MOCKING THE PUBLIC INTEREST: CONGRESS RESTORES MEANINGFUL JUDICIAL REVIEW OF GOVERNMENT ANTITRUST CONSENT DECREES

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INTRODUCTION

On June 22, 2004, President Bush signed into law the Antitrust Criminal Penalty Enhancement and Reform Act of 2004.[1] Although no public fanfare accompanied passage of this Act, it contains important provisions designed to restore a meaningful role for the courts in the settlement of antitrust lawsuits brought by the U.S. government.

Over three decades ago, in response to concern that such settlements might be tainted by corruption, yet routinely rubber-stamped by the courts, Congress passed the Tunney Act.[2] This Act provided that before entering a consent decree proposed by the government in an antitrust action, "the court shall determine that the entry of such judgment is in the public interest."[3] It also provided that in making the "public interest" determination, the court had the discretion to consider such factors as the "competitive impact" of the proposed judgment; the court, however, was not required to consider these factors.[4]

The plain language of the Tunney Act appeared to require judges to make a de novo determination of whether a proposed antitrust consent decree was in the public interest, without giving deference to the executive branch's view that the public interest would best be served by a proposed settlement.[5] Courts, however, declined to adopt a de novo standard of

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1. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 665.

2. Antitrust Procedures and Penalties (Tunney) Act, Pub. L. No. 93-528, § 2, 88 Stat. 1706, 1706–08 (codified as amended at 15 U.S.C. § 16(b)–(g) (2000)). The common name of the Act comes from its primary sponsor, Senator John Tunney.

3. 15 U.S.C. § 16(e)(1) (2000). The Tunney Act uses the term "consent judgment" for settlement of government antitrust actions, while courts typically use the term "consent decree." The terms are interchangeable, and this Article uses the term "consent decree."

4. *Id.* § 16(e)(1)–(2) (2000), *amended by* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 221, 118 Stat. 665. The Act also contained procedural requirements. 15 U.S.C. § 16(b), (d) (2000).

5. The executive branch agency that has the primary authority for enforcing federal antitrust law is the Antitrust Division of the U.S. Department of Justice (DOJ). *See* United States Department of Justice, About DOJ: Mission Statement and Statutory Authority, http://www.usdoj.gov/02organizations

review. Instead, they settled on a narrower standard: a proposed consent decree should be entered if it was "within the reaches of the public interest," giving some deference to the executive branch's view that the proposed settlement was in the public interest.[6] Courts adopted this deferential standard in order to preserve consent decrees as an effective enforcement mechanism. De novo judicial review, in their view, would convert the settlement process virtually into a trial on the merits and thereby strip that process of much of its value.[7]

Though deferential, this "within the reaches of the public interest" standard preserved an independent and meaningful role for the courts. Judges emphasized that they were not acting as rubber stamps for the executive branch by approving settlements no matter how tainted or inadequate. Proposed settlements were instead scrutinized to determine whether they were reasonably calculated to protect competition. The great majority of proposed consent decrees were entered after such scrutiny. In a number of cases, however, courts performed an important mediation role by refusing to approve proposed decrees unless appropriate modifications were made.[8] Moreover, it is likely that the very prospect of searching judicial scrutiny was an important deterrent to efforts to use political heft to "swing sweetheart deals."[9]

This decades-long consensus unraveled in the 1990s in a string of decisions by the United States Court of Appeals for the District of Columbia. These decisions arose from antitrust actions that the United States brought against the computer software colossus, Microsoft Corporation. The D.C. Circuit ruled that, in making the substantive

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(noting that the DOJ is the "central agency for enforcement of federal laws"); United States Department of Justice, Antitrust Division: Overview, http://www.usdoj.gov/atr/overview.html (stating the Antitrust Division fulfills its mission by enforcing the antitrust laws). Thus, when the term "executive branch" is used in this article, the reference specifically is to the Department of Justice, Antitrust Division.

6. *See, e.g.*, United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975).

7. *See id.* (noting that the court is "not settling the case" and is limiting review to whether the settlement achieved is "within the reaches of the public interest").

8. For a more detailed discussion of the "within the reaches of the public interest standard," see 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, 10–20 (1996) (discussing the development and application of the standard). One commentator has argued that courts used "varying standards of review" in making the public interest determination. Natalie L. Krodel, Comment, *The Tunney Act: Judicial Discretion in* United States v. Microsoft Corporation, 62 BROOK. L. REV. 1293, 1316 (1996). This argument confuses the general standard of review with the degree of scrutiny afforded a particular settlement. Courts in this period were unanimous that "within the reaches of the public interest" was the proper standard. In particular cases, however, the level of scrutiny varied according to several factors, such as a party's prior history of sweetheart deals and the amount of information available to the court in the case record. *See* Anderson, *supra*, at 28.

9. Anderson, *supra* note 8, at 4, 37–38.

determination whether a proposed consent decree was in the public interest, judicial review was limited to whether the decree made a "mockery of judicial power."[10] Under this standard, the court's role appeared to be merely ministerial in nature: a proposed decree must be entered with little regard for whether the judge thought it was in the public interest, unless it was so inadequate as to suggest actual wrongdoing by the government.[11] A retreat to the days of judicial rubber-stamping was under way.[12]

Congress had acquiesced for decades in the deferential "within the reaches of the public interest" standard of review, but the toothless "mockery" standard represented a major threat to vigorous enforcement of federal antitrust law. The overwhelming majority of government antitrust actions are settled by consent decrees.[13] Such settlements thus are an important—perhaps the single most important—component of antitrust law enforcement. Judicial oversight of this process is a key safeguard against corrupt or inadequate deals struck by the executive branch. Such oversight both deters and provides a means to reject bad deals when they are made. The "mockery" standard posed a serious threat to effective judicial oversight of the settlement process, and therefore posed a threat to vigorous enforcement of federal antitrust law.

A bipartisan effort was launched in the U.S. Senate to overturn the D.C. Circuit's "mockery" standard and restore meaningful judicial oversight. The product of that effort is the Act of 2004. Its provisions are twofold. First, there is an express congressional finding that the "mockery" standard is not a correct construction of Congress's intent that courts must

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10. Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1236 (D.C. Cir. 2004); United States v. Microsoft Corp., 56 F.3d 1448, 1462 (D.C. Cir. 1995). The D.C. Circuit also applied the "mockery" standard in other cases. *E.g.*, Mass. Sch. of Law at Andover, Inc. v. United States, 118 F.3d 776, 783 (D.C. Cir. 1997) ("[W]e have construed the public interest inquiry narrowly. The district court must examine the decree in light of the violations charged in the complaint and should withhold approval . . . if the decree otherwise makes 'a mockery of judicial power.'" (quoting *Microsoft*, 56 F.3d at 1462)). For a detailed discussion of the Microsoft cases, *see infra* text accompanying notes 28–52. The D.C. Circuit also ruled that the procedural requirements of the Tunney Act must be met. *See, e.g.*, *Massachusetts v. Microsoft*, 373 F.3d at 1246–47 (affirming the district court determination that the consent decree met the procedural requirements of the Tunney Act). This Article is concerned solely with the standard of review in making the substantive determination of whether a proposed settlement is in the public interest.

11. *See, e.g.*, *Mass. Sch. of Law*, 118 F.3d at 784 (explaining that a consent decree was not so inadequate as to suggest "malfeasance" or a "sellout" by the government).

12. For an excellent critique of the D.C. Circuit's standard of review, see John J. Flynn & Darren Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies"*, 34 LOY. U. CHI. L.J. 749 (2003).

13. 1 ANTITRUST CONSENT DECREES ix (Talbot S. Lindstrom & Kevin P. Tighe eds., 1974); Stephen Squeri, *Government Investigation and Enforcement: Antitrust Division*, 36 Am. Antitrust L. Inst. 519, 564 (1995); Note, *The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974*, 82 MICH. L. REV. 153, 153 n.3 (1983).

determine whether proposed settlements are in the public interest, and that the purpose of the amendments to the Tunney Act is to restore meaningful judicial review.[14] Second, the Act of 2004 amends the Tunney Act to make it mandatory—not merely discretionary—for courts to consider various factors in making the public interest determination.[15] The amendments do not mandate any particular standard of judicial review. The thesis of this Article is that the amendments should be construed to restore the standard to the one to which Congress had acquiesced to in the decades before the "mockery" standard burst upon the scene; that the proper role of the court is to determine whether a proposed consent decree is "within the reaches of the public interest"; and while a court should afford some deference to the executive branch's decision to settle on the proposed terms, it should also exercise close scrutiny of whether the proposed consent decree is reasonably calculated to protect competition. A corollary to this thesis is that judges should issue written opinions that explain, in a transparent manner, how they evaluated the now-mandatory list of factors that they must consider in deciding whether settlements are in the public interest.

Part I of this Article discusses the original Tunney Act and the "within the reaches of the public interest" standard of review developed by the courts in the early decades after passage of the Act. Part II reviews the decisions in the D.C. Circuit that established the narrower "mockery of judicial power" standard of review. Part III analyzes the text and legislative history of the amendments to the Tunney Act, which are intended to overturn the "mockery" standard. Part IV discusses the reasons why the proper standard of review under the amended Tunney Act is the "within the reaches of the public interest" standard.

I. THE ORIGINAL TUNNEY ACT AND THE "WITHIN THE REACHES OF THE PUBLIC INTEREST" STANDARD OF REVIEW

Prior to the Tunney Act, courts rubber-stamped antitrust consent decrees proposed by the government, with little or no scrutiny of their terms or of the adequacy of the relief obtained. Public frustration with such judicial rubber-stamping came to a head in a celebrated case in which it appeared to many that the defendant had swung a sweetheart deal with the government in exchange for bankrolling the National Convention of the party in power when the deal was struck.[16]

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14. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108–237, § 221(a)(1)–(2), 118 Stat. 665, 668.

15. *Id.* § 221(b)(2) (to be codified at 15 U.S.C. § 16(e)(1)).

16. This case was *United States v. International Telegraph & Telephone Corp*. There is no

Congress responded to this controversy by passing the Tunney Act.[17] Its procedural provisions were designed to create transparency in the settlement process by requiring the government to reveal its justifications for a proposed settlement and by allowing the public to participate in the process. The Act stated that a proposed consent decree must be published in the Federal Register and that the government must file with the court both the materials that were determinative in formulating the settlement and a statement of its competitive impact.[18] Additionally, any person could file written comments with the court, and the government was required to file a written response to such comments.[19]

The heart of the Tunney Act, however, was its substantive provision: before entering a proposed consent decree, the court must determine "that the entry of such judgment is in the public interest."[20] This mandatory directive was followed by a list of factors the court "may consider" in making its determination, such as the termination of alleged violations.[21] The court, however, was not required to consider any of these factors. The "public interest" determination was designed to end the traditional rubber-stamping role of the courts and provide for meaningful judicial review of proposed antitrust consent decrees.[22]

The literal text of the Tunney Act required a court to make a de novo determination whether, in its own opinion, a proposed settlement was in the public interest. Nothing in the text suggested that any deference should be afforded to the decision of the executive branch to settle on the specified terms. The courts, however, never construed the Act in that manner. In the first two decades after passage of the Act, a substantial consensus was reached that the court's role should be more limited than the text suggested: a proposed consent decree should be entered if it was "within the reaches of the public interest."[23] Under that standard, a court should not automatically rubber-stamp a proposed settlement no matter how inadequate its terms, but

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reported opinion regarding the settlement. For a detailed discussion of the controversy created by this case, see generally Note, *The* ITT *Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 COLUM. L. REV. 594 (1973) (discussing consent decree procedures, non-legislative reform efforts, and proposed legislation following the *ITT* case).

17. H.R. Rep. No. 93–1463, at 6536 (1974).

18. 15 U.S.C. § 16(b), (d) (2000).

19. *Id.* § 16(d).

20. *Id.* § 16(e).

21. *Id.*, *amended by* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 221, 118 Stat. 665.

22. H.R. Rep. No. 93-1463, at 6538 (1974).

23. *See, e.g.*, United States v. Nat'l Broad. Co., 449 F. Supp. 1127, 1143 (D.C. Cal. 1978) (finding the "within the reaches of the public interest" standard to be the most significant interpretation of the Tunney Act).

neither should a court substitute its judgment for that of the executive branch on what was in the public interest. Instead, courts should afford some deference to the executive branch, so that the proper inquiry was whether the settlement was reasonably calculated to protect competition. This standard was flexible, in that the level of judicial scrutiny varied according to a number of factors: the complexity of the case, the extensiveness of the record available to the court, and any prior history of undue influence or attempts to evade public scrutiny.[24]

There are several powerful justifications for this atextual construction of the Tunney Act. First, as a practical matter, when a case is settled, the judge is not sufficiently familiar with the case to make a de novo public interest determination. This is especially so in the typical case, where the settlement is negotiated before a lawsuit is even filed, and the complaint and proposed consent decree are filed simultaneously. There is neither discovery nor evidence. The judge only has the competitive impact statement; public comments and the government's response thereto; and materials the government considers determinative in reaching the settlement. Second, insistence that consent decrees conform to a judge's own perception of what relief is in the public interest would undermine the usefulness of consent decrees in achieving protection for competition without the cost and risk of full-scale litigation. The public interest inquiry would turn very nearly into a trial on the merits that consent decrees are intended to avoid, so the incentive to settle would be greatly reduced. Third, the principle of separation of powers might be violated were judges to substitute their own judgment of what is in the public interest for that of the executive branch. Congress delegated to the executive branch the discretion to determine how extensive an antitrust complaint should be and to decide upon the terms of an appropriate settlement. A court's attempt to make the very same determinations is arguably an impermissible exercise of executive power.[25]

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24. *See, e.g.*, United States v. GTE Corp., 603 F. Supp. 730, 734 (D.D.C. 1984) (noting that the public interest evaluation of the consent decree varies with the complexity of the particular case); United States v. Am. Tel. & Tel. Co. (AT&T), 552 F. Supp. 131, 152 (D.D.C. 1982) (considering history of undue influence in making public interest determination of consent decree); United States v. Gillette Co., 406 F. Supp. 713, 715 (D.C. Mass. 1975) (noting that "the record is both open and extensive").

25. The Supreme Court has recognized for over two centuries that the principle of separation of powers means that "neither the Legislative nor the Executive branches, can constitutionally assign to the Judicial any duties, but such as are properly judicial, and to be performed in a judicial manner." Hayburn's Case, 2 U.S. (1 Dall.) 409, 411 (1792) (opinion of Jay, C.J., Cushing, J., and Duane, D.J.); *see also id.* at 411 (opinion of Wilson, J., Blair, J., and Peters, D.J.), 412–13 (opinion of Iredell, J. and Sitgreaves, D.J.). The Justices reached the conclusion that legislation requiring the judiciary to make recommendations concerning Revolutionary War veterans' pensions, but subject to de novo review and revision by the executive and legislative branches, was unconstitutional because it assigned a nonjudicial

In actual practice, although the "within the reaches of the public interest"[26] standard mandates some deference to the executive branch, it does not amount to rubber-stamping. Judges who were truly disturbed by the provisions of proposed antitrust consent decrees did not hesitate to refuse to enter them unless modified to protect the public interest.[27] There matters stood when the *Microsoft* litigation erupted and threatened to unravel this consensus.

II. THE D.C. CIRCUIT AND THE "MOCKERY OF JUDICIAL POWER" STANDARD OF REVIEW

A. Microsoft I

In 1994, the United States filed a complaint against computer software giant Microsoft Corporation, alleging that Microsoft was using its monopoly in the operating software market to prevent competing software companies from selling their systems to computer manufacturers.[28] The parties filed a proposed consent decree with the complaint without further

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task to the judiciary. *Id.* at 410–13. A plausible argument can be made that de novo judicial review of consent decrees suffers from the same constitutional defect. The executive branch performs the function of determining whether a settlement is in the public interest. For the judiciary to perform the same function by making its own, non-deferential determination of the same matter would be to perform an executive, not judicial, function.

The Court has recently reaffirmed the general rule that it is a violation of separation of powers for Congress to assign nonjudicial functions to the judicial branch. Mistretta v. United States, 488 U.S. 361, 381–82 (1989); Morrison v. Olson, 487 U.S. 654, 677 (1988) (quoting Buckley v. Valeo, 424 U.S. 1, 123 (1976)). This is not to say that de novo judicial review does violate separation of powers, and this Article does not advocate that view. In *Morrison*, the Court held that judicial participation in the appointment of an independent counsel and in defining the powers of such a counsel was not an assignment of nonjudicial functions to the judiciary. *Morrison*, 487 U.S. at 695. In *Mistretta*, the Court held that legislation creating the Sentencing Guidelines Commission with judges as members did not assign nonjudicial functions to judges. *Mistretta*, 488 U.S. at 412. For an argument that de novo review of antitrust consent decrees does not violate separation of powers, see Krodel, *supra* note 8, at 1323–27 (arguing that the judicial department must be able to reject judgments that contravene the public interest, and the exercise of such power does not interfere with the executive branch's power to enforce the law). For a view that de novo review of pretrial decrees may violate separation of powers but that de novo review of post-trial decrees does not, see Flynn & Bush, *supra* note 12, at 768 n.94. The argument of this Article is that de novo review would raise serious issues concerning separation of powers.

26. *Gillette Co.*, 406 F. Supp. at 716.

27. *See, e.g.*, *GTE Corp.*, 603 F. Supp. at 743, 751–53 (outlining the court's required modifications prior to entering the consent decree); *AT&T Co.*, 552 F. Supp. at 224–25 (requiring certain modifications before approving the decree as being in the public interest); *Gillette Co.*, 406 F. Supp. at 715 (questioning whether the proposed consent decree was in the public interest).

28. United States v. Microsoft Corp., 159 F.R.D. 318, 321 (D.D.C. 1995), *rev'd*, 56 F.3d 1488 (D.C. Cir. 1995).

litigation.[29] The settlement placed limits on Microsoft's allegedly anticompetitive practices but did not prohibit them outright.[30]

The District Court refused to enter the decree on the basis that it was not "within the reaches of the public interest," as the court conceived that standard.[31] The court found that the proposed remedies for the anticompetitive practices alleged in the complaint were inadequate. Additionally, the court reasoned that the government had failed, in the complaint and proposed settlement, to address other allegedly anticompetitive practices by Microsoft[32] that the judge had read about in a book.[33] Thus, the District Court went beyond the complaint to reject a settlement which it found to be too narrow.[34]

The D.C. Circuit ruled that the District Court exceeded the proper scope of inquiry under the Tunney Act.[35] It first reasoned that the public interest inquiry does not authorize a court to reject a settlement because it believes the government should have filed a broader complaint.[36] This is a sensible proposition because it is a quintessential exercise of executive discretion to decide what claims should be brought in a civil enforcement action, and judicial rejection of such decisions raises serious separation-of-powers issues.[37] The D.C. Circuit, however, did not rest its decision on that basis. It used the occasion to drastically narrow the proper scope of inquiry under the Tunney Act:

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

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29. *Id.*
30. *Id.* at 324.
31. *Id.* at 329, 332.
32. *Id.* at 332.
33. United States v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C. Cir. 1995) (per curiam).
34. *Microsoft Corp.*, 159 F.R.D. at 332.
35. *Microsoft Corp.*, 56 F.3d at 1459.
36. *Id.*
37. *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985) (explaining the presumption against judicial review of discretionary decisions of the executive branch not to bring enforcement actions).
38. *Microsoft Corp.*, 56 F.3d at 1462 (emphasis added).

There was no suggestion that, as a practical matter, a judge lacks sufficient information to determine anything other than whether the government is mocking the court. The D.C. Circuit's rationale was entirely based upon a supposed separation-of-powers principle: any serious judicial inquiry into whether a consent decree was in the public interest would be to improperly perform a nonjudicial, executive branch function.[39]

B. Microsoft II

The first *Microsoft* case was settled before the complaint was filed, so there remained a question of whether the D.C. Circuit would extend its new "mockery" standard to consent decrees proposed after full litigation of the merits of an antitrust action. That question was answered in the second *Microsoft* case. In 1998, perhaps stung by public criticism that the first lawsuit was too narrow, the United States brought a much broader antitrust suit against Microsoft. Among the new claims was the assertion that Microsoft had illegally required computer manufacturers to install its Internet Explorer browser as a condition of using Microsoft's Windows operating system.[40] This case was consolidated with similar suits brought by a number of states and went to trial.[41] The District Court, finding that Microsoft had violated sections one and two of the Sherman Antitrust Act in a number of ways, ordered extensive remedies.[42] The D.C. Circuit affirmed some of the liability findings, reversed others, and reversed the remedial order.[43] On remand, the United States and some of the plaintiff states agreed to a proposed consent decree with Microsoft.[44] Industry groups sought to intervene to object to the settlement, but the District Court denied intervention and entered the consent decree.[45]

On the industry groups' appeal, the D.C. Circuit ruled that the "mockery" standard is equally applicable to a consent decree proposed after trial on the merits.[46] It reasoned that "the Tunney Act does not distinguish between pre- and post-trial consent decrees."[47] In the court's view, the only

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39. *See Microsoft Corp.*, 56 F.3d at 1462 (noting that a district court judge "must be careful not to exceed his or her constitutional role").

40. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 35 (D.D.C. 2000), *aff'd in part, rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001).

41. *Id.*

42. *Id.*; United States v. Microsoft Corp., 97 F. Supp. 2d 59, 64–74 (D.D.C. 2000) (ordering the extensive remedies).

43. *Microsoft Corp.*, 253 F.3d at 118–19.

44. United States v. Microsoft Corp., 231 F.Supp 2d 144, 150–51 (D.D.C. 2002).

45. Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1204 (D.C. Cir. 2004).

46. *Id.* at 1237.

47. *Id.*

difference in evaluating pre- and post-trial consent decrees is that the adequacy of a decree without trial on the merits is measured against the allegations of the complaint, whereas a decree after trial is measured against the findings and conclusions of the court.[48]

When it came time to actually apply the "mockery" standard, however, the appellate panel took a very curious approach: not once did it measure the consent decree against, nor did it even mention, the "mockery" standard. The intervenors raised nine separate objections to the settlement.[49] The appellate panel discussed these objections at length, clarifying that the actual issue raised by the objections was whether the judgment was "within the reaches of the public interest."[50] The opinion provides a clear analysis of why each objection failed to demonstrate that the judgment was not in the public interest.[51]

Two possible explanations come to mind for this curious omission of the "mockery" standard from the actual analysis of the industry groups' objections. First, the panel may have (mistakenly) understood the "mockery" standard and the "within the reaches of the public interest" standard to be identical, and therefore interchangeable.[52] This first possibility, however, seems highly unlikely. Some district court decisions within the D.C. Circuit made it clear that, unlike the public interest standard, the "mockery" standard is toothless. The most striking example of this abdication of authority is *United States v. Pearson*.[53] In *Pearson*, a company sought to acquire a science textbook business from a competitor.[54] The United States was concerned that this purchase would reduce competition in the market for such books.[55] After negotiations, the government filed a complaint and proposed consent decree that would allow Pearson to acquire the new business but require it to sell off other product lines in the same market.[56] In considering whether to enter the

48. *Id.*

49. *Id.* at 1207–34 (discussing the objections regarding commingling, Java deception, forward-looking provisions, web services, market development programs, open source Internet Explorer, Java must-carry, and cross-cutting objections of "fruits" and presumption).

50. *Id.* at 1239.

51. *Id.* at 1237–46.

52. There are a few indications in the opinion that the panel conflated the two standards. *See, e.g.*, *id.* at 1239 ("[T]he question before us is whether the remedy approved by the district court was within the reaches of the public interest."). In another case, a district court quite clearly conflated the two standards. United States v. Archer-Daniels-Midland Co., 272 F. Supp. 2d 1, 10 (D.D.C. 2003) (concluding that the consent decree did not make a mockery of judicial power and is within the reaches of the public interest).

53. United States v. Pearson PLC, 55 F. Supp. 2d 43 (D.D.C. 1999).

54. *Id.* at 44.

55. *Id.*

56. *Id.*

decree, the District Court stated that "the public interest inquiry authorized by the Tunney Act is so limited in scope as to be very nearly a *ministerial task*."[57] The task performed by the court was "ministerial" indeed. In addressing the ultimate question of whether the proposed settlement was adequate, the court baldly stated that the settlement "does not 'make a mockery of judicial power'" without one word of explanation.[58] The court did not explain, for example, how the divestiture of other products would protect against the anticompetitive effects of the acquisition. It is difficult to imagine a clearer instance of rubber-stamping a settlement. The "mockery" and "public interest" standards are not identical.

The second possible explanation for omission of the "mockery" standard from analysis of the objections is that the panel may have felt constrained to pay lip service to the "mockery" standard as controlling D.C. Circuit precedent. At the same time, the panel may have seen how inadequate that standard is for complying with the congressional mandate to determine whether a proposed settlement is in the "public interest" and thus ignored the standard in the actual analysis of the consent decree.

This second possibility is much more likely than the first. The phenomenon of paying lip service to the "mockery" standard and then ignoring it in the actual consideration of the consent decree occurred in a string of three other district court cases within the D.C. Circuit.[59] In all three cases, the government filed complaints alleging that a proposed merger would harm competition, in violation of federal antitrust law.[60] The parties filed proposed consent decrees that did not bar the mergers but instead required divestiture of other assets in order to maintain a similar level of post-merger competition.[61] In actually determining whether the proposed decree was in the public interest, the District Court in each case glossed over the "mockery" standard and focused on whether the judgment was "within the reaches of the public interest," giving due deference to the views of the executive branch.[62] Applying this standard was no "ministerial" task, as in the *Pearson* case. The court in each case engaged

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57. *Id.* at 45 (emphasis added).

58. *Id.* at 47.

59. United States v. Archer-Daniels-Midland Co., 272 F. Supp. 2d 1 (D.D.C. 2003); United States v. Alcoa, Inc., 152 F. Supp. 2d 37 (D.D.C. 2001); United States v. Enova, Corp., 107 F. Supp. 2d 10 (D.D.C. 2000).

60. *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d at 3; *Alcoa, Inc.*, 152 F. Supp. 2d at 38; *Enova Corp.*, 107 F. Supp. 2d at 12.

61. *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d at 6; *Alcoa, Inc.*, 152 F. Supp. 2d at 39; *Enova Corp.*, 107 F. Supp. 2d at 14–15.

62. *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d at 5–6; *Alcoa, Inc.*, 152 F. Supp. 2d at 41; *Enova Corp.*, 107 F. Supp.2d at 18.

in careful analysis of whether divestiture was reasonably calculated to protect competition. The difference between the barren analysis entailed by the "mockery" standard and the meaningful review fostered by the "public interest" standard is illustrated by the following passage from one of the three divestiture cases:

> [The consent decree] sufficiently curtails PE/Enova's incentive to abuse its market power over southern California's natural gas transmission market in order to raise electricity prices and/or diminish competition in southern California's electricity generation market. This result is accomplished by requiring Enova to divest those assets which would provide the largest profit margins if the price of electricity rose and by imposing a rigorous system of prior approvals and contract monitoring to assure that PE/Enova does not take steps to undo the effects of the divestiture. It is plainly not for the Court to second-guess the government's predictions concerning the impact of the merger or the proposed remedies.[63]

These three cases demonstrate that the "mockery" standard was on shaky ground even within the D.C. Circuit itself. It is likely, then, that the appellate panel in *Microsoft II* felt the same way: though constrained by D.C. Circuit precedent to mention the "mockery" standard, the panel applied the broader "public interest" standard in its actual evaluation of the decree.[64]

Outside the D.C. Circuit, the "mockery" standard was ignored in at least one circuit. *United States v. Alex. Brown & Sons, Inc.* arose in the Southern District of New York, in the Second Circuit.[65] The United States filed a complaint against brokerage firms that made the stock market on the NASDAQ.[66] The claim was that the firms adhered to a "quoting convention" for setting stock prices, which resulted in higher stock prices and thus artificially high commissions charged to investors.[67] The parties

63. *Enova Corp.*, 107 F. Supp. 2d at 18.

64. The composition of the six-judge panel that decided *Microsoft* II was almost entirely different from the three-judge panel which decided *Microsoft* I. Chief Judge Edwards was the only judge who sat on both panels. United States v. Microsoft Corp., 253 F.3d 34, 44 (D.C. Cir. 2001); United States v. Microsoft Corp., 56 F.3d 1448, 1451 (D.C. Cir. 1995).

65. United States v. Alex. Brown & Sons, Inc. 963 F. Supp. 235 (S.D.N.Y. 1997), *aff'd sub nom*, United States v. Bleznak, 153 F.3d 16 (2d Cir. 1998) (omitting, in both opinions, any mention of the mockery standard).

66. NASDAQ is the automated stock quotation system operated by the National Association of Securities Dealers. *In re* NASDAQ Market-Makers Antitrust Litigation, 894 F. Supp. 703, 705 (S.D.N.Y. 1995).

67. *Alex. Brown*, 963 F. Supp. at 237.

filed a proposed consent decree that prohibited use of the quoting convention.[68] The focus of objections to the settlement was a controversial provision that NASDAQ traders' telephone calls would be taped and monitored in order to determine whether the firms were complying with the ban on the quoting convention, but that such tapes could not be subpoenaed or admitted into evidence at the request of private plaintiffs.[69]

In determining whether to enter the proposed consent decree with this controversial nondisclosure provision, the District Court stated that its function was to ensure that the settlement was "within the *reaches* of the public interest," giving due deference to the executive branch's decision to settle on the specified terms.[70] In applying the "public interest" standard, the court did not rubber-stamp the judgment by accepting the government's justification for the nondisclosure provision at face value but rather independently analyzed whether that justification was sufficient.[71] The proffered justification was that the firms had bargained for the nondisclosure provision in exchange for their agreement to permit taping the calls, and that the firms would not have agreed to tape the calls without the nondisclosure provision.[72] The court ruled, first, that the nondisclosure provision did not illegally restrict the existing legal rights of third parties.[73] The court reasoned that the provision did not seal evidence already in existence.[74] It only sealed evidence that was made possible by the settlement, and there was a "compelling" justification why the latter should be permitted: "Taping offers the public enhanced assurance that traders will not conspire against the public interest."[75]

The court then turned to the question of whether, even though the nondisclosure provision was not illegal, the consent decree was "within the reaches of the public interest."[76] Objectors contended that nondisclosure of the recorded calls would hamper effective private enforcement of antitrust law by depriving private plaintiffs of valuable evidence.[77] The court found it "troubling" and "disturbing" that the government might uncover evidence in the tapes that either the settlement or the law was being violated, yet

68. *Id.* at 237.
69. *Id.* at 237–38.
70. *Id.* at 238.
71. *Id.* at 238–39.
72. *Id.* at 240.
73. *Id.* at 241.
74. *Id.*
75. *Id.* at 241–42.
76. *Id.* at 239, 244.
77. *Id.* at 244.

private plaintiffs would be denied that evidence.[78] Nonetheless, the court concluded that government enforcement with the tapes and private enforcement without the tapes would provide stronger overall enforcement than government and private enforcement without the tapes: "thus, the public interest balance tips in favor of approving the Consent Decree."[79]

The upshot of all these cases is that there was a brewing conflict among the federal district and appellate courts over whether the neo-rubber-stamp "mockery" standard or the more robust "within the reaches of the public interest" standard provided the proper standard of judicial review of proposed government antitrust consent decrees. It was in this context that Congress acted.

III. THE 2004 TUNNEY ACT AMENDMENTS

A. Text

In the Act of 2004, Congress made two findings concerning the Tunney Act and the D.C. Circuit's "mockery" standard:

> (A) the purpose of the Tunney Act was to ensure that the entry of antitrust consent judgments is in the public interest; and
>
> (B) it would misconstrue the meaning and Congressional intent in enacting the Tunney Act to limit the discretion of district courts to review antitrust consent judgments solely to determining whether entry of those consent judgments would make a "mockery of the judicial function."[80]

Congress also made an explicit statement of the purpose of the amendments to the Tunney Act: "The purpose of this section is to effectuate the original Congressional intent in enacting the Tunney Act and to ensure that United States settlements of civil antitrust suits are in the public interest."[81] Standing alone, these provisions would have no effect on judicial consideration of proposed settlements. Congress does not have the power to direct particular results under prior law. The judicial power encompasses the interpretation of laws passed by the legislature. For the legislature to

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78. *Id.* at 245.

79. *Id.* at 246.

80. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 221(a)(1)(A)–(B), 118 Stat. 665, 668.

81. *Id.* § 221(a)(2).

direct the judiciary to interpret existing law in a matter at odds with judicial interpretation of that law would be an unconstitutional attempt to exercise judicial power.[82] The "mockery" standard, however misguided, is a judicial interpretation of the original Tunney Act, and Congress has no power to overturn it merely by stating it is an incorrect interpretation.

On the other hand, Congress does have the power to require particular results if it changes the prior law.[83] The questions then become: How did Congress change the Tunney Act? Do those changes accomplish the stated purpose of overturning the "mockery" standard? If so, what standard of judicial review should be required?

Congress left unchanged the requirement that a court must determine whether "the entry of such judgment is in the public interest." The Act of 2004 amends the Tunney Act in two respects. First, the original Tunney Act stated that courts "may" consider various factors, such as "the competitive impact" of the proposed settlement.[84] The new law substitutes the word "shall" for "may," thus making it mandatory that courts consider the enumerated factors.[85] Second, the original Tunney Act listed as a factor to be considered the catch-all "any other considerations bearing upon the adequacy of such judgment."[86] The new law adds to this catch-all phrase the words "that the court deems necessary to a determination of whether the consent judgment is in the public interest."[87] This change makes the point that the standard of review is not whether the judgment is "adequate" for some unspecified purpose; it is for the purpose of determining whether the proposed settlement is in the "public interest." Since courts are now required to consider the enumerated factors when making the public interest determination, it is worthwhile to highlight what these factors are:

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82. United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1871) (finding that Congress violated separation of powers by attempting to "prescribe rules of decision to the Judicial Department of the government in cases pending before it"); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225 (1995) (declaring that the legislature cannot require courts to construe laws according to legislature's view) (citing THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE AMERICAN UNION 94–95 (1868)).

83. *See* Miller v. French, 530 U.S. 327, 347 (2000) (noting that when Congress changes the law "underlying a judgment awarding prospective relief, that relief is no longer enforceable to the extent it is inconsistent with the new law"); Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 437–41 (1992) (finding that a statute directing decisions in pending cases was constitutional if it amended the law).

84. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 221(b), 118 Stat. 665, 668–69 (2004) (to be codified at 15 U.S.C. § 16(e)).

85. *Id.* § 221(b)(2)(A)(1), 118 Stat. 665, 668.

86. Antitrust Procedures and Penalties (Tunney) Act, Pub. L. No. 93-528, § 2, 88 Stat. 1706, 1707 (1974) (codified at 15 U.S.C. § 16(e)(1) (2000)).

87. Antitrust Criminal Penalty Enhancements and Reform Act of 2004, Pub. L. No. 108-237, § 221(b), 118 Stat. 665, 668–69 (to be codified at 15 U.S.C. § 16(e)).

> (1) the competitive impact of such judgment, including:
> - termination of alleged violations;
> - provisions for enforcement and modification;
> - duration of relief sought;
> - anticipated effects of alternative remedies actually considered;
> - whether its terms are ambiguous;
> - any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest.
>
> (2) the impact of entry of such judgment upon:
> - competition in the relevant market or markets;
> - the public generally;
> - individuals alleging specific injury from the violations set forth in the complaint.
>
> (3) the public benefit, if any, to be derived from a determination of the issues at trial.[88]

These changes in the text of the Tunney Act accomplish the stated purpose of overturning the "mockery" standard. No longer may a court approve an antitrust consent decree, as in the *Pearson* case, with a conclusory, unexplained statement that the decree "does not 'make a mockery of judicial power.'"[89] To do so would fall short of what is required by law: to evaluate the enumerated factors in making its "public interest" determination. Consideration of these factors, in turn, necessarily entails the very sort of close scrutiny of the impact of the proposed settlement that the "mockery" standard eschewed.

The findings, statement of purpose, and amendments to the Tunney Act are silent as to the proper standard of judicial review. Insofar as the text is concerned, the literal words of the Act still appear to require de novo review of whether the court itself considers the judgment to be in the public interest. There is not a word about any need for deference to the executive branch. Since such a standard would present serious separation-of-powers concerns,[90] a look at the legislative history of the Act of 2005 is appropriate to determine whether Congress intended to establish a potentially

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88. *Id.*

89. United States v. Pearson PLC, 55 F. Supp. 2d 43, 47 (D.D.C. 1999); *see supra* text accompanying notes 57–59.

90. *See supra* text accompanying note 25.

unconstitutional standard of review, and, if not, what the intended standard is.[91]

B. Legislative History

The most extensive legislative history of the Tunney Act amendments is found in the statements of its bipartisan Senate sponsors, Senators Kohl, DeWine, Leahy, and Hatch.[92] Senator Kohl's statement contains the most thorough explanation of the Tunney Act amendments and is therefore worth quoting at some length. First, Senator Kohl made it clear that the amendments are intended to overturn the D.C. Circuit's "mockery" standard and restore meaningful judicial scrutiny of antitrust consent decrees:

> While the legislative history of the law is clear that it was meant to prevent "judicial rubber stamping" of consent decrees, the leading precedent of the *D.C. Circuit Court of Appeals currently interprets the law in a manner which makes meaningful review of these consent decrees virtually impossible*. Leading cases stand for the proposition that only consent decrees that "make a mockery of the judicial function" can be rejected by the district court. The changes in the Tunney Act incorporated in this legislation, as well as the statement of Congressional findings,

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91. However, as one commentator has noted, "[t]he fiercest debate in the field of statutory interpretation involves the proper use of legislative history. Textualists like Justice Scalia insist that legislative history has no proper place in statutory interpretation. Other distinguished jurists hold it invaluable. . . . There is also an abundant and rich academic debate." Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2150 (2002) (footnotes omitted). To enter that fray is beyond the scope of this Article. One use of legislative history, however, appears to enjoy general acceptance: if a literal reading of a statute would probably render the statute unconstitutional, legislative history should be consulted as an aid in determining whether Congress intended that the statute be given a different—and clearly constitutional—interpretation. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 73–78 (1994) (consulting committee reports and floor debates to discern a construction of a child pornography statute that would avoid a serious question regarding whether the statute violated the First Amendment).

92. Statements by congressional sponsors of legislation are generally considered to be a reliable guide to legislative intent. *See, e.g.*, Edward O. Correia, *A Legislative Conception of Legislative Supremac*y, 42 CASE W. RES. L. REV. 1129, 1153–60 (1992). Professor Correia explains that sponsors' statements concerning bills they introduce are among the "reliable indicators of the legislature's policy" because the sponsors have "special responsibility" for the proposed legislation, other members of Congress rely heavily on sponsors' statements in deciding how to vote, and their statements are subject to the safeguard of open debate. *Id.*

With regard to the Act of 2004, the bill that originated in the House as H.R. 1086 contained no provision for amending the Tunney Act. Amendments to the Tunney Act originated in the Senate as S. No. 1797, offered as an amendment to H.R. 1086. There are no committee reports on the Tunney Act amendments. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, §§ 201–21, 2004 U.S.C.C.A.N. (118 Stat.) 665. Thus, the statements of the Senate sponsors of the Tunney Act amendments constitute the most authoritative explanation of these amendments.

> will make clear that *such an interpretation misconstrues the legislative intent of the statute*.
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> . . . .
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> . . . It is this overly deferential standard [of] review which makes reform of the Tunney Act necessary so that the legislative intent can be effectuated and courts can provide an independent safeguard to prevent against improper or inadequate settlements. The changes we make to the Tunney Act today address these problems and correct the mistaken precedents.
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> . . . .
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> In sum, as the Tunney Act is currently interpreted, it is difficult if not impossible for courts to exercise meaningful scrutiny of antitrust consent decrees. The "mockery" standard is contrary to the intent of the Tunney Act as found in the legislative history. *Our legislation will correct this misinterpretation of the statute*.
>
> . . . .
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> . . . To the extent that these precedents are contrary to section 221(a) of our bill regarding the standard of review a court should apply in reviewing consent decrees under the Tunney Act, *these decisions are overruled by this legislation*.
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> . . . .
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> . . . In sum, *our bill will mandate that courts engage in meaningful review* of the Justice Department's antitrust consent decrees and not merely 'rubber stamp' the decrees. It will make clear that it is a misinterpretation of the Tunney Act . . . to limit judicial review of these consent decrees to whether they make a mockery of the judicial function, and therefore overrule recent D.C. Circuit decisions holding to the contrary.[93]

Second, Senator Kohl emphasized that the purpose of overruling the D.C. Circuit and restoring meaningful judicial review was to be

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93. 150 CONG. REC. S3615–18 (daily ed. Apr. 2, 2004) (statement of Senator Kohl) (emphasis added); *see also id.* at S3613–14 (statement of Senator Hatch) (offering a lengthy endorsement to the proposed revisions); *see also id.* at S3618–19 (statement of Senator DeWine) (also endorsing the proposed revisions).

accomplished by mandating, rather than permitting, courts to consider the factors enumerated in the Tunney Act, and by enhancing the factors themselves:

> It will accomplish this by, No. 1, a clear statement of congressional findings and purposes expressly overruling the improper judicial standard of recent D.C. Circuit decisions; No. 2, by *requiring, rather than permitting, judicial review of a list of enumerated factors* to determine whether a consent decree is in the public interest; and No. 3, by enhancing the list of factors which the court now must review.
>
> . . . .
>
> . . . *While this legislation is not intended to require a trial de novo of the advisability of antitrust consent decrees* or a lengthy and protracted review procedure, *it is intended to assure that courts undertake meaningful review* of antitrust consent decrees to assure that they are in the public interest and analytically sound.
>
> . . . Our bill modifies the law by stating that, in making this determination, the court "shall" look at a number of enumerated factors bearing on the competitive impact of the settlement. The current statute merely states that the court "may" review these factors in making its determination. Requiring, rather than permitting, the court to examine these factors will strengthen the review that courts must undertake of consent decrees and will ensure that the court examines each of the factors listed therein. Requiring an examination of these factors is intended to preclude a court from engaging in "rubber stamping" of antitrust consent decrees, but instead to seriously and deliberately consider these factors in the course of determining whether the proposed decree is in the public interest.
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> . . . .
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> . . . By restoring *a robust and meaningful standard of judicial review*, our bill will ensure that the Justice Department's antitrust consent decrees are in the best interests of consumers and competition.[94]

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94. 150 CONG. REC. S3616–18 (daily ed. Apr. 2, 2004) (statement of Senator Kohl) (emphasis added); *see also id.* at S3615 (statement of Senator Leahy) (stating that amendments to the Tunney Act

This legislative history demonstrates that, by requiring courts to consider the enumerated factors in determining whether a proposed consent decree is in the public interest, Congress overturned the D.C. Circuit's "mockery" standard of review. Congress did not intend, however, to go to the other extreme and require "trial de novo of the advisability of antitrust consent decrees."[95] What Congress did intend is that courts utilize, in Senator Kohl's words, "a robust and meaningful standard of judicial review."[96]

IV. THE PROPER STANDARD OF JUDICIAL REVIEW

The proper standard of judicial review under the Tunney Act is the "within the reaches of the public interest" standard employed by courts prior to the D.C. Circuit's invention of its "mockery of judicial power" standard. Courts should not make de novo determinations of whether proposed antitrust settlements are in the public interest or are the best settlements possible. Instead, courts should afford respectful deference to the executive branch's proposals. That deference is limited, however, by the new requirement that courts must consider the factors enumerated in the 2004 amendments to the Tunney Act. Courts should enter proposed consent decrees only if they are firmly convinced, after serious consideration of the enumerated factors, that they are reasonably calculated to protect competition. This conclusion is based upon the principle of separation of powers, the text of the 2004 amendments, the legislative history of the 2004 amendments, and sound policy for the effective enforcement of federal antitrust law.

Ever since the Tunney Act was enacted in 1974, its literal text has required that courts engage in de novo review of whether a proposed antitrust consent decree is in the public interest, with no deference to the judgment of the executive branch. Were statutory text the sole consideration, then this would be the required standard of review. Such a standard, however, would create serious doubt as to whether the Tunney Act is constitutional. By the time the executive branch presents a proposed settlement to a court, the executive branch has made a judgment confided to it by law that the settlement is in the public interest. For a court to ignore that judgment, and to make its own de novo judgment of whether the settlement is in the public interest would give rise to a strong argument that

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would increase judicial scrutiny of consent decrees).

95. 150 CONG. REC. S3618 (daily ed. Apr. 2, 2004) (statement of Senator Kohl).

96. *Id.*

the judiciary has performed an executive function, in violation of separation of powers.[97] The doctrine of "constitutional doubt," therefore, weighs heavily in favor of construing the Tunney Act to require less than de novo judicial review and instead to allow some deference to the executive branch.[98]

That deference, however, is limited by the unambiguous text of the 2004 amendments to the Tunney Act. Those amendments require that a court must consider a number of enumerated factors in determining whether to approve a settlement. Uncritical deference to the executive branch is inconsistent with this requirement. While some deference is appropriate, a court must still make an independent judgment weighing the enumerated factors.

The legislative history of the 2004 amendments makes clear that the mandate to consider the enumerated factors is intended to create a "robust and meaningful" standard of judicial review.[99] That standard is the "within the reaches of the public interest" standard, under which the court determines whether a proposed consent decree is reasonably calculated to protect competition. Congress acquiesced in that construction of the Tunney Act for many years. Congressional agreement with the judicial interpretation of a statute is an indication—though not dispositive—that the interpretation is consistent with congressional intent.[100]

Finally, as a policy matter, the "within the reaches of the public interest" standard will promote effective enforcement of federal antitrust law. The government's consent decree program is a critical component of

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97. *See supra* note 25 and accompanying text.

98. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 689 (2001) ("'[I]t is a cardinal principle' of statutory interpretation, however, that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'") (citation omitted). In *Zadvydas*, the Court concluded that indefinite detention of aliens would raise a serious question whether such detention violates due process of law; the Court therefore construed the statute to permit detention only for a reasonable time. *Id.* at 682.

99. *See supra* note 94.

100. Johnson v. Transp. Agency, 480 U.S. 616, 629–30 n.7 (1987) ("The fact that [congressional] inaction may not always provide crystalline revelation, however, should not obscure the fact that it may be probative to varying degrees."); Grove City Coll. v. Bell, 465 U.S. 555, 568 (1984) ("Congress' failure to disapprove the regulations is not dispositive, but . . . it strongly implies that the regulations accurately reflect congressional intent."); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 533–35 (1982) (interpreting Congress's "post enactment history" of Title IX as support for their opinion). Professor Correia cautions, however, against "placing too much weight on post-enactment failures to act" because a failure to act can be explained by numerous motives—such as intransigence by a few members—other than agreement with the manner in which courts have interpreted a statute. Correia, *supra* note 92, at 1163–65. It is congressional inaction during this period in conjunction with the other factors discussed, not congressional inaction alone, which supports the conclusion of this Article.

its law-enforcement function. The government lacks the resources to take every case to trial, and success is never guaranteed, even if a case goes to trial. Settlement allows both the government and defendants to conserve scarce resources and achieve predictable results. De novo review would undermine the utility of the consent decree program because it would turn the settlement process into a proceeding very similar to a trial on the merits, thus undermining the incentive to settle. At the same time, however, history teaches that there must be a meaningful check on the government's decision to settle, in order to avoid the very sort of sell-outs and sweetheart deals that prompted the 1974 enactment of the Tunney Act. Experience after 1974 revealed that the "within the reaches of the public interest" standard has provided a meaningful check on executive decision-making, while not undermining the settlement process itself.

CONCLUSION

The 2004 amendments to the Tunney Act should be construed to mean that the proper standard of judicial review is whether a proposed antitrust consent decree is reasonably calculated to protect competition. Just as the executive branch must be accountable for its decisions, so must the judicial branch be accountable for decisions to accept or reject settlements. To that end, a federal district court should, in every case, provide a written explanation—such as a memorandum opinion—of how it analyzed each of the enumerated factors in arriving at its decision that a proposed settlement is (or is not) within the reaches of the public interest. If district courts refuse to do so, appellate courts should order them to do so. The requirement of a written explanation will ensure that courts do not pay lip service to the 2004 amendments and rubber-stamp proposed settlements, but instead do what Congress has mandated: engage in robust and meaningful review of whether antitrust consent decrees are in the public interest.