Testimony of

The Honorable Patrick Leahy

December 12, 2001

The proposed settlement that the Department of Justice and nine States have transmitted to the District Court offers a plan for the conclusion of this landmark antitrust litigation. It must now pass the legal test set out in the Tunney Act to gain court approval. That test is both simple and broad, and requires an evaluation of whether the proposed settlement is in the public interest.

There is significant difference of opinion over how well the proposed settlement passes this legal test. In fact, the States participating in the litigation against Microsoft are evenly split, with nine States joining in the proposed settlement and nine non-settling States presenting the court with an alternative remedy. As the courts wrangle with the technical and complex legal issues at stake in the case, this committee is conducting hearings to educate ourselves and the public about what this proposed settlement really means for our high-tech industry and for all of us who use computers at work, at school, and at home.

Scrutiny of the proposed settlement by this committee during the course of the Tunney Act proceeding is particularly important. The focus of our hearing today is to examine whether the proposed settlement is good public policy and not on the legal technicalities. The questions raised here and views expressed may help inform the court. I plan with Senator Hatch to forward to the court the record of this hearing for consideration as the court goes about the difficult task of completing the Tunney Act proceedings and the remedy action by the non-settling States.

I am especially concerned that the District Court take the opportunity seriously to consider the remedy proposal of the non-settling States before making her final determination on the other parties' proposed settlement. The insights of the other participants in this complicated and hard-fought case will surely be valuable additions to the comments received in the Tunney Act proceeding and help inform the evaluation whether the settlement is in the public interest.

The effects of this case extend beyond simply the choices available in the software marketplace. The United States has long been the world leader in bringing innovative solutions to software problems, in creating new tools and applications for use on computers and the Web, and in driving forward the flow of capital into these new and rapidly growing sectors of the economy. This creativity is not limited to Silicon Valley. The Burlington, Vermont, area ranks seventh in the nation in terms of patent filings. Whether the settlement proposal will help or hinder this process, and whether the high tech industries will play the important role that they should in our Nation's economy, is a larger issue behind the immediate impact of this proposal.

With that in mind, I intend to ask the representatives of the settling parties how their resolution of this conflict will serve the ends that the antitrust laws require. Our courts have developed a test for determining the effectiveness of a remedy in a Sherman Act case: The remedy must end the anticompetitive practices, it must deprive the wrongdoer of the fruits of the wrongdoing, and it

must ensure that the illegality does not recur. The Tunney Act also requires that any settlement of such a case serve the public interest. These are all high standards, but they are reasonable ones. In this case, the D.C. Circuit, sitting en banc and writing unanimously, found that Microsoft had engaged in serious exclusionary practices, to the detriment of their competitors and, thus, to all consumers. Today, we must satisfy ourselves that these matters have been addressed and redressed, or find out why not.

I have noted my concern that the procedural posture of this case not jeopardize the opportunity of the non-settling States to have their "day in court" and not deprive the District Court of the value of their views on appropriate remedies in a timely fashion. In addition, I have two basic areas of concern about the proposed settlement. First, I find many of the terms of the settlement to be either confusingly vague, subject to manipulation, or both. Mr. Rule raised an important and memorable point when he last testified before this Committee in 1997 during the important series of hearings convened by Senator Hatch on competition in the digital age. Testifying about the first Microsoft-Justice Department consent decree, Mr. Rule said: "Ambiguities in decrees are typically resolved against the Government. In addition, the Government's case must rise or fall on the language of the decree; the Government cannot fall back on some purported 'spirit' or 'purpose' of the decree to justify an interpretation that is not clearly supported by the language." We take seriously such counsel, and would worry if ambiguity in the proposed settlement would jeopardize its enforcement.

Second, I am concerned that the enforcement mechanism described in the proposed decree lacks the power and the timeliness necessary to inspire confidence in its effectiveness. Particularly in light of the absence of any requirement that the decree be read in broad remedial terms, it is especially important that we inquire into the likely operation of the proposed enforcement scheme and its effectiveness.

Any lawyer who has litigated cases and any business person knows how distracting litigation of this magnitude can be and appreciates the value that reaching an appropriate settlement can have not only for the parties but also for consumers, who are harmed by anticompetitive conduct, and the economy. I do not come to this hearing prejudging the merits of this proposed settlement but instead as one ready to embrace a good settlement that puts an end to the merry-go-round of Microsoft litigation over consent decrees. But the serious questions that have been raised about the scope, enforceability and effectiveness of this proposed settlement leave me concerned that, if approved in its current form, it may simply be an invitation for the next chapter of litigation. On this point, I share the concern of Judge Robert Bork, who warns, in his written submission, that the proposed settlement "contains so many ambiguities and loopholes as to make it unenforceable, and likely to guarantee years of additional litigation." I look forward to hearing from the Department of Justice and other distinguished witnesses today on the merits of this warning.

# # # # #