp. 2d 76 (D.D.C. 2002). At every turn, the court rejected the dissenting states' attempts to close loopholes in the proposed government decree, expand the decree to deal with threats to new markets by Microsoft, address the problem of Microsoft's "bundling" of programs left largely unresolved by the proposed government settlement, protect middleware markets, etc. Instead of working with a variety of proposed remedies, the court appeared to be working from the position of whether the government's proposed settlement complied with the narrowest interpretations of the court of appeals findings of liability.

183. *See infra* Part VI.E (discussing two-track proceedings). The trial court did engage in a general review of the standards applied by courts when determining an antitrust remedy. *See id.* at 99–110. The court then systematically rejected each of the major remedy proposals made by the dissenting states, including remedies to deal with Microsoft's bundling practices. *Id.* at 184–91.

184. *See generally Microsoft Corp.*, 224 F. Supp. 2d at 76. The problems inherent in such a two-track analysis are discussed *infra*, Part VI.E.

185. *See infra* Part VI.E (discussing two-track proceedings).

186. *Microsoft II: Appeal*, 253 F.3d at 101.

to the claimed "consent decree" proposed by some of the parties. The opinions of the district court on remedy hewed closely to the narrowest reading of the findings of violation, affirmed by the court of appeals, to prevent a recurrence of the past violations engaged in by Microsoft but did little by way of "preventing or restraining" future violations of the same character or eliminate practices like the bundling of software.

B. Separation of Powers

The process followed in negotiating the proposed Microsoft "consent decree," not only took place in secret,[187] after litigation of the federal and state claims, but also after a final judgment by the court, finding that the defendant violated § 2 of the Sherman Act and a remand by the court of appeals requiring "judicial resolution" of the case.[188] A basic function of the judiciary is to determine and implement the remedy for the antitrust violations found pursuant to a final, litigated judgment.[189] Where the judiciary does not perform this function, serious issues concerning separation of powers will later arise concerning the integrity of any final remedy imposed. The judicial function is compromised when two of the twenty parties to a litigated case are permitted to negotiate and define the initial parameters of the decree,[190] which the court is responsible for determining only after open hearings in court. This procedure vests the executive branch with a judicial power that Congress had reserved for the courts in § 4 of the Sherman Act.[191] It also deprives other parties to the lawsuit of rights guaranteed them by the Federal Rules of Civil Procedure, not to mention the specific mandate of the court of appeals in *Microsoft II*.[192] For the parties and

187. *See* Wilke, *supra* note 177 (noting that Assistant Attorney General Charles James sometimes negotiated one-on-one with Chief Microsoft negotiator Charles Rule). The plaintiff States were left to either sign on to something they had no part of or to continue with litigation. *See supra* note 175 (listing those states that settled and identifying the states that chose to continue litigating). Such a process also raised the specter of undue political interference in the settlement negotiations, a concern driving the adoption of the Tunney Act and the 15 U.S.C. § 16(g) requirement that the defendant disclose any written or oral communications with any offices or employee of the United States.

188. *See generally Microsoft II: Appeal*, 253 F.3d 34 (D.C. Cir.), *cert denied*, 534 U.S. 952 (2001).

189. *See id.* at 101.

190. *See* Wilke, *supra* note 177.

191. As the Supreme Court held in *Utah Public Service Commission v. El Paso Natural Gas Co.*, "the Department of Justice . . . by stipulation or otherwise has no authority to circumscribe the power of the courts to see that our mandate is carried out." *El Paso II*, 395 U.S. 464, 467 (1969). By the same token, the DOJ has no authority, by stipulation or otherwise, to circumscribe the power of the trial court to carry out the mandate of the court of appeals in *Microsoft II* or the power Congress expressly conferred on the court through § 4 of the Sherman Act.

192. *See Microsoft II: Appeal*, 253 F.3d at 34.

the court to ignore the clear statutory allocation of powers by treating the remedy phase of a litigated antitrust case as one requiring a Tunney Act consent decree process, particularly under the erroneous standards of the first "Microsoft Fallacy," raises a substantial separation of powers issue. Whether analyzed under a "formal," "functional,"[193] or other approach,[194] separation of power concerns arise when an executive agency assumes certain powers that Congress expressly reserved for the judiciary, and a court tolerates the assumption.

Executive and judicial powers have been intermingled in the realm of government antitrust enforcement for a long time as a result of the widespread use of consent decrees as an enforcement tool in civil cases and nolo contendere pleas to settle criminal cases without formal litigation of the charges.[195] Such a state of affairs is, of course, unavoidable because Congress has bestowed the executive branch with the power to initiate civil or criminal cases in order to enforce the antitrust laws and has endowed the judiciary with the power to apply criminal sanctions and equitable relief by entry of judgments of illegality and decrees imposing a remedy.[196] The clear statutory scheme of both the Sherman Act and the Clayton Act leaves to the discretion of the Attorney General the power to initiate and voluntarily dismiss criminal or civil cases, while leaving to the judiciary the power to determine the appropriate remedy in criminal and civil cases—whether by a plea of nolo contendere, or a conviction upon trial in criminal cases, or entry of an injunction in a civil case by consent or by litigation.[197] Consent decrees require a judicial act and become an

193. *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 488–89 (1987); Michael L. Yoder, Note, *Separation of Powers: No Longer Simply Hanging in the Balance*, 79 GEO. L.J. 173, 175–82 (1990); *see also* Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEO. WASH. L. REV. 401, 407–09 (1989) (discussing the increasing controversy over separation of powers).

194. *See* E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 529–32 (1989) (proposing an "interactive" approach to separation of power jurisprudence).

195. The complex issue of "separation of powers" in this instance should be understood as a case of "intermingled powers." *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2-5 (3d ed. 2000).

196. *See* 15 U.S.C. §§ 1–2, 4 (2000). Sections 1 and 2 of the Sherman Act, *id.* §§ 1–2, provide for fines and jail sentences, and § 4 of the Sherman Act authorizes the United States Attorneys under the direction of the Attorney General to seek equitable relief to "prevent and restrain . . . violations," *id.* § 4.

197. *See* Andrew B. Loewenstein, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351, 351 (2001) ("[W]hen Congress enacts a binding legal standard, the doctrine of separation of powers, rather than requiring unquestioning judicial deference to the

injunction of a court once entered. As a judicial act imposing injunctive relief, consent decrees, like litigated injunctions, are subject to potential future judicial proceedings by way of a contempt action.[198] Both the act of deciding to enter a decree and the act of deciding whether to enforce the decree by a contempt citation are judicial functions and not executive branch functions entrusted solely to the discretion of the DOJ.

Although the DOJ certainly has the right to dismiss a civil or criminal antitrust complaint or negotiate a settlement with Microsoft or any other party, the right of prosecutorial discretion ends when either: (1) a court is asked to exercise its power to enter a consent decree, or (2) where there is a litigated final judgment of illegality and the court is asked to enter an injunction or punish the illegal conduct. Entry of both the judgment and a remedy decree are judicial functions, subject to the court's full equitable powers, regardless of whether the decree is a consent decree within the meaning of the Tunney Act[199] or a litigated

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Executive's prosecutorial decision-making, instead affirmatively permits the courts to assert their own constitutionally granted right to 'say what the law is.'").

198. The earlier action against Microsoft for alleged violations of the consent decree was by way of a contempt action. *See supra* notes 166–67 and accompanying text (discussing United States v. Microsoft, 980 F. Supp. 537, 539 (D.D.C. 1997), contempt action).

199. *See* Savin, *supra* 164, at 377 n.102. Concerning judicial power, James Savin writes:

> [A] denial of the court's power to refuse to enter decrees that do not protect the public interest could itself represent an unconstitutional infringement on judicial power. Such a denial would arguably prevent the court from accomplishing its constitutionally assigned function of enforcing the laws . . . as a court of equity.

Id.

Concerning the "public interest" at stake, another commentator writes:

> [T]he argument for deference made by the Justice Department and Microsoft fails to consider the courts' inherent equitable power to reject the entry of judgments that contravene the public interest. Although negotiations involve administrative decisions by the government, a court's entry of a consent decree is a judicial act which is both constitutional and statutory in nature. Thus, an intensive review of a consent decree by a district court may be supported apart from the Tunney Act.

Krodel, *supra* note 39, at 1326; *see also* Lloyd C. Anderson, United States v. Microsoft, *Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review*, 65 ANTITRUST L.J. 1, 6, 38–40 (1996) (arguing for more flexible judicial review of consent decrees).

Other authors believe that separation of powers analysis argues in favor of judicial deference. *See, e.g.*, Ronald G. Carr, *The Tunney Act Revisited: Some Observations on the Tunney Act*, 52 ANTITRUST L.J. 953, 961 (1983); Joshua C. Teitelbaum, *The Scope and Constitutionality of Judicial Review Under the Tunney Act:* United States v. Microsoft Corp., 56 F.3d 1448 (D.C. Cir. 1995), 19 HARV. J.L. & PUB. POL'Y 941, 947 (1996) ("[I]nsofar as the public interest review mandated by the Tunney Act authorizes a district court to review an exercise of prosecutorial discretion, it transfers an executive function and political question to the judicial branch, in violation of the doctrine of separation of powers."); Greg Staton, Comment, Microsoft *and the Tunney Act: All Is Not Constitutional on the Western Front*, 21 T. MARSHALL L. REV. 397, 405 (1996) (suggesting the public interest standard in the Tunney Act is ambiguous and that "[w]ithout a judicially manageable standard, a political question emerges"). This is also the position the DOJ and Microsoft have consistently taken in their consent decree in 1995 and their

judgment. Moreover, Congress specifically designed the Tunney Act to deal with the practice of excessive deference to the judgment of the DOJ in establishing the terms of a consent decree and to stop the practice of courts rubber-stamping the DOJ's proposed injunctive relief.[200] Congress mandated that *the courts* consider the public interest, not whether the DOJ achieved what it considered to be in the public interest when designing the appropriate relief, when deciding whether or not to enter a decree.[201] Although recognizing Congress's concern with courts rubber-stamping consent decrees negotiated by the DOJ, the trial court in *Microsoft II* proceeded to do so by giving deference to the "consent decree" negotiated by the DOJ under a confused standard of deference:

> "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is within the reaches of public interest."
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> . . . .
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> . . . [T]he Court cannot overlook the fact that the appellate court sustained liability against Microsoft for violation of § 2 of the Sherman Act. Therefore, without applying a wholly distinct standard, this Court must remain ever-mindful of the posture of this case when assessing the proposed consent decree for determination of the public interest.
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> Given the liability findings, part of the public interest analysis will require consideration of the extent to which the proposed consent

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proposed final judgment in 2002. Although the decision *to propose* a consent decree may be within the prosecutorial discretion of the DOJ, the determination of whether *to adopt* the decree is within the judicial discretion of the court. Requiring the court to consider the "public interest" in a true Tunney Act proceeding is no more a "political question" than is the requirement in § 4 of the Sherman Act that a court determine a remedy that both "prevents" and "restrains" present and future violations. Under a "functional approach" to the separation of powers issue, the functions of each branch "can be determined by balancing the specific public policies involved against the possible disruption to the traditional exercise of power by a particular branch." Yoder, *supra* note 193, at 179.

200. *See supra* Part II (discussing the Tunney Act in relation to this practice).

201. *See supra* text accompanying note 61 (quoting Senator Tunney as mandating the court to independently assure itself that a proposed decree serves the public interest). An underlying concern of separation of powers jurisprudence is the "encroachment and aggrandizement" caused by the "hydraulic pressure inherent with each of the separate Branches to exceed the outer limits of its power." INS v. Chada, 462 U.S. 919, 951 (1983). This concern was one shared by Congress in enacting the Tunney Act—that the DOJ was aggrandizing its power in resolving civil antitrust cases by presenting them to a court with little or no explanation and asking the court to adopt the proposed decree. *See supra* Part II (discussing judicial "rubber-stamping" of consent decrees). By requiring the filing of a competitive impact statement and providing for public comment, Congress sought to enable the courts to make an informed judgment on whether to exercise the court's discretion to enter, modify, or reject the proposed decree in light of the court's general obligation to adopt a decree which "prevents and restrains" violations of the antitrust laws by the defendant.

> decree "meets the requirements for an antitrust remedy." "A remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct,' to 'terminate the illegal monopoly, deny to the defendants the fruits of the statutory violation, and ensure that there remains no practices likely to result in monopolization in the future.'" Although this inquiry is usually reserved for cases which are litigated through remedy, . . . consideration of these "objectives," to the extent they are applicable to the facts of this case, remains appropriate because liability has been established in this case. Still, the Court's assessment of the remedy's ability to satisfy these objectives is tempered by the deference owed to the government in the Tunney Act context.[202]

Whatever may be said concerning the intermingling of executive and judicial functions in the consent decree process and the appropriate standard of review for Tunney Act consent decrees, Congress specifically delegated the power of determining the equitable remedy in litigated government civil antitrust cases to the courts under § 4 of the Sherman Act.[203] The wisdom, effectiveness, and necessity of specific remedies are choices Congress has reserved to the courts in litigated antitrust suits. Congress did not give the DOJ the right to determine the remedy in a litigated case by submitting a proposed consent decree in circumstances where a consent decree is entirely inappropriate.[204]

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202. *Microsoft II: Final Judgment*, 231 F. Supp. 2d 144 (D.D.C. 2002) (alteration in original) (citations omitted).

203. Section 4 of the Sherman Act reads:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

15 U.S.C. § 4 (2000).

204. The use of the Tunney Act is limited to cases where there has *not* been "any testimony taken." *Id.* § 16(a). The Tunney Act is limited to cases of proposed settlements where the court must determine "the public benefit, if any, from a determination of the issues at trial" under § 5(e)(2) of the Clayton Act. *Id.* § 16(e)(2). The Tunney Act is clearly not applicable to cases where there has been a fully litigated final judgment of illegality. *See id.* § 16(a). Section 5(h) makes the competitive impact statement and proceedings to determine whether the "public interest" is served by entry of the proposed decree inadmissible in subsequent treble damage actions; evidence that is otherwise admissible in fully litigated cases. *Id.* § 16(h). Section 5(e)(2) evidences a clear intent to limit consent decrees to cases where there has been no trial by requiring the court to determine whether the public interest would be served by "a determination of the issues at trial." *Id.* § 16(e)(2).

Although the DOJ and a defendant may propose a remedy in such circumstances, the court cannot abdicate its statutory responsibility to determine the appropriate remedy under § 4 of the Sherman Act in order to defer to the DOJ where the case is a fully litigated one.[205]

If the courts were to unconstitutionally abdicate their statutory responsibility in favor of deference to the DOJ, certain third parties would be affected adversely. Other parties to the lawsuit are entitled to have their proposed remedies and comments considered on an equal footing with those of the DOJ and an antitrust defendant in open court, in a single trial, and with an opportunity to cross-examine witnesses. They are entitled to have the court, not some of the parties, determine the appropriate remedy without giving any special deference to the remedy proposed by the DOJ or other parties. Where the injunctive relief is imposed after testimony is taken, private parties are also entitled to use the proceedings on remedy in subsequent treble damage actions pursuant to the specific language of § 5(a) of the Clayton Act.[206]

In summary, the DOJ has the discretion to file and voluntarily dismiss antitrust cases as an exercise of the prosecutorial discretion committed to the DOJ by Congress. If a filed civil case proceeds to the point of a consent decree being proposed for approval by a court before any testimony is taken, then the court is instructed by Congress to make its own determination of whether the proposed decree is "in the public interest" under the standards set forth in § 5(e) of the Tunney Act and in light of the competitive impact statement filed and public comments made about the decree. Section 5(f) of the Tunney Act provides extensive means for the court to seek assistance in fulfilling its independent function required by § 5(e) in evaluating the proposed decree.[207] If litigation of the case takes place and a decree is then proposed or the case is pursued to a final judgment of liability, Congress requires the court to make its own determination of the appropriate remedy based on the record and without deference to the proposals of

205. *See* Gumbel v. Pitkin, 124 U.S. 131, 145–46 (1888) ("[T]he equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression, and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise . . . .").

206. *See* 15 U.S.C. § 16(a). This interpretation of § 5(a) is supported by § 5(h), 15 U.S.C. § 16(h), of the Tunney Act amendment, which specifically excludes from the prima facie effect of § 5(a) the Competitive Impact Statement and court proceedings in a true consent decree proceeding. If the remedy proceeding is not a true consent decree proceeding, the obvious inference is that the hearings on remedy and materials submitted in those proceedings are admissible in subsequent treble damage proceedings. *See id.*

207. *See* 15 U.S.C. § 16(e)–(f).

the DOJ.[208] Although the court may require filings similar to those provided for by the Tunney Act to aid it in making its own Sherman Act § 4 determination pursuant to its general equitable powers, as Judge Greene did in *AT&T*,[209] the proceeding in a litigated case is not a consent decree proceeding but rather the independent act of the judiciary to determine the remedy in a litigated antitrust case.[210] To permit the DOJ and the defendant to dictate the remedy in a litigated antitrust case by pretending their proposed decree is a consent decree, and that the court's discretion is somehow restricted in the circumstances of a litigated case by deference owed to the DOJ, violates the statutory scheme set forth by Congress. It also raises the specter of a violation of the inherent separation of judicial and executive powers, as well as the specific separation of those powers mandated by Congress under the Clayton Act and the Sherman Act in determining the remedy for conduct found illegal under the antitrust laws.[211]

C. Scope of the Trial Court's Discretion

By portraying the proposed final judgment as a consent decree, Microsoft and the DOJ sought to have the court defer to their proposed remedy. By holding that the proposed settlement was a Tunney Act consent decree, the district court implicitly agreed to limit its discretion to review the propriety of the proposed settlement under the standards of the first "Microsoft Fallacy," imposed earlier by the court of appeals, and unlawfully narrowed the scope of its power to determine the appropriate remedy. As noted above, the standard for a district court in considering whether to adopt a remedy in a Tunney Act proceeding is one which requires *some* deference to the decision of the DOJ to settle rather than to litigate a pending antitrust case. Although deference subject to a general "public interest" standard like that found in § 5(e) of the Tunney Act may be justified in cases where the trial court has no record to look to other than the disclosures mandated by the Tunney Act, the same policies do not apply to a fully litigated case.[212]

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208. *See* 15 U.S.C. § 16(a).

209. *See supra* Part III.C (discussing Judge Greene's decision in *AT&T*).

210. *See* 15 U.S.C. § 16(e)–(f).

211. This discussion serves as the basis for our proposal *infra* at Part VII.B.

212. The Tunney Act, however, provides mechanisms by which a judge might explore the scope, meaning, and wisdom of a proposed consent decree in a Tunney Act proceeding. Section 5(f) of the Tunney Act, 15 U.S.C. 16(f), provides:

> 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;

The record in a litigated case, like *Microsoft II*, and the final findings of fact and law are clear. Therefore, the court has no need to defer to the judgment of some of the twenty parties to the case in deciding the appropriate remedy. Doing so substantially reduces the incentives of defendants to enter into consent decrees at the beginning of significant antitrust litigation in violation of the intent of Congress[213]—particularly during important litigation involving an organization fundamental to the economy and at risk of having significant structural remedies imposed. If a defendant can litigate a case fully, lose, and then enter into a negotiated settlement and have it labeled a "consent decree," what does the defendant lose by litigating the case? Deference to the parties in deciding a remedy also increases the risk of attempts to use undue political influence, like those that caused Congress to adopt the Tunney Act for consent decrees where no litigation has taken place, to resolve fully litigated antitrust cases in which a defendant held liable may lose the battle but win the war by negotiating a toothless remedy and labeling it a "consent decree."[214] Moreover, allowing such a process would result in an application of an inappropriate and lesser standard of review instead of subjecting the proposal to an independent determination of what remedy is necessary both to prevent and to restrain the violations.

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(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.

15 U.S.C. § 16(f).

213. *See supra* Part II (discussing Congressional intent behind passage of the Tunney Act).

214. Preventing manipulation of the consent decree process in this way was a primary objective of the Tunney Act and one that can be circumvented by negotiating a decree and then drafting the complaint to fit the decree. *See* Savin, *supra* note 164, at 387.

An appropriate remedy not only must restrain "existing evils," but also must "prevent future violations."[215] As the court of appeals explained in *Microsoft II*:

> The Supreme Court has explained that a remedies decree in an antitrust case must seek to "unfetter a market from anticompetitive conduct," . . . to "terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future, ..."[216]

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215. Associated Press v. United States, 326 U.S. 1, 22 (1945). The Supreme Court has held that after a district court has found that a violation of the antitrust laws exists,

> [the court] has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited. The conspirators should, so far as practicable, be denied future benefits from their forbidden conduct.
>
> . . . .
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> . . . [R]elief, to be effective, must go beyond the narrow limits of the proven violation.

United States v. U.S. Gypsum Co., 340 U.S. 76, 88–90 (1950).

216. *Microsoft II: Appeal*, 253 F.3d 34, 103 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001). In *United States v. E.I. Du Pont de Nemours & Co.*, the Court explained:

> The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial. For the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it. "A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause."

United States v. E.I. Du Pont de Nemours & Co., 366 U.S. 316, 323–24 (1961) (quoting Int'l Salt Co. v. United States, 332 U.S. 392, 401 (1947)); *see also id.* at 366 n.12 ("'In general the object of the remedies under the antitrust laws is to prevent the continuance of wrongful conduct, and to deprive the wrongdoers of the fruits of their unlawful conduct, and to prevent the creation anew of restraint forbidden by law.'" (quoting United States v. Minn. Mining & Mfg. Co., 96 F. Supp. 356, 357 (D.C. Mass. 1957))); Int'l Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242, 253 (1959) ("The decree should (1) put 'an end to the combination or conspiracy when that is itself the violation'; (2) deprive 'the antitrust defendants of the benefits of their conspiracy'; and (3) 'break up or render impotent the monopoly power which violates the Act.'" (quoting Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128–29 (1948))). *Schine Chain Theatres* also stands for the proposition that remedies should deprive the monopolist of the fruits of its unlawful conduct.

With respect to maintaining the fruits of unlawful conduct, the Supreme Court has said:

> In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless

The *Microsoft II* court could only fulfill these requirements after a trial in a single court proceeding where all of the parties to the case had an equal opportunity to present their remedy proposals and have them fairly evaluated by the court as required by § 4 of the Sherman Act, the Federal Rules of Civil Procedure, and the mandate of the court of appeals in *Microsoft II*. Instead, the district court bifurcated the trial of the dissenting states from review of the proposed consent decree and adopted a confused standard of review of the proposed consent decree by recognizing the case was a fully litigated case, yet believing the scope of its discretion "is tempered by the deference owed to the government in the Tunney Act context."[217] Thus, the second "Microsoft Fallacy"—that a proposed settlement after a fully litigated case is a Tunney Act consent decree—was combined with the first "Microsoft Fallacy"—that a court reviewing a Tunney Act consent decree must give deference to the DOJ's choice to settle the case and the remedies adopted when making the decision whether to adopt the decree as an order of the court.

D. Standard of Review of the District Court's Decision on Remedy by Appellate Courts

A third problem with the treatment of the proposed remedy by the DOJ and the courts in *Microsoft II* is that the scope of review of the district court's determination by higher courts of the remedy necessary to prevent and restrain the violations found in a case litigated to final judgment is unlawfully limited. Rather than defer to the discretion of the trial court under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52[218] in adopting a remedy under § 4 of the Sherman Act, appellate review of the trial court's determination of whether the

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perchance the United States moved in at the incipient stages of the unlawful project. For these reasons divestiture or dissolution is an essential feature of these decrees.

Schine Chain Theatres, 334 U.S. at 128 (citing United States v. Crescent Amusement Co., 323 U.S. 173, 189 (1944)).

217. *Microsoft II: Final Judgment*, 231 F. Supp. 2d 144, 154 (D.D.C. 2002) (citing *Microsoft I: Appeal*, 56 F.3d 1448 (D.C. Cir. 1995) (per curiam)).

218. Federal Rule of Civil Procedure 52(a) states in part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

FED. R. CIV. P. 52(a) (emphasis added).

consent decree is in the public interest under the Tunney Act would be analyzed under the standard of whether the district court had given due deference to the determination of the DOJ that the appropriate remedy has been entered. The latter is the erroneous standard applied by the court of appeals in its review of *Microsoft I*, settled without litigation by a true Tunney Act consent decree. That court observed:

> If the essential dispute between *amici* and appellants were more narrowly cast as objections to the remedies sought, the district judge would still not be empowered to reject them merely because he believed other remedies were preferable. As we have said in the context of reviewing agreed upon modifications of a consent decree:
>
> > The court should also bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities "is one that will *best* serve society," but only to confirm that the resulting settlement is "'within the *reaches* of the public interest.'"
>
> Thus, a court should not reject an agreed-upon modification unless "it has exceptional confidence that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency."[219]

Clearly, there is a significant difference between the standards for appellate review of a trial court's findings under Sherman Act § 4 and Federal Rule of Civil Procedure 52[220] and those the court of appeals erroneously held applied in a Tunney Act proceeding, which gives deference to the DOJ's choice of remedy akin to the predictive judgments of an administrative agency.[221] Because the proposed settlement in *Microsoft II* was clearly not a consent decree to be weighed under Tunney Act standards, the court should have established that the trial on remand did not involve a Tunney Act proceeding or the erroneous standard of review of the Tunney Act proceeding previously

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219. *Microsoft I: Appeal*, 56 F.3d at 1460 (per curiam) (citation omitted) (quoting United States v. W. Elec. Co., 900 F.2d 283, 309 (D.C. Cir. 1990), and United States v. W. Elec. Co., 993 F.2d 1572, 1577 (D.C. Cir. 1993)) (reversing and remanding Judge Sporkin's refusal to approve a consent decree proposed without any litigation of the underlying complaint by way of taking testimony in open court).

220. Under these standards, a court must impose remedies that prevent current and future conduct and deprive the defendant of the fruits of its unlawful conduct.

221. *See* United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981) ("The [Tunney Act] suggests that a court may, and perhaps should, look beyond the strict relationship between complaint and remedy in evaluating the public interest. We cannot agree that a district court should engage in an unrestricted evaluation of what relief would best serve the public."); *see also Microsoft I: Appeal*, 56 F.3d at 1458–62 (per curiam) (discussing the scope of the district court's consideration of public interest under the Tunney Act).

mandated by the court of appeals. By finding that the proposed settlement was a consent decree for Tunney Act purposes, the trial court bound itself to approve the proposed decree under the erroneous deference standard set forth in *Microsoft I*.[222] This also raised the following question: Why hold a hearing on the proposed remedies of the dissenting states if the only function of the court is to defer to the DOJ's proposed remedy?

In the event that a party seeks review of the *Microsoft II* final judgment on remedies, the claims of the proponents of the alleged "consent decree" that the Tunney Act standards apply, and whether trial court deference is due, the court of appeals should adhere to its statements in *Microsoft II*.[223] Additionally, the court is bound to apply the law Congress adopted and not engage in judicial activism by amending that statute. Such a decree must be "vacated whenever there is 'a bona fide disagreement concerning substantive items of relief which could be resolved only by trial.'"[224] Review must be based upon the standards established by § 4 of the Sherman Act, the record of the trial on the merits, and Rules 43, 52, and 54 of the Federal Rules of Civil Procedure after an open proceeding in the district court where all the parties of record have a full and equal opportunity to propose a remedy. The trial court—and only the trial court—can fashion a remedy to prevent future, and cure current, violations of the Sherman Act found pursuant to a fully litigated judgment of the trial court. Given the mandate of the court of appeals and the fact that the proposed settlement is not a "consent decree" for Tunney Act purposes, the trial court's holding that the DOJ proposed settlement is a consent decree for Tunney Act purposes creates a procedural morass. Now that an appeal is pending,[225] sorting out which standard of review should be applied to the trial court's decision should be as entertaining, if not as enlightening, as that followed by the trial court in its review of the "consent decree" and trial of the dissenting states' remedy proposals.

222. *See supra* Part IV (discussing *Microsoft I*).

223. *See supra* note 25 (quoting *Microsoft II: Appeal*, in which the court of appeals explained that a district court must fully explore the facts of a case to properly draw a decree).

224. *Microsoft II: Appeal*, 253 F.3d 34, 101 (D.C. Cir.) (quoting United States v. Ward Baking Co., 376 U.S. 327, 330–31 (1964)), *cert. denied*, 534 U.S. 952 (2001).

225. Massachusetts and West Virginia are appealing Judge Kollar-Kotelly's ruling. *See* Kim Peterson, *W. Virginia Joins Fight to Appeal Settlement; Microsoft Case*, SEATTLE TIMES, Dec. 3, 2002, at C1, *available at* 2002 WL 3924242.

E. The Right to Have Proposed Remedies Given Equal Consideration

A fourth reason the *Microsoft II* trial court should have addressed the jurisdictional issue of whether the DOJ was improperly usurping the powers conferred on the court by § 4 of the Sherman Act and Rules 43, 52, and 54 of the Federal Rules of Civil Procedure is to prevent the deprivation of the equal right of all the parties to participate in the court's determination of the appropriate remedy. By virtue of having drafted and submitted to the court a proposed "consent decree," the DOJ, Microsoft, and some of the parties preempted other parties of record from fully participating in the process of determining the appropriate remedy, compromised the role of the court in formulating the remedy it may have found necessary to cure the violations upheld on appeal, and read § 4 out of the Sherman Act. The trial court then sanctioned the misuse of the Tunney Act by bifurcating the trial on remedy into two separate proceedings and holding that the proposed decree was a Tunney Act consent decree, further exacerbating the problem for dissenting parties to the case.

Parties of record found themselves addressing what they believed to be good or bad elements of the proposed consent decree put forth by the DOJ and Microsoft and not advocating their own independent judgment and positions of what should be the appropriate remedy, independent of the proposal labeled a "consent decree" pending before the court. The trial court struggled with the definition of the appropriate standard of review after the dissenting states' remedy trial and appeared to measure the dissenting states' remedy proposals against those proposed by the DOJ's "consent decree." Parties of record should be free to propose their own structural and/or conduct remedies in a single proceeding, should they believe that such remedies are necessary to prevent future and current violations of the Sherman Act, and not be forced to pick apart the DOJ's proposal under the standards forced upon them by *Microsoft I*.

Similarly, the DOJ and Microsoft caused the court to fall into the position of running two separate remedy proceedings on substantially different standards where only one was legally permissible and justified by the processes mandated by § 4 of the Sherman Act, the doctrine of the separation of powers, the Federal Rules of Civil Procedure, and the mandate of the court of appeals. The two-track approach also had the potential to cause confusion if the dissenting states had been free to propose different remedies under § 4 of the Sherman Act. For example, suppose that Judge Kollar-Kotelly had found that the appropriate remedy in the litigating states' case should be divestiture of the

operating system functions[226] of Microsoft from the application software. Judge Kollar-Kotelly, however, must also approve the consent decree unless the court has exceptional confidence that adverse antitrust consequences will result, according to the D.C. Circuit's erroneous interpretation of the Tunney Act in *Microsoft I* and her erroneous finding that the Tunney Act applies to review of the proposed settlement in *Microsoft II*.[227]

If the trial court ordered divestiture to prevent and restrain future as well as past violations, the consent decree would be nonsensical. Therefore, several questions would have arisen. First, is the court free to order divestiture when doing so would destroy the meaning and the function of the consent decree under the standards of review mandated by *Microsoft I*, or is the court precluded from issuing remedies that would limit the consent decree? If the latter, does the consent decree preempt remedies that might be had under the pendant state antitrust law claims before the judge?[228] This confusion could be avoided with the recognition that the final judgment proposed by the DOJ is not a Tunney Act consent decree. Thus, the court should have found that it was always free to accept or to reject the proposed final judgment or grant whatever relief it deems necessary under its equitable powers conferred by § 4 of the Sherman Act. In order to impose such a remedy, a trial would have been necessary, pursuant to the appellate court's mandate, such that all parties to the case could present their own

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226. It is a common misperception that the court of appeals effectively eliminated the option of the judge on remand to order divestiture. On the contrary, the court stated:

> As a general matter, a district court is afforded broad discretion to enter that relief it calculates will best remedy the conduct it has found to be unlawful. . . . This is no less true in antitrust cases. . . . And divestiture is a common form of relief in successful antitrust prosecutions: it is indeed "the most important of antitrust remedies."
>
> On remand, the District Court must reconsider whether the use of a structural remedy of divestiture is appropriate with respect to Microsoft . . . .

Microsoft II: Appeal, 253 F.3d at 105.

227. *See supra* Parts IV, VI (discussing the erroneous interpretation and application of the Tunney Act in *Microsoft I & II*).

228. The final judgment by Judge Jackson, affirmed by the court of appeals, found violations of the state antitrust laws of each of the party states. The states are presumably entitled to enforce their own state laws and decrees entered pursuant to those laws without the consent of the federal government. *See Microsoft II: Conclusions of Law*, 87 F. Supp. 2d 30, 35 (D.D.C. 2000).

> The Court [in *Microsoft II: Conclusions of Law* wa]s persuaded that the evidence in the record proving violations of the Sherman Act also satisfies the elements of analogous causes of action arising under the laws of each plaintiff state. For this reason, and for others stated below, the Court [held] Microsoft liable under those particular state laws as well.

Id.; *see also* 15 U.S.C. § 16(i) (2000) (suspending statute of limitations for "every private or State right of action" during the pendency of a government action based upon the same fact).

proposals, independent of that pending before the court at the insistence of the DOJ, in a single proceeding. It was up to the court—not the DOJ and Microsoft meeting in secret—to determine the appropriate remedies where there was a final court ruling that the defendant had violated the antitrust laws. Should similar cases arise in the future, a single remedy proceeding should be held with the court exercising the powers conferred by § 4 of the Sherman Act to make its own independent determination of the remedies necessary to prevent and restrain violations of the antitrust laws. To hold otherwise would not only undermine the appropriate standard of judicial review of proposed remedies for antitrust violations, but also undermine the congressional purpose of retaining the threat of the prima facie effect of § 5(a) to encourage antitrust defendants to enter into consent decrees without litigating a case and tying up scarce enforcement resources.

F. Denial of Prima Facie Effect

A fifth problem with characterizing the final judgment proposed by the DOJ as a Tunney Act proceeding is that doing so may deprive subsequent treble damage action plaintiffs of the use of the "final judgment or decree" as prima facie evidence of a violation. Plaintiffs may also be deprived of the use of evidence developed during the remedy proceedings, including evidence similar to the competitive impact statement required under § 5(e) of the Tunney Act, testimony similar to that required by § 5(f) of the Tunney Act, and any other evidence that might be derived from the district court's proceeding on remedy. These consequences are specifically provided for by § 5(h) of the Tunney Act, but only in exchange for "consent judgments or decrees entered before any testimony has been taken."[229]

Congress made clear in the legislative history of the Tunney Act that it was designed to preserve the prima facie effect of judgments and decrees "entered as a result of litigation."[230] Part VIII of the final

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229. 15 U.S.C. § 16(a).

230. H.R. REP. No. 93-1463 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6537.

> Because of the protracted nature of antitrust litigation, with the expense and complexity of proof of the legal and economic issues involved, it is difficult at best for a private citizen to prosecute to conclusion an action under the antitrust laws. When the private litigant is deprived of the use of the Government's decree as prima facie evidence, moreover, a private action becomes virtually impossible to maintain.

ANTITRUST SUBCOMM., COMM. ON THE JUDICIARY, 86TH CONG., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE 24 (Comm. Print 1959); *see also* N.J. Wood Finishing Co. v. Minn. Mining & Mfg. Co., 332 F.2d 346, 354 (3d Cir. 1964) (explaining that the purposes of § 5(a) and § 5(i) of the Clayton Act were "to stimulate private antitrust suits and aid . . . private suitors"). Private suitors were aided by "making available to them all matters

judgment approved by the district court in the *Microsoft* case expressly provides: *"[n]othing in this Final Judgment is intended to confer upon any other persons any rights or remedies of any nature whatsoever hereunder or by reason of this Final Judgment."*[231]

The court, the DOJ, Microsoft, and other parties to the final judgment apparently believed that they could not only assume the power conferred on courts to fashion a final decree under § 4 of the Sherman Act but also could assume the powers of Congress to repeal § 5(a) of the Clayton Act![232] That section of the final decree was a blatant violation of § 5(a) of the Clayton Act and the powers of Congress to repeal legislation.

The intent of the DOJ and Microsoft was to assert that the final judgment, decree, and any evidence taken in open court during the remedy phase of the case would not be subject to the prima facie effect of litigated judgments or decrees. To hold or imply that the proposed *Microsoft II* decree was a consent decree subject to a Tunney Act process is an obvious violation of the prima facie effect of litigated antitrust judgments in subsequent damage actions that Congress mandated in § 5(a) of the Clayton Act. To sanction such language in a

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previously established by the Government in antitrust actions" and "vouchsaf[ing] the intended benefits of related government proceedings by suspending the running of the statute of limitations." Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co., 381 U.S. 311, 317–18 (1965) (quoting Emich Motors Corp. v. Gen. Motors Corp., 340 U.S. 558, 568 (1951), and Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 569 (10th Cir. 1962)).

As the House Report explained:

> Present law [now § 5(a)] . . . encourages settlement by consent decrees as part of the legal policies expressed in the antitrust laws. Consent decrees, unlike decrees entered as a result of litigation, are not available as prima facie evidence against defendants in public antitrust cases in subsequent private antitrust cases. The bill [proposed §§ 5(b)–(h)] preserves these legal and enforcement policies and, moreover, expressly makes judicial proceedings brought under the bill as well as the impact statement required to be filed prior thereto inadmissible against defendants of the public antitrust action in subsequent antitrust actions, if any.

H.R. REP. No. 93-1463 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6537; *see also* 51 CONG. REC. 1962, 1964 (1914) (President Wilson's Special Message to Congress).

231. New York v. Microsoft Corp., 224 F. Supp. 2d 76, 277 (D.D.C. 2002) (emphasis added).

232. The D.C. Circuit rejected a similar attempt in 1984:

> Section 5(a) of the Clayton Act, by its terms, applies to consent judgments entered after testimony has been taken. . . . With increasing frequency, parties to antitrust agreements are inserting into consent agreements nonliability clauses such as that contained in the [Modification of Final Judgment]. We do not believe that the mere appendage of such a clause should automatically make section 5(a) inapplicable; such a per se rule would contravene the congressional mandate contained in the statute. The question in each case must be whether the judgment, considered as a whole, is "to the effect that" the defendant has violated the antitrust laws.

S. Pac. Communications Co. v. AT&T, 740 F.2d 1011, 1022 (D.C. Cir. 1984) (citing Michigan v. Morton Salt Co., 259 F. Supp. 35, 62 (D. Minn. 1966)).

final court judgment after litigation has taken place is an open invitation to antitrust defendants to fully litigate a government antitrust case and, if they lose, enter a consent decree purporting to remedy the violation found while asserting that there has been no finding of illegality.[233] Thus, they can later claim that the "consent decree" immunizes that which it was never intended to immunize—the consequences of a fully litigated final judgment and decree and evidence produced during the remedy phase of the trial for subsequent damage actions under § 5(a) of the Clayton Act.[234] Moreover, it would be contrary to the admonition of the court of appeals in the *Microsoft* case that the threat of treble damage actions be maintained to secure compliance with the decree and the antitrust laws:

> We do not mean to say that enforcement actions will no longer play an important role in curbing infringements of the antitrust laws in technologically dynamic markets, nor do we assume this in assessing the merits of this case. Even in those cases where forward-looking remedies appear limited, the Government will continue to have an interest in defining the contours of the antitrust laws so that law-abiding firms will have a clear sense of what is permissible and what is not. And the threat of private damage actions will remain to deter those firms inclined to test the limits of the law.[235]

The only way to resolve this obvious circumvention of the intent of Congress and the court of appeals is to read the Tunney Act for what it clearly states: that a Tunney Act proceeding can only be invoked for a true consent decree entered before any litigation has taken place, not settlements after testimony has been taken, let alone proposed settlements of fully litigated cases. Attempts to circumvent the statute by steps like the language in the final judgment entered by the court, purporting to be made pursuant to the Tunney Act, does not confer immunity[236] from the prima facie effect of § 5(a) because the proposed

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233. In *Microsoft II*, there is no question that there have been clear final findings of violations of § 2 of the Sherman Act after a fully litigated case.

234. *See* 15 U.S.C. § 16(a). The language now found in the final judgment in the *Microsoft* case means the court has joined the proponents of the judgment in unconstitutionally asserting the power to repeal § 5(a) of the Clayton Act. *See Microsoft II: Appeal*, 253 F.3d 34, 49 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001).

235. *Microsoft II: Appeal*, 253 F.3d at 49.

236. As noted by the D.C. Circuit, judicial precedent "is not the parties' property" that can be used as a "bargaining chip in the process of settlement." *In re* United States, 927 F.2d 626, 628 (D.C. Cir. 1991) (quoting *In re* Mem'l Hosp. of Iowa County, Inc., 862 F.2d 1299, 1302 (7th Cir. 1988)); *see also* Humphreys v. DEA, 105 F.3d 112, 115 n.1 (3d Cir 1996) ("[A]ppellate courts routinely refuse to vacate their own decisions when the parties settle their dispute after an appellate decision has issued."); Okla. Radio Assoc. v. FDIC, 3 F.3d 1436, 1442 (10th Cir. 1993) (quoting Clarendon Ltd. v. Nu-West Indus., Inc., 936 F.2d 127, 129 (3d Cir. 1991) ("[T]he worthy goal of encouraging settlements does not 'override[] the policy that a losing party with a

remedy is not a consent decree within the meaning of § 5(a). Even though courts may require the parties to proceed by filing the remedies they think best and statements similar to a competitive impact statement in support of their proposals, jurisdiction to do so cannot be premised on the Tunney Act without violating § 5(a) of the Clayton Act. The only basis for further proceedings by the district court was that provided by § 4 of the Sherman Act, the standards of the Federal Rules of Civil Procedure, and the mandate of the court of appeals. The trial court's ruling, finding that the proposed remedy in *Microsoft II* is a consent decree for Tunney Act purposes, and adoption of language attempting to limit third party use of the judgment not only ignores the court's jurisdiction under § 4 of the Sherman Act but also repudiates the express language of § 5(a) of the Clayton Act and the clear implication of § 5(h) of the Act.[237]

VII. PROPER APPLICATION OF THE TUNNEY ACT OR § 4 OF THE SHERMAN ACT

Given the legislative history described above and the prior discussion of the consequences of the abuse in *Microsoft I* and misuse of the Tunney Act in situations where it is not warranted in *Microsoft II*, it is possible to construct a framework under which to analyze whether the Tunney Act is the appropriate tool for reviewing a proposed remedy or whether the situation calls for application of § 4 of the Sherman Act and the courts' equitable powers. What follows is a framework for the application of the Tunney Act, § 5(a) of the Clayton Act, and § 4 of the Sherman Act.

A. "Testimony Has Been Taken"

Recall that prima facie effect is given to final judgments or decrees except those "consent judgments or decrees entered before any testimony has been taken."[238] Thus, the key issue in determining

deep pocket should not be permitted to use a settlement to have an adverse precedent vacated.'"); *In re Mem'l Hosp. of Iowa County*, 862 F.2d at 1302 ("When the parties' bargain calls for judicial action . . . the benefits of settlements to the parties are not the only desiderata.").

237. The implication arises because § 5(h) makes inadmissible proceedings in a consent decree proceeding that comply with § 5(e) of the Tunney Act. 15 U.S.C. § 16(e)–(h). As previously stated, § 5(e) defines the public interest standard in terms of a proposed decree where there has not been a trial of the issues. *Id.* § 16(e).

238. *Id.* § 16(a).

whether the Tunney Act applies is whether "testimony has been taken," within the meaning of § 5(a) of the Clayton Act.[239]

The legislative history of the Clayton Act suggests that § 5(a) was passed in order to give plaintiffs an additional weapon in their arsenal against defendant trusts. The original language of § 5(a) of the Clayton Act provided that final judgments entered into in prior government antitrust actions were "conclusive evidence against the defendant of the law and facts determined in the prior equity action."[240] The House conferred upon the plaintiff one-way estoppel: a judgment finding that a violation of the Sherman Act would preclude a defendant from relitigating liability. The plaintiff, however, would not be precluded from bringing a private antitrust action due to a finding that the defendant was not liable.[241] The Senate Judiciary Committee had concerns that the one-way conclusive effect the House had given the final judgment would be unconstitutional under a due process analysis.[242] Because of these due process concerns, the Senate Judiciary Committee changed the effect that a final judgment would have on a defendant in subsequent litigation from a conclusive evidence standard to one where the final judgment would only have prima facie

239. *Id.* The significance of taking testimony for drawing the line between a Tunney Act proceeding and a proceeding under § 4 of the Sherman Act in the remedy phase of a government antitrust case is further highlighted by the language of § 5(e)(2) of the Tunney Act instructing the Court to measure the public benefit of a proposed consent decree in light of the "benefit, if any, to be derived from a determination of the issues at trial." *Id.* § 16(e)(2).

240. H.R. REP. NO. 627, pt. 1, at 13 (1914), *reprinted in* 2 EARL W. KINTER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 1089 (1978); *see also* John A. Doninger § Robert F. Frandeen, *Section 5(a) of the Clayton Act and the Use of Collateral Estoppel by a Private Plaintiff in a Treble Damage Action*, 8 U.S.F. L. REV. 74, 83 (1973); Daniel R. Fischel, *The Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial*, 43 U. CHI. L. REV. 338, 342 (1976).

241. This principle ran contrary to the generally accepted principle of the time that estoppel must be mutual. The mutuality requirement held that unless both parties are bound by a prior judgment, neither is so bound. *See* Herbert Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1459 (1968) ("[T]he rule of mutuality in collateral estoppel holds that unless both parties are bound by a prior judgment, neither may use the prior judgment as determinative of an issue in a second action."). *See generally* James G. Hazard et. al., Note, *Mutuality of Estoppel and the Seventh Amendment: The Effect of* Parklane Hosiery, 64 CORNELL L. REV. 1002 (1979) (discussing the offensive use of collateral estoppel in the context of *Parklane Hoisery v. Shore*); Michael Kimmel, Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967) (discussing the distinction between offensive and defensive uses of collateral estoppel by a nonparty). Courts did not begin to reject the mutuality requirement until 1942. *See* Bernhard v. Bank of America, 122 P.2d 892, 894 (Cal. 1942) ("There is no compelling reason . . . for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.").

242. S. REP. NO. 698, at 45 (1914).

effect.[243] The struggle that Congress faced with the mutuality requirement demonstrates a strong desire to give plaintiffs the full benefit of any final judgment in a government antitrust action.[244]

Congress sought to eliminate the barriers that private plaintiffs faced[245] in bringing an antitrust suit.[246] Congress believed that private litigation was expensive and time consuming, given that the private plaintiff was required to re-litigate the very claims won by the government in prior litigation.[247] As President Wilson stated:

> "It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He can not afford, he has not the power, to make use of such processes of inquiry as the Government has command of. Thus shall individual justice be done while the processes of business are rectified and squared with general conscience."[248]

Thus, Congress established § 5(a) to better enable private plaintiffs to bring antitrust suits in order to remedy harms done to them by easing proof of a violation of law.[249] Even though Congress, at the time of the

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243. *Id.*

244. "[W]e have given to the citizen, in addition to the remedy he now has, an additional remedy, so far as the future is concerned, and we have not taken away by the statute any right which he now has." 51 CONG. REC. 16,058 (1914) (statement of Sen. Overman).

245. Of the forty-six private suits filed between the passage of the Sherman Act and the Clayton Act, only four were successful. *See* E.E.W., Jr., Note, *Closing an Antitrust Loophole: Collateral Effect for Nolo Pleas and Government Settlements*, 55 VA. L. REV. 1334, 1336–37 n.8 (1969).

246. *See* 51 CONG. REC. 9270 (1914) (statement of Rep. Carlin) (noting at length that the Clayton Act gives private plaintiffs the right to sue, allows private plaintiffs to use final judgments in government actions as evidence against defendants, and suspends the statute of limitations while a government suit is pending in order to facilitate the bringing of actions by private plaintiffs).

247. *See id* at 16,058 (statement of Sen. Clapp). Senator Moses Clapp reiterated the views of President Wilson:

> [The litigation of a private antitrust suit] requires a long and sustained effort to bring one of these great combinations to the bar of justice; it requires the expenditure of a vast amount of money; and it seemed to us . . . that one of the things that was unjust and unfair was that a man injured and wronged by a trust should have to travel over the same road again in his suit for damages that the Government had traversed in bringing the trust to the bar of justice.

Id.

248. *Id.* (statement of Sen. Clapp) (quoting President Wilson).

249. *See id.* at 9090 (statement of Rep. Mitchell). Representative John Mitchell described at length the importance of § 5(a):

> A remarkable situation prevailed when the Government won its suits against the Standard Oil Co. and the Tobacco Trust. In these cases the Supreme Court of the United States found unanimously, without a dissenting voice, that acts had been committed which were not only illegal but immoral. These combinations had been effected, in large part, by the crushing out of rivals. At the end of these very long court

passage of the Clayton Act, did not believe that private plaintiffs would have an additional deterrent effect on potential violators, many now recognize that private plaintiffs serve an important deterrence function.[250] Moreover, in seeking to maintain the prima facie effect of § 5(a) of the Clayton Act, Congress acknowledged the private plaintiff's deterrence role when passing the Tunney Act.[251] Scarce enforcement resources were also conserved by giving defendants a significant incentive to settle government cases without litigation.[252] In light of this general policy of encouraging suits by private plaintiffs through use of a final judgment or decree obtained in a government case as prima facie evidence against a defendant and maintaining the incentive to settle government cases to conserve scarce enforcement resources, the question arises as to under what circumstances this weapon was supposed to be implemented.

There is some discussion in the legislative history indicating that prima facie effect should be given to cases that have begun and in which a decree or final judgment has been rendered. The original language of Clayton Act § 5(a) had two provisions relating to the prima facie effect: (1) "This section shall not apply to consent judgments or decrees

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proceedings a decree was finally entered, declaring that there should be a segregation. The lamentable fact, then, became patent that those who had been crushed and driven out of business, "the heroes," as one witness put it, "who had made it possible for the Government successfully to conduct its proceedings to a final decree," were left without a remedy, and no way could be found that would give them redress for the wrongs which they had suffered.

The situation was, indeed, intolerable and a travesty upon justice. Small wonder that men cried out in their hopelessness that there was no justice in the land for the poor. It was found that none of those who were injured could, under existing law, recover for the injuries that had been sustained by the illegal acts of these combinations. They could, of course, institute entirely new proceedings, but they could not in any way benefit from the decree which had been entered.

Id.

250. This result is likely due to the threat of treble damages. *See* 15 U.S.C. §§ 15–16 (2000); STAFF OF HOUSE COMM. ON THE JUDICIARY, 98TH CONG., REPORT ON STUDY OF THE ANTITRUST TREBLE DAMAGE REMEDY 1 (Comm. Print 1984) (statement of Rep. Garvey) (noting that private actions are the principal vehicle for enforcing the antitrust laws). Representative George E. Garvey's view may have been relevant especially during the Reagan era of antitrust non-enforcement. See also Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979)), which states: "Section 4 of the Clayton Act . . . 'contains little in the way of restrictive language.' And the lack of restrictive language reflects Congress' 'expansive remedial purpose' in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations."

251. *See supra* note 67 and accompanying text (discussing the invocation of consent decrees and nolo contendere pleas through the threat of treble damage actions).

252. *See supra* note 81 (discussing the Antitrust Division's description of consent decrees).

entered before any testimony has been taken";[253] and (2) "This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity now pending in which the taking of testimony has been commenced but has not been concluded . . . ."[254] Congress designed the latter section to give current litigants an opportunity to settle via consent decree and, thus, protect themselves from the prima facie effect provision.[255] If, instead of settling, the defendant continued with litigation—"the taking of testimony"—any judgment or decree in that case could be used against the defendant by subsequent private party plaintiffs.[256] Thus, the exemption presumed that any decree entered into after the taking of testimony in court would be subject to the prima facie effect under § 5(a). Moreover, because Congress sought to preserve the prima facie effect when passing the Tunney Act, it is clear that consent decrees cannot be entered into once testimony begins, or in other words, once trial commences.

Because the commencement of trial is the focal point at which the Tunney Act no longer applies, it is impossible for the *Microsoft II* proposed final judgment to be a "consent decree" as that concept is used in the Tunney Act. Moreover, given the legislative history of the Tunney Act and the Clayton Act, any judgment or decree entered after testimony had been taken could not be a consent decree within the meaning of the Tunney Act. In addition, the final decree and testimony evidence in the decree proceedings should be admissible in subsequent treble damage actions along with the final judgment finding violations of § 2 of the Sherman Act.

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253. *See* 51 CONG. REC. 15,938 (1914).

254. *Id.* at 15,939.

255. *Id.*

256. *Id.* The exchange between Senator Nelson and Senator Norris highlights this result:

> SENATOR NORRIS: Does [the second provision] mean that in the cases that are now pending the trusts may come in and plead guilty before they take all their testimony—that after this law is passed it will apply to them?
>
> SENATOR NELSON: Yes, certainly; and that you can not use the judgment itself in a suit brought by anyone else.
>
> SENATOR NORRIS: Exactly; but after the passage of this bill—assuming that it becomes law—if some additional evidence is taken this exemption would not apply, as I understand it. Is that what it means?
>
> SENATOR NELSON: If they do not plead guilty without taking further evidence, they do not get the benefit.

Id.

B. Application of the Tunney Act or § 4 of the Sherman Act

The preceding discussion raises the obvious question: When does the Tunney Act apply? The answer is that the Tunney Act applies to any settlement entered into between the government and a defendant in an antitrust proceeding before trial commences. Once trial commences, the case could either be litigated fully or be settled during trial. In either case, it is not the Tunney Act that applies. Instead, the full equitable powers of the court and § 4 of the Sherman Act, or § 15 of the Clayton Act if the violation is found under the Clayton Act, will apply.

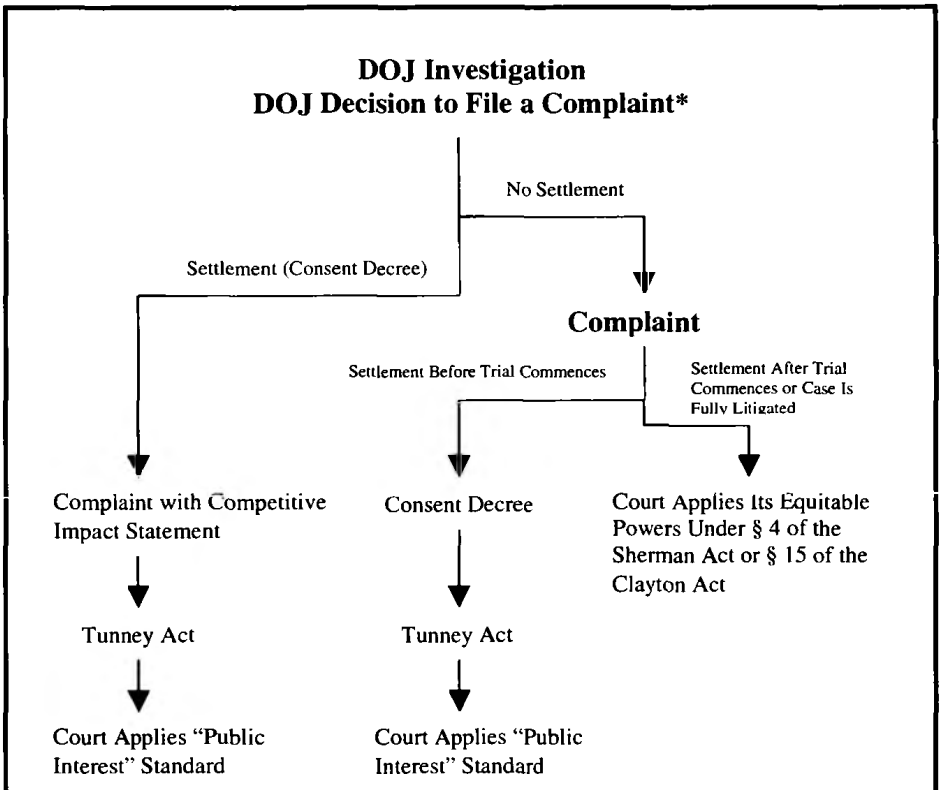

FIGURE 1: PROPER APPLICATION OF THE TUNNEY ACT AND § 4 OF THE SHERMAN ACT

***Once the DOJ has filed a complaint, with or without a competitive impact statement, prosecutorial discretion ends and the matter is now in the realm of the courts and the judicial function**

Figure 1 outlines the methodology implicit in the legislative history that distinguishes between Tunney Act proceedings and other settlements. If the DOJ and the defendant agree to settle prior to the

filing of a complaint,[257] then the Tunney Act clearly applies. The DOJ would file a complaint, a consent decree, and a competitive impact statement. The consent decree would be subject to Tunney Act review—namely, public comments would be solicited and the judge would make an independent determination with no deference to the DOJ—as to whether the settlement is in the public interest.

This methodology differs from what traditionally took place prior to the enactment of the Tunney Act, with respect to consent decrees, in one significant respect. As was discussed above,[258] the court owes no deference to the DOJ's proposed remedy and is required under the Tunney Act to make its own independent determination as to whether the remedy is in the public interest. If the court fails to make an independent determination without deference to the DOJ, as was the case in *Microsoft I* giving rise to the first "Microsoft Fallacy" it would be ignoring the express language of § 5(e) and the legislative history of the Tunney Act discussed above. Courts would return to the days of judicial rubber-stamping of consent decrees—the very thing that Congress sought to eliminate when it passed the Tunney Act.[259] It may also be the case that the DOJ and defendants settle at some point after the complaint is filed and prior to the commencement of trial. In these circumstances, the Tunney Act also applies, as does the court's independent judgment of whether to approve the consent decree, without deference to the DOJ.

The polar opposite scenario would be a case that has been litigated fully to a final judgment. In such a case, § 4 of the Sherman Act clearly applies and the Tunney Act does not. Once a final judgment has been entered, the judge has the responsibility and the discretion to consider all possible remedies in order to implement the most effective remedy:

> The Supreme Court has explained that a remedies decree in an antitrust case must seek to "unfetter a market from anti-competitive conduct," . . . "terminate the illegal monopoly, deny to the defendant

257. Note that the methodology outlined in Figure 1 recognizes that the decision whether or not to file a complaint is a decision within the DOJ's prosecutorial discretion. In keeping with the understanding of the separation of powers explicit in the Tunney Act's legislative history, however, the entry of any decree is an inherently judicial act. *See supra* Part VI.B (discussing the executive branch's infringement on congressionally conferred judicial power).

258. *See supra* Part VI.B (discussing the infringement on congressionally conferred judicial power by the executive branch).

259. *See supra* note 61 and accompanying text (discussing Senator Tunney's argument in favor of an act that insured independent judicial judgment in antitrust consent decrees).

> the fruits of the statutory violation, and ensure that there remain no practices likely to result in monopolization in the future."[260]

Thus, once a finding has been made as to liability, the court has an obligation to insure that the remedy imposed eliminates the actual and potential evils brought forth by the monopolist. The court in such a case would be free to ignore the proposed settlement by the parties if the court believed that it failed to cure the ills of anticompetitive conduct. The court also could hold hearings in order to ascertain what remedy would cure these same ills and must do so where there are other parties to the case contesting the remedy. The court also would have discretion to have Tunney-like hearings and solicit public comment—as Judge Greene did in the *AT&T* case[261]—in order to acquire information sufficient to make a determination as to remedy once a finding of liability has been entered.

Microsoft II took place in the context outlined above. A final judgment had been entered as to liability. What was left was a hearing or trial on remedy—a trial mandated by the court of appeals. The DOJ cannot usurp the powers of the court and the court's obligation to determine independently an appropriate remedy by mislabeling a proposed final judgment a "consent decree" at a stage of a proceeding well beyond the "taking of testimony." Nor can the court ignore the purpose of Congress in adopting the Tunney Act by applying it and the first "Microsoft Fallacy" in circumstances where Congress did not intend for the Act to be applied. To do so would be to compound the first "Microsoft Fallacy" by adopting the second "Microsoft Fallacy," undermining not only the structure and incentives of § 5(a) of the Clayton Act, but also the incentives for entering a consent decree before any litigation has taken place.

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260. *Microsoft II: Appeal*, 253 F.3d 34, 103 (D.C. Cir.) (quoting Ford Motor Co. v. United States, 405 U.S. 562, 577 (1972), and United States v. United Shoe Mach., 391 U.S. 244, 250 (1968)), *cert. denied*, 534 U.S. 952 (2001); *see* United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 366 n.12 (1961) ("'In general the object of the remedies under the anti-trust laws is to prevent the continuance of wrongful conduct, and to deprive the wrongdoers of the fruits of their unlawful conduct, and to prevent the creation anew of restraint forbidden by law.'" (quoting United States v. Minn. Mining & Mfg. Co., 96 F. Supp. 356, 357 (D.C. Mass. 1957))); *see also* Int'l Boxing Club of N.Y. v. United States, 358 U.S. 242, 253 (1959) ("The decree should (1) put 'an end to the combination or conspiracy when that is itself the violation'; (2) deprive 'the antitrust defendants of the benefits of their conspiracy'; and (3) 'break up or render impotent the monopoly power which violates the Act.'" (quoting Schine Chain Theatres v. United States, 334 U.S. 110, 128–29 (1948))).

261. *See AT&T*, 552 F. Supp. 131 (D.D.C. 1982). The court would be able to do this under its broad equitable powers. Regardless, the holding of such hearings would not make the decree entered into a "consent decree" under the Tunney Act.

The final possibility is where a settlement or dismissal of the complaint is proposed after trial has commenced but before entry of any final judgment. In that situation, some testimony has been taken, but there has not been a complete trial on the merits before the judge. Instead, the parties offer a proposed final judgment or the DOJ moves to dismiss the complaint.[262] The judge may or may not accept the proposed judgment under the court's equitable powers. The judge has the discretion to hold additional hearings in order to determine whether the settlement "prevent[s] and restrain[s] violations,"[263] and fulfill the court's obligations under § 4 of the Sherman Act or § 15 of the Clayton Act. In order to make that determination, the judge may hold hearings, solicit public comment, and order the filing of a Tunney-like "competitive impact statement," explaining the proposed decree.[264] No deference would be due to the DOJ's proposed remedy because the court would be exercising its independent power under § 4 of the Sherman Act or § 15 of the Clayton Act.

Additionally, the DOJ would not be entitled, under this scenario, to repeal § 5(a) of the Clayton Act by inserting exculpatory language into the settlement.[265] Section 5(a) clearly indicates that once testimony has been taken and a settlement is proposed, the exculpatory language cannot be inserted because when any evidence is taken, hearings on the remedy and the decree may be used as prima facie evidence against the defendant. Thus, the court would be obligated to strike any such exculpatory language should it choose to accept a proposed settlement under the guidelines set forth above.

In the event the DOJ moves to dismiss the case, the motion should generally be considered a decision within the discretion of the DOJ, in

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262. Because some testimony has been taken, the proposed final judgment would not be a consent decree.

263. *See* 15 U.S.C. § 4 (2000). The Sherman Act and the Clayton Act have parallel provisions. *See id.* §§ 4, 25.

264. This is precisely what Judge Greene did in the *AT&T* case without making the determination of whether or not the decree before him was a consent decree within the meaning of the Tunney Act. If the proceeding were a Tunney Act proceeding, § 5(f) would have allowed him to conduct hearings and take testimony to determine whether or not the decree was in the public interest. *See supra* note 212 (quoting § 5(f) of the Tunney Act, which provides the steps a court may take in examining a proposed consent decree). Alternatively, if the proceeding was not conducted under the Tunney Act, Judge Greene could use his equitable powers under § 4 of the Sherman Act to hold hearings and take testimony to determine whether the proposed decree would prevent and restrain violations of the Sherman Act. *See supra* note 24 (discussing the specific jurisdictional component of § 4 of the Sherman Act); *see also* Part III.C (discussing Judge Greene's decision in the *AT&T* case).

265. See *supra* note 231 and accompanying text for an example of such language.

the absence of some reason to the contrary.[266] Such a motion would obviously not be one subject to either the Tunney Act or § 4 of the Sherman Act because neither a consent decree is being proposed in such circumstances nor is there any request for injunctive relief being sought from the court requiring invocation of the its equitable powers.

VIII. CONCLUSION

The abuse and misuse of the Tunney Act in *Microsoft I* and *Microsoft II*, which created two new antitrust "fallacies," has eliminated independent judicial review of consent decrees, abrogated the power and obligation of the courts to remedy harms caused by violations of the antitrust laws, undermined the incentives to enter into consent decrees, and raised serious constitutional and procedural issues that may lead any court applying the Tunney Act into error. Both decisions reflect a startling disregard for the intent of Congress, the purposes of the Tunney Act, the rights of potential damage claimants, and the sensible management of antitrust litigation. Abuse of the Tunney Act, by the adoption of the first "Microsoft Fallacy," has led courts to return to the days before the Tunney Act when courts rubber-stamped any consent decree filed by the government.

No reasonable interpretation of the Tunney Act or its legislative history should lead to the conclusion that where the court is faced with a consent decree, its sole function is to rubber-stamp that decree. To the contrary, the legislative history makes clear that Congress wanted the courts to have an active role—to make an independent determination as to whether the consent decree is in the public interest. To hold otherwise—as the D.C. Circuit has done—is to gut the Tunney Act's standard of judicial review of proposed consent decrees and to engage in judicial activism that interprets laws not based upon the intent of Congress and the language of the Act but rather in spite of the express language and legislative intent of the statute.

Misuse of the Tunney Act by the adoption of the second "Microsoft Fallacy" led the DOJ to inject executive imperialism into the judicial function, a step improperly sanctioned by the trial court in *Microsoft II*. The Tunney Act makes clear that it applies only to "consent decrees" and that consent decrees are proposed final judgments entered before trial commences. By labeling as a consent decree any proposed final

266. The view of this Article is that the decision to dismiss is within the prosecutorial discretion of the DOJ and neither tramples upon the court's jurisdiction over the matter nor requires judicial action. *See supra* Part VI.B (discussing the infringement on congressionally conferred judicial power by the executive branch).

judgment arrived at after litigation has taken place, the DOJ can utilize the prior abuse of the Tunney Act to further its later misuse of the Act. In other words, the DOJ can usurp the statutory authority of the court under § 4 of the Sherman Act to determine the appropriate remedy and confer that power unto itself by labeling a proposed final judgment a "consent decree."

For the court to sanction such a misuse of the Tunney Act not only is contrary to the legislative history of the Act, but also eliminates § 4 of the Sherman Act as the source of the court's power to remedy violations of the Sherman Act, creates confusion over the appropriate standard to apply to review of the trial court's decision with respect to the proposed decree, denies other parties to the litigation of the remedy phase of an antitrust case a fair hearing on their proposed remedies, deprives private parties of rights guaranteed them by § 5(a) of the Clayton Act, and has resulted in a final decree in *Microsoft II* which should be reversed on jurisdictional grounds. The result is a limitation on the power of the court to craft an appropriate remedy and establishes a harsher standard of review for any remedy so crafted. The incentives for entering a consent decree before any testimony is taken are also reduced because an antitrust defendant may have nothing to lose by litigating a case to final judgment finding illegality and then agreeing to a settlement that can later be argued is a consent decree. Moreover, sanctioning such a perversion of the statutory scheme in *Microsoft II* ignores the law of the case and the mandate of the court of appeals that a hearing was to be held regarding to remedy. Additionally, other parties are denied the right to have their proposed remedies heard on equal footing with the DOJ proposal.

The misuse of the Tunney Act has significant impacts on the rights of third parties as well. By mislabeling the final judgment a "consent decree," the DOJ and a court may, with one quick flash of the pen, seek to eliminate all the rights conferred upon third parties by § 5(a) of the Clayton Act. The purported "consent decree"—the final judgment in the case—would lack prima facie effect, enabling the DOJ to effectively repeal § 5(a) of the Clayton Act and the incentive of defendants to enter into consent decrees.

The enormous problems outlined above arise from a total misinterpretation of the Tunney Act and its legislative history. A more reasonable interpretation, one consistent with the legislative history of the Tunney Act, avoids these pitfalls. Namely, the Tunney Act applies if a proposed settlement is reached before trial. Because the Tunney Act is designed to give the court information with respect to whether the settlement is in the public interest, this interpretation makes sense. In

such a proceeding, the judge would make an independent, non-deferential determination as to whether the consent decree is in the public interest, assessing whether the proposal prevents and restrains the violation alleged in light of the factors set forth in § 5(e) of the Tunney Act. If need be, the court can invoke the powers conferred by § 5(f) to aid in making its independent "public interest" determination. This interpretation is not only in agreement with the Act's legislative history, but also avoids the procedural and constitutional pitfalls outlined above. Once the DOJ files a complaint and proposed decree, the matter is before the court and judicial action is necessary.

Once trial commences, the equitable powers of a court are invoked, and there is no need for the sunlight of the Tunney Act because the judicial spotlight is already shining on the matter. If a court were to find its own spotlight to be insufficient, it has the power to hold hearings to shed even more light on the matter. At this point, the decree that may be ultimately entered is never a Tunney Act consent decree, unless Congress rewrites the statute, but rather a decree entered by the court pursuant to § 4 of the Sherman Act. This interpretation is not only in agreement with the legislative history of the Tunney Act but also prevents the DOJ from crafting language in the decree designed to repeal § 5(a) of the Clayton Act and engaging in inappropriate conduct in negotiating a settlement of the case.

Absent the proper application of the Tunney Act, and with the use of consent decrees where they cannot exist (after trial commences), antitrust enforcement will likely return to the days of secret deals, undue political interference with antitrust enforcement, limited or nonexistent private enforcement, and judicial rubber-stamping of proposed consent decrees. The future use of consent decrees to settle government cases might itself be undermined because defendants will no longer have an incentive to settle a case if they are free to litigate the case and then settle by a consent decree if they lose. That which Congress mandated will have been taken away through the DOJ and the courts rewriting the law Congress adopted.