

## RECENT CASES

THE SCOPE AND CONSTITUTIONALITY OF JUDICIAL REVIEW UNDER THE TUNNEY ACT: *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995).

The Antitrust Procedures and Penalties Act of 1974 (known as the Tunney Act)<sup>1</sup> requires a district court to determine that a proposed antitrust consent decree<sup>2</sup> is "in the public interest" before it enters the decree as a judgment.<sup>3</sup> The Tunney Act, however, does not specify how a district court is to make this determination.<sup>4</sup> As a result, the proper scope of judicial review under the Tunney Act has been a matter of controversy.<sup>5</sup> A particular point of confusion has been whether a reviewing court may "look beyond the strict relationship between complaint and remedy in evaluating the public interest."<sup>6</sup> In *United States v. Mi-*

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1. 15 U.S.C. § 16(b)-(h) (1988).

2. An antitrust consent decree is "an order of the court agreed upon by the 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." ANITRUST SUBCOMM., HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEPT. OF JUSTICE ix (Comm. Print 1959).

3. 15 U.S.C. § 16(e) (1988).

4. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 149 (D.D.C. 1982) (stating that the statute "provides relatively little guidance regarding the meaning of 'public interest' in this context"), *aff'd mem., sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 348g (rev. ed. 1995) (stating that the statute "does not tell the judge how he is to appraise" a proposed consent decree).

The Tunney Act does identify several factors the court "may consider" in making its public interest determination, including "the competitive impact of [the proposed consent decree]" and "the impact of entry of such [decree] upon the public generally and individuals alleging specific injury from the violations set forth in the complaint." 15 U.S.C. § 16(e)(1)-(2) (1988).

5. See James C. Noonan, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility With Executive Discretion*, 35 HASTINGS L.J. 133, 133-34 (1983).

6. *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981). The full passage states, "The statute 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." *Id.*

In *United States v. BNS Inc.*, 858 F.2d 456, 462, *modifying* 848 F.2d 945 (9th Cir. 1988), a divided panel construed this passage to indicate that "a court may consider matters not

*crosoft Corp.*,<sup>7</sup> the Court of Appeals for the District of Columbia Circuit held that a district court exceeds its statutory, and perhaps its constitutional, authority when it considers allegations not covered by the complaint and proposed consent decree in conducting its public interest review under the Tunney Act.<sup>8</sup> In so holding, the court preserved the proper separation of powers between the executive and judicial branches of government, and rendered a potentially unconstitutional statute constitutional as applied.

In July 1994, after an extensive investigation,<sup>9</sup> the Antitrust Division of the Department of Justice (the Department) filed a civil complaint against Microsoft Corporation<sup>10</sup> in the United States District Court for the District of Columbia.<sup>11</sup> The Department simultaneously filed a proposed consent decree with the district court.<sup>12</sup> The complaint charged Microsoft with unlawfully maintaining a monopoly in the market for certain IBM-compatible personal computer operating systems in violation of sections 1 and 2 of the Sherman Act.<sup>13</sup> The Department objected to two contracting practices employed by Microsoft. First, in contracts with original equipment manufacturers (OEMs), Microsoft required OEMs to pay a licensing fee for each computer they sold containing a particular microprocessor, regardless of whether the computer included a Microsoft operating system.<sup>14</sup> Second, in contracts with independent software vendors (ISVs),<sup>15</sup> Microsoft required ISVs to enter into nondisclosure agreements as a

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discussed in the complaint." The dissent argued that the passage indicates that "this court does not accept that a district court may, or should, 'look beyond the [complaint].'" *BNS Inc.*, 848 F.2d at 948-49 (Breezer, J., dissenting).

7. 56 F.3d 1448 (D.C. Cir. 1995).

8. *See id.* at 1458-62.

9. In 1990, the Federal Trade Commission (the Commission) initiated the investigation of Microsoft. The Commission deadlocked on whether to file an administrative action and consequently suspended its investigation. In 1993, the Antitrust Division of the Department of Justice (the Department) reopened the investigation. *See id.* at 1451.

10. Microsoft is the world's leading developer of operating systems software for IBM-compatible personal computers. *See id.* Microsoft's share of the operating systems market is consistently above 70 percent. *United States v. Microsoft*, 159 F.R.D. 318, 322 (D.D.C. 1995).

11. *See Microsoft*, 56 F.3d at 1451.

12. *See id.* at 1452.

13. *See id.* at 1451. Sections 1 and 2 of the Sherman Act are codified as amended at 15 U.S.C. §§ 1-2 (1988).

14. *See Microsoft*, 56 F.3d at 1451. In addition to the use of per processor licenses, Microsoft required minimum commitments, and credited unused balances to future contracts, and executed long-term contracts with major OEMs. *See id.*

15. ISVs design applications software that runs on operating systems.

condition for obtaining advance test versions of new operating systems.<sup>16</sup> The Department alleged that these practices were anticompetitive.<sup>17</sup> Accordingly, the proposed consent decree prohibited Microsoft from entering into per processor licenses and unduly restrictive nondisclosure agreements.<sup>18</sup>

In Fall 1994, Judge Sporkin, the presiding district judge, held a series of status conferences and hearings<sup>19</sup> at which he questioned the Department as to whether it had investigated certain additional allegations made in the book *Hard Drive*.<sup>20</sup> Judge Sporkin was particularly concerned about allegations that Microsoft engaged in "vaporware," which he defined as "the public announcement of computer product before it is ready for market for the sole purpose of causing consumers not to purchase a competitor's product that has been developed and is either currently available for sale or momentarily about to enter the market."<sup>21</sup> Judge Sporkin informed the Department that he wanted to be satisfied that the allegations made in the book were not true.<sup>22</sup> The Department did not amend the complaint or the consent decree to include charges or remedies with respect to "vaporware" or other allegations made in *Hard Drive*.<sup>23</sup>

In January 1995, the Department filed a motion for entry of the consent decree.<sup>24</sup> The district court denied the motion.<sup>25</sup> Stressing that the proposed consent decree failed to address several "anticompetitive practices that . . . Microsoft has been accused of engaging in by others in the industry,"<sup>26</sup> the district

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16. See *Microsoft*, 56 F.3d at 1451.

17. See *id.* More specifically, the Department alleged that the practices deterred OEMs from using competing operating systems and precluded ISVs from working with competing operating systems or developing competing products. See *id.* at 1451-52.

18. See *id.* at 1452. The consent decree prohibited various other practices as well. See *Microsoft*, 159 F.R.D. at 324. The product lines covered by the consent decree included Microsoft's primary operating systems (MS-DOS, Windows, and Windows 95) and any successor versions, but not its high-end operating system (Windows NT). See *Microsoft*, 56 F.3d at 1452.

19. See *Microsoft*, 56 F.3d at 1452-54.

20. JAMES WALLACE & JIM ERICKSON, *HARD DRIVE: BILL GATES AND THE MAKING OF THE MICROSOFT EMPIRE* (1992).

21. See *Microsoft*, 159 F.R.D. at 334.

22. See *Microsoft*, 56 F.3d at 1453.

23. See *id.*

24. See *id.*

25. See *Microsoft*, 159 F.R.D. at 338.

26. *Id.* at 334.

court found the decree was not in the public interest.<sup>27</sup> Judge Sporkin noted that he was “particularly concerned about the accusations of ‘vaporware,’ ”<sup>28</sup> and that he could not “sign off” on the decree “without the [Department] providing a full explanation as to its ‘no action’ stance.”<sup>29</sup>

The court of appeals reversed.<sup>30</sup> Writing for the unanimous three-judge panel, Judge Silberman ruled that the proposed consent decree was in the public interest.<sup>31</sup> Judge Silberman stated that “the district court’s function is not to determine whether [the proposed decree] ‘is the one that will *best* serve society,’ but only to confirm that the resulting settlement is ‘within the *reaches* of the public interest.’ ”<sup>32</sup> The court found that the proposed consent decree satisfied this standard.

The court held that the Tunney Act did not authorize the district court to “reach beyond the complaint to evaluate claims that the [Department] did *not* make and to inquire as to why they were not made.”<sup>33</sup> Judge Silberman ruled that, absent a strong showing of bad faith or improper behavior, “the district court is not empowered to review the actions or behavior of the Department.”<sup>34</sup> Because there was no such showing, the court ruled that the district court was “only authorized to review the decree itself.”<sup>35</sup>

In contrast to the district court, the court was not “troubled” by the prospect that the Department could limit judicial review of a consent decree to certain practices and markets by narrowly drafting the complaint.<sup>36</sup> Judge Silberman remarked, “Congress surely did not contemplate that the district judge would, by reformulating the issues, effectively redraft the complaint himself. . . . The court’s authority to review the decree depends entirely on the [Department’s] exercising its prosecutorial discre-

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27. *See id.* at 332, 338.

28. *Id.* at 334.

29. *Id.* at 336.

30. *See Microsoft*, 56 F.3d at 1451.

31. *See id.*

32. *Id.* at 1460 (quoting *United States v. Western Elec. Co.*, 900 F.2d 283, 309 (D.C. Cir. 1990), in turn quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981), in turn quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)).

33. *Id.* at 1459.

34. *Id.*

35. *Microsoft*, 56 F.3d at 1459.

36. *See id.* at 1459-60.

tion by bringing a case in the first place.”<sup>37</sup>

In conclusion, the court acknowledged the “constitutional difficulties that inhere in [the Tunney Act].”<sup>38</sup> Judge Silberman stated that “when the government is challenged for not bringing as extensive an action as it might, a district judge must be careful not to exceed his or her constitutional role. . . . [T]he Tunney Act cannot be interpreted as an authorization for a district judge to assume the role of Attorney General.”<sup>39</sup> Accordingly, the court remanded the case with instructions to enter the proposed consent decree.<sup>40</sup>

By narrowly delimiting the scope of judicial review under the Tunney Act, the court of appeals preserved the proper separation of powers between the executive and judicial branches. The doctrine of separation of powers prohibits one branch of government from usurping the constitutionally assigned powers of another branch.<sup>41</sup> A corollary to the separation of powers doctrine is the so-called political question doctrine,<sup>42</sup> which embraces the notion that certain political questions are nonjusticiable.<sup>43</sup>

In *Baker v. Carr*,<sup>44</sup> the Supreme Court identified several alternative tests for distinguishing nonjusticiable political questions,

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37. *Id.*

38. *Id.* at 1459.

39. *Id.* at 1462.

40. *See Microsoft*, 56 F.3d at 1462. In a separate opinion, the court granted Microsoft’s request that the case be remanded to a judge other than Judge Sporkin. *See id.* at 1465 (separate opinion) (per curiam). The court stated that it was “deeply troubled by several aspects of the proceedings in district court” and that Judge Sporkin’s reliance on the book *Hard Drive* “contaminated the entire Tunney Act review.” *Id.* at 1463. The court expressed doubt as to whether Judge Sporkin could be impartial on remand. *See id.* at 1465.

On remand, the district court found that entry of the decree was in the public interest and entered the decree as written. *See United States v. Microsoft*, No. 94-1561, 1995 U.S. Dist. LEXIS 20533 (D.D.C. Aug. 21, 1995) (Jackson, J.).

41. *See Note, The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974*, 82 MICH. L. REV. 153, 168 n.98 (1983) [hereinafter *Scope of Review*] (citing *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

42. *See Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”).

43. *See Green v. Frazier*, 253 U.S. 233, 240 (1920) (“Questions of policy are not submitted to the judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other branches of government.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (Marshall, C.J.) (“Questions in their nature political, of which are, by the constitution and laws, submitted to the executive, can never be made in this court.”).

44. 369 U.S. 186 (1962).

three of which are relevant here. According to the Court, a question is political in nature and, therefore, nonjusticiable when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding [it] without an initial policy determination of a kind clearly for nonjudicial discretion."<sup>45</sup>

Under each of these tests, the question whether the scope of a particular consent decree is in the public interest is a nonjusticiable political question. First, there is a textually demonstrable constitutional commitment of the question to the executive branch. Article II vests the executive with the power to "take Care that the Laws be faithfully executed . . . ."<sup>46</sup> Pursuant to Article II, Congress conferred prosecutorial discretion over the Sherman Act to the Attorney General.<sup>47</sup> Accordingly, the Department has the authority to determine whether it is in the public interest to prosecute a particular matter, which includes the authority to determine what charges to bring, what remedies to seek, and whether to litigate or settle.

Second, there are no judicially discoverable or manageable standards by which a district court can evaluate a proposed consent decree. When a court reviews a proposed consent decree, "it will find itself in a thicket of administrative considerations."<sup>48</sup> In fact, it is unclear how a judge could determine whether a particular decree is in the public interest "without trying the case and without himself allocating the Justice Department's resources."<sup>49</sup> In recognition of this problem, one district judge exasperated, "Taken literally, the burden [that the Tunney Act

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45. *Id.* at 217.

46. U.S. CONST. art II, § 3.

47. See 15 U.S.C. § 4 (1988).

48. H.R. REP. NO. 1463, 93d Cong., 2d Sess. (1973), reprinted in 1974 U.S.C.C.A.N. 6535, 6545 [hereinafter *Hutchinson Views*] (additional views of Rep. Hutchinson). According to Representative Hutchinson:

It will have to decide how well the Department is utilizing its resources to enforce the antitrust laws, how important the legal issues are to future cases, how strong or weak the Department's case is, how much time and manpower the particular case would consume if tried to completion, how much trial would preclude other antitrust enforcement efforts, how much of the relief prayed for in the complaint would the Department obtain through the decree, and how much time would be saved by the entry of the decree.

*Id.*

49. 2 AREEDA & HOVENKAMP, *supra* note 4 ¶ 348g.

places upon the court] is impossible.”<sup>50</sup>

Finally, the district court’s interpretation of the Tunney Act would require courts to make an initial policy determination that is for nonjudicial discretion. Whether a particular consent decree is in the public interest “requires an evaluation of . . . whether the benefits that might be obtained in a lawsuit are worth the risks and costs.”<sup>51</sup> Under our system, the judiciary does not make this cost-benefit determination: “Such determinations are reserved for the executive and legislative branches, which are answerable to the people.”<sup>52</sup> The judicial power is limited “to decid[ing] on the rights of individuals, not to inquir[ing] how the executive, or executive officers, perform duties in which they have a discretion.”<sup>53</sup>

Thus, insofar as the public interest review mandated by the Tunney Act authorizes a district court to review an exercise of prosecutorial discretion,<sup>54</sup> it transfers an executive function and political question to the judicial branch,<sup>55</sup> in violation of the doctrine of separation of powers.<sup>56</sup>

The potential constitutional defect of the Tunney Act has been recognized by members of the antitrust bar,<sup>57</sup> Congress,<sup>58</sup>

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50. *United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975).

51. *Maryland v. United States*, 460 U.S. 1001, 1006 (1983).

52. See *Hutchinson Views*, *supra* note 48, at 6545.

53. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

54. The legislative history of the Tunney Act suggests that it was intended to authorize broad judicial review. See, e.g., *Consent Decree Bills: Hearings on H.R. 9203, H.R. 9947, and S. 782 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 45 (1973) [hereinafter *House Hearings*] (statement of Sen. Tunney) (stating that the legislation preserves complete discretion on the part of the courts); *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., 1st Sess. 1 (1973) [hereinafter *Senate Hearings*] (statement of Sen. Tunney) (stating that the purpose of the legislation is to “make courts an independent force rather than a rubber stamp in reviewing consent decrees”).

Judge Sporkin relied on this history to justify looking beyond the face of the complaint in conducting his public interest review. See *Microsoft*, 159 F.R.D. at 329-32.

55. See *Hutchinson Views*, *supra* note 48, at 6545.

56. But see *Scope of Review*, *supra* note 41, at 168-70. The Note argues that this line of reasoning is flawed “because it fails to distinguish between the Justice Department’s negotiation of a proposed settlement and a court’s entry of a consent decree.” *Id.* at 168. “Since entry of a consent decree is a judicial act,” argues the author, “the decree is subject to the court’s equitable power to refuse to enter any judgment not ‘equitable and in the public interest.’” *Id.* at 169 (quoting *United States v. Radio Corp. of Am.*, 46 F. Supp. 654, 655 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943)).

57. See, e.g., *House Hearings*, *supra* note 54, at 145-46 (statement of Miles W. Kirkpatrick) (“The determination to be made . . . has traditionally been that of the prosecutor. . . . I doubt that the Court would or should be deemed to have competence in that

and the judiciary. Most significantly, three Supreme Court Justices have "expressed grave doubt as to the [Tunney] Act's constitutionality."<sup>59</sup> In *Maryland v. United States*,<sup>60</sup> the Court affirmed without opinion the entry of several antitrust consent decrees. However, in a published dissent authored by then-Justice Rehnquist and joined by Chief Justice Burger and Justice White, the Justices questioned whether the public interest review required under the Tunney Act "is within the judicial power."<sup>61</sup> The opinion asserted that "[t]he question assigned to the district courts by the [Tunney] Act is a classic example of a question committed to the Executive,"<sup>62</sup> and that even though Congress by statute poses such a question to the federal courts, the courts may not answer it.<sup>63</sup>

Thus, in holding that the district court is not authorized under the Tunney Act to "look beyond the strict relationship between complaint and remedy in evaluating the public interest,"<sup>64</sup> the court of appeals not only preserved the proper separation of powers between the executive and judicial branches, it rendered a potentially unconstitutional statute constitutional as applied.<sup>65</sup>

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area which is essentially not a judicial but an executive matter."); *Senate Hearings, supra* note 54, at 66-67 (statement of Robert A. Hammond III) ("Our judicial system has been designed for . . . the determination of controversies on the basis of an adjudicated record. The courts have no special expertise to determine, absent such a record, whether a proposed consent decree is in the public interest.")

58. See *Hutchinson Views, supra* note 48, at 6544-46.

59. *Microsoft*, 56 F.3d at 1459.

60. 460 U.S. 1001 (1983).

61. *Id.* at 1006.

62. *Id.* at 1005.

63. See *id.* at 1006 (citing *Muskrat v. United States*, 219 U.S. 346 (1911)).

64. *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981).

65. One commentator predicts that if the Supreme Court were to find the separation of powers argument persuasive, it would declare the public interest determination required by the Tunney Act unconstitutional on its face. See *Scope of Review, supra* note 41, at 168 n.97.