



Congressional Testimony

The Use and Abuse of Consent Decrees in Federal Rulemaking

**Testimony before the
Subcommittee on the Courts, Commercial and
Administrative Law,
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As a policy device, government by consent decree serves no necessary end. It opens the door to unforeseeable mischief; it degrades the institutions of representative democracy and augments the power of special interest groups. It does all of this in a society that hardly needs new devices that emasculate representative democracy and strengthen the power of special interests.

— *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1137 (Wilkey, J., dissenting)

My name is Andrew Grossman. I am a Visiting Legal Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

The Subcommittee is to be commended for focusing its attention on the subject of this hearing, abuses of consent decrees in institutional reform and agency litigation, and for giving serious consideration to practical solutions to this problem. “Government by decree” is contrary to the principles of democratic self-governance. It takes power from the people’s elected representatives and places it in the least accountable of the branches of government, the judiciary. Our federal courts are excellent at deciding the “cases and controversies” to which their jurisdiction is limited under the Constitution. But the judiciary lacks the institutional competence, resources, and mandate to oversee institutions and make government policy. As with any deviation from the constitutional separation of power, when the courts stray from their proper role, the consequences are myriad, from lack of transparency, to reduced governmental accountability, to bad public policy results.

These observations apply equally to consent decrees that bind federal agencies and limit their exercise of discretion as to consent decrees in institutional reform litigation regarding state programs. Especially in recent years, such consent decrees have been used to short-circuit normal agency rulemaking procedures, to accelerate rulemaking in ways that constrain the public’s ability to participate in a meaningful fashion, and to do an end-run around the inherently political process of setting governmental priorities. In some cases, these decrees appear to be the result of collusion, where an agency shares the goals of those suing it and takes advantage of litigation to achieve those shared goals in ways that would be difficult or impossible outside of court. In these and other cases, consent decrees allow political actors to disclaim responsibility for agency actions that are unpopular and thereby evade accountability. And as with consent decrees in institutional reform litigation, previous administrations have, in several instances, abused such consent decrees in an attempt to bind their successors and limit their policy discretion. For these reasons, and more, consent decrees are often contrary to the public interest. More than that, consent decrees that limit discretion, if they are at all binding on the Executive Branch, also raise serious constitutional concerns.

There are solutions. The best, in my opinion, is for the Executive Branch itself to preserve its powers and discretion by declining to enter into consent decrees that compromise either. But this takes fortitude and the willingness to pass up short-term gain

for longer-term benefits that are less tangible, such as greater public participation in rulemaking and robust democratic accountability. It should come as little surprise that the Reagan Administration was willing to make this trade-off, and that its policy was spearheaded by Attorney General Edwin Meese III, who is now Chairman of the Center for Legal and Judicial Studies at the Heritage Foundation. As I will explain, the principles that Attorney General Meese laid out in a 1986 memorandum setting Department of Justice Policy on consent decrees and settlements remain vital today and should form the backbone of any attempt to address this problem. Although the ultimate decision on whether to enter into any given consent decree should be left to high-ranking and accountable Executive Branch officials, such as the Attorney General and agency heads, Congress can and should act to provide for greater transparency and public participation and to ensure that consent decrees are entered into and carried out in the public interest, rather than as a means to circumvent usual rulemaking procedures or to evade accountability.

Background

In the abstract, consent decrees serve a useful, beneficial purpose by allowing parties to settle claims without the expense and burden of litigation, while providing for ongoing judicial oversight of their settlement agreement. But litigation seeking to compel the government to undertake certain future acts is not the usual case, and the federal government is not the usual litigant. Consent decrees (and settlements) that bind the federal government present special challenges that do not arise in private litigation. This happens in all manner of litigation, and is not confined to a particular subject matter. Consent decrees binding federal actors have been considered in cases concerning environment policy, civil rights, federal mortgage subsidies, national security, and many others. Basically, consent decrees may become an issue in any area of the law where federal policymaking is routinely driven by litigation.

These special challenges arise when parties attempt to use consent decrees to do more than to mimic the results of litigation by simply stipulating the rights and obligations of the parties under law, as a court might rule if the case were to proceed to trial. Although a decree is regarded as a judgment for most purposes, its basis is not the application of the law by a disinterested arbiter, but the consent of the parties. Accordingly, parties may agree to terms that would be unavailable to a court issuing its own judgment on a case, and yet have those terms “blessed” by the court through its adoption of the decree. In this way, parties can use the court to adopt terms that may affect the rights of third parties or have consequences beyond the dispute between the parties. While third parties may be able to directly challenge, or at least contract around, consent decrees that affect their rights in litigation among private parties, the public may have little or no recourse when its rights are traded away.

But why would a public official do such a thing? Judge Frank Easterbrook provides a compelling account of the ways that government officials may use consent decrees to obtain advantage—over Congress, over successors, over other Executive Branch officials—in achieving their policy goals:

The separation of powers inside a government—and each official’s concern that he may be replaced by someone with a different agenda—creates incentives to use the judicial process to obtain an advantage. The consent decree is an important element in the strategy. Officials of an environmental agency who believe that the regulations they inherited from their predecessors are too stringent may quickly settle a case brought by industry (as officials who think the regulations are not stringent enough may settle a case brought by a conservation group). A settlement under which the agency promulgated new regulations would last only for the duration of the incumbent official; a successor with a different view could promulgate a new regulation. Both parties to the litigation therefore may want a judicial decree that ties the hands of the successor. It is impossible for an agency to promulgate a regulation containing a clause such as “My successor cannot amend this regulation.” But if the clause appears in a consent decree, perhaps the administrator gets his wish to dictate the policies of his successor. Similarly, officials of the executive branch may obtain leverage over the legislature. If prison officials believe their budget is too small, they may consent to a judgment that requires larger prisons, and then take the judgment to the legislature to obtain the funds.¹

I am not as sanguine as Judge Easterbrook that bad regulations by one administration may be easily replaced or repealed by the next. But if anything, this makes his point far stronger: a government official who uses a consent decree to rush a rulemaking process may gain an advantage over possible successors who do not share his agenda, as well as competitors within his own administration. Even routine consent decrees—ones that do not, on their face, appear to bind successors, but merely require an official to take some act that durably alters legal entitlements—should therefore be subject to significant scrutiny.

Judge Easterbrook also observes—correctly, in my view—that the existing law does not thoughtfully address the possibility of consent decrees based on collusion or primarily intended for their external effects, rather than merely to resolve the dispute before the court. Federal Rule of Civil Procedure 60(b) allows for the modification of judgments, but underlying it is the assumption that a judgment accurately reflects parties’ entitlements under law—something that may not be true in the case of a consent decree where the parties’ interests are not opposed, but aligned. Based on this assumption, courts typically require a strong showing of changed circumstances to justify revision of a consent decree. They also typically disfavor challenges by third parties. The result is that the public’s rights and interests may go unrepresented in legal proceedings that incorrectly assume an adversarial posture and only minor externalities.

All of this implicates rights, under the Constitution and otherwise. Jeremy Rabkin and Neal Devins argue persuasively that some consent decrees may intrude on the rights

¹ Frank Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. Chi. L. Forum 19, 33-34 (1987).

and prerogatives of the Executive Branch and thereby violate the separation of powers.² Entry of a decree gives the court the power to enforce its terms, on par with any normal judgment, but the federal government—and the Executive Branch, in particular—is not an ordinary litigant who may be subject to the judiciary’s powers in every instance. Rather, it is a co-equal branch of government, with its own powers that it may not trade or share with the other branches. The Supreme Court has made clear, repeatedly, that it lacks that authority.³ It is clear from this case law, for example, that those powers assigned by the Constitution to the President are inalienable. He may not, for example, agree to be bound in his exercise of the veto power or, most likely, in his power to recommend legislation to Congress.⁴

Spending authority presents a closer question. The President’s power here is subordinate to Congress’s, which implies that he may not commit funds that Congress has not appropriated. But he may, in some circumstances, make contingent commitments, which raise their own difficulties:

Where the executive promises to provide funds only if and when relevant appropriations are approved by Congress, such promises may seem to pose no threat to the legislative power of the purse. And, the courts could therefore enforce such a promise without constitutional objection if Congress subsequently enacts the relevant appropriation. Yet suppose that Congress intended the appropriation to cover a large number of projects or programs but full satisfaction of a prior contingent commitment has the effect of excluding most other expenditures because the prior commitment preempts so much of the appropriation. In that case, enforcement of a contingent finding commitment might indeed thwart legislative expectations and thus still threaten legislative control of the federal pursestrings.⁵

Rabkin and Devins suggest that the sovereign breach doctrine provides a safeguard here, such that an agency may generally be held to its contingent funding commitment, but such a commitment “could not prevent the agency from altering its general funding policies, even though the policy alteration had the incidental effect of limiting the funds

² Jeremy Rabkin and Neal Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 *Stan. L. Rev.* 203 (1987) [hereinafter *Constitutional Limits*].

³ *See, e.g., Bowsher v. Synar*, 478 U.S. 714 (1986) (executive may not give away power to execute the laws); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (executive may not give away veto power).

⁴ Memorandum from Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, to Raymond Fisher, Associate Attorney General, regarding Authority of the United States To Enter Settlements Limiting the Future Exercise of Executive Branch Discretion (June 15, 1999), available at http://www.justice.gov/olc/consent_decrees2.htm [hereinafter “OLC Memorandum”].

⁵ *Constitutional Limits* at 235-36.

available for that particular commitment.” Put differently, “[n]o agency has the constitutional authority to restrict its own ability to alter ‘general and public’ policies.”⁶

In a 1999 memorandum, the Office of Legal Counsel adopted the opposite view, arguing that the Constitution in no way limits the Executive’s power to incur obligations in advance of appropriations. It reasons that the Antideficiency Act, 31 U.S.C. § 1341, which countenances certain “authorized” exemptions, demonstrates that the President may in fact incur such obligations without constitutional limit. This memorandum, however, performs a slight of hand, conflating the President’s authority to incur prospective obligations where authorized by Congress with his power (under the Constitution) to incur them on his own say-so. In this, it effectively ignores the Appropriations Clause, weakly suggesting that the Executive Branch avoid incurring such obligations where possible.⁷ Rabkin and Devins have the better argument on this point.

A third area is the carrying out of the laws through regulation. As with traditional law enforcement, the Executive’s discretion is, within the boundaries set by Congress in defining the law, nearly “absolute.”⁸ Relying on administrative review cases, Rabkin and Devins conclude that the Executive possesses an irreducible quantum of discretionary power in the regulatory process that cannot be arrogated in consent decrees:

The Court has been inconsistent in its rulings on the degree to which courts should defer to an agency’s interpretation of its statutory mandate, although it has generally urged some degree of deference. Even where the courts have substituted their own judgments regarding the construction of statutory standards, however, they have rarely directed executive agencies to particular rulemaking results. Rather, the courts have almost always remanded challenged rules back to the agency for revision ‘in the light of’ the court’s construction of the relevant statutory mandate. This practice acknowledges that a good deal of discretion must inevitably remain with implementing agencies, even in rulemaking.⁹

The Supreme Court recognized as much in *Massachusetts v. EPA*, when it declined to require EPA to regulate greenhouse gas emissions by new motor vehicles and instead directed the agency to provide “reasons for action or inaction [that] conform to the authorizing statute.”¹⁰

And, of course, the Executive’s discretion is limited by the guarantees of rights contained in the Constitution and its amendments. No one would seriously argue that it has the authority to enter into a consent decree that abrogates a third party’s speech rights or requires it to seize, without due process or compensation, a third party’s property.

⁶ *Id.* at 236.

⁷ OLC Memorandum.

⁸ *United States v. Nixon*, 418 U.S. 683, 693 (1971).

⁹ *Constitutional Limits* at 241 (footnotes omitted).

¹⁰ *Massachusetts v. EPA*, 127 S.Ct. 1438, 1462 (2007).

Finally, the bulk of rights are not constitutional in nature, but flow from statutory guarantees. Even the Office of Legal Counsel (“OLC”), which takes a narrow view of limits on Presidential power (even limits that prevent the President from trading away his powers), recognizes that “the Attorney General ordinarily may not settle litigation on terms that would transgress valid, otherwise applicable, statutory restrictions on agency conduct.”¹¹ Thus, an agency may not agree to ignore, in a rulemaking, a particular factor that it is bound by the statute to consider, or to consider another factor that the statute requires it to ignore. It must also abide by all procedural requirements, including, where applicable, those of the Administrative Procedure Act. Thus, an agency may not agree to dispense with notice and comment in most circumstances. And even OLC, which does not believe that the Constitution bars the President from trading away his discretion, argues that the APA may, in effect, do so, by requiring that agencies adhere to certain procedures in reaching substantive outcomes.¹²

In sum, consent decrees (and in some instances, settlement agreements) that bind the federal government to undertake particular future actions present special risks and concerns that are simply not present in litigation between private parties. Nonetheless, they receive no greater scrutiny than consent decrees in cases that concern private parties’ rights, that do not present issues of great public interest, and that do not predominantly effect third parties’ rights.

Consent Decrees at Issue

Having sketched the problem, it is useful to fill in greater detail by surveying experience. In an attempt to distance this issue from the political and policy controversies of today, this discussion will, with one exception, discuss cases that arose in the 1970s and 1980s but which remain typical, in their essential points, of cases today.

National Audubon Society v. Watt (1982).¹³ The court describes the history of this case crisply:

This appeal arises out of protracted litigation concerning the federal government’s plans to construct a 250,000-acre water development project, the Garrison Diversion Unit, in North Dakota. In 1977, in connection with a suit by the National Audubon Society seeking injunctive relief for alleged violations of federal statutes including the National Environmental Policy Act (NEPA), the Secretary of the Interior and Audubon agreed to the Stipulation and Order at issue in this case. The stipulation provided that the parties would suspend litigation on the merits, and that the government would not proceed with major construction on the Garrison project until the Secretary had completed two environmental studies and submitted proposed legislation to Congress, and until Congress had adopted legislation either reauthorizing, modifying, or deauthorizing the

¹¹ OLC Memorandum.

¹² *Id.*

¹³ 678 F.3d 299 (D.C. Cir. 1982).

project. Five years later, under a new Administration, the government contends that the stipulation is no longer binding.

The Reagan Administration argued that the consent decree was invalid because “one Administration may not constitutionally bind its successors in the exercise of policymaking discretion, and that the judiciary may not command the Executive Branch to exercise its discretionary powers in any particular manner.”¹⁴ But the court ducked the “novel and far-reaching constitutional issues involved,” instead finding within the consent decree an “implied condition subsequent,” consistent with the government’s limited authority under NEPA to delay implementation of an authorized project, that, “[i]f Congress fails to act after having had a reasonable opportunity to reconsider the 1965 authorizing legislation, the parties shall no longer be bound by the stipulation.”¹⁵ Accordingly, the court vacated the injunction entered by the district court.

Environmental Defense Fund v. Costle (1980) / Citizens for a Better Environment v. Gorsuch (1983).¹⁶ The D.C. Circuit’s punt in *National Audubon Society* was consistent with the Court’s treatment of *EDF v. Costle* two years prior, when it pointedly declined to address the issue of restrictions on a federal official’s discretion to enter into a consent decree and remanded the case for further proceedings on that issue.

Three years after that, the case returned, under a new title, and the constitutional issue could not be easily avoided. The court summarized the case’s posture:

[T]he Agreement [consent decree] was entered into by the original parties to these consolidated cases in settlement of the plaintiffs’ claims that EPA had failed to carry out its statutory duty to implement certain provisions of the Federal Water Pollution Control Act The Agreement contains a detailed program for developing regulations to deal with the discharge of toxic pollutants under the CWA. It required EPA to promulgate guidelines and limitations governing the discharge by 21 industries of 65 specified pollutants. It also mandated the use of certain scientific methodologies and decision-making criteria by EPA in determining whether additional regulations should be issued and whether other pollutants should be included in the regulatory scheme. It did not specify the substantive result of any regulations EPA was to propose and only required EPA to initiate “regulatory action” for other pollutants identified through the research program. The regulations envisaged by the Agreement were, after full notice and comment, to be promulgated in phases by December 31, 1979 and the industries affected were to comply with them by June 30, 1983.¹⁷

Industry interveners challenged the decree on the grounds that it impermissibly infringed upon the EPA Administrator’s discretion by precluding him from taking actions otherwise open to him under the CWA. In the absence of the decree, they argued, EPA

¹⁴ *Id.* at 305.

¹⁵ *Id.* at 310.

¹⁶ 636 F.2d 1229 (1980); 718 F.2d 1117 (1983).

¹⁷ 718 F.2d at 1120-21.

could in the exercise of this discretion choose whether or not to establish the criteria and programs which the decree mandates. The court rejected this argument, on the basis that the “Decree here was largely the work of EPA and the other parties to these suits, not the district court,” and therefore “the requirements imposed by the Decree do not represent judicial intrusion into the Agency’s affairs to the same extent they would if the Decree were a creature of judicial cloth.”¹⁸

Judge Wilkey authored a stirring dissent, taking on the majority’s view of both the facts and the law. As to the facts, the district court was heavily engaged in the making of the consent decree: “The court shaped it, scrutinizing and even altering its terms.”¹⁹ As to the law, EPA’s consent, he argued, was irrelevant:

[A] decree of this type binds not only those present Administrators who may welcome it, but also their successors who may vehemently oppose it. For reasons that ultimately have to do with preserving the democratic nature of our Republic, American courts have never allowed an agency chief to bind his successor in the exercise of his discretion. Today’s majority decision effectively undercuts that line of authority by allowing an Administrator to waive his successor’s power of discretion—so long as a court is willing to play accomplice.²⁰

“The greatest evil of government by consent decree,” Judge Wilkey concluded, “comes from its potential to freeze the regulatory processes of representative democracy.”²¹ He warned, too presciently, of the “foreseeable mischief” that would follow.

Ferrell v. Pierce (1984).²² A sure sign that judicial overreach follows is an opinion that opens with a statement of this sort: “Congress has declared as a policy ‘the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family.’”²³ *Ferrell* delivers.

Rabkin and Devins summarize the case’s posture:

[*Ferrell*] involved a mortgage insurance program operated by the Department of Housing and Urban Development. In 1976, HUD settled a suit brought by low-income homeowners in the Chicago area and promised to take assignment of the mortgages of these homeowners, under certain conditions, to prevent foreclosures by the original mortgagees. When the plaintiffs subsequently charged HUD with failure to observe the terms of this agreement in 1979, the parties agreed to an amended stipulation. HUD promised that ‘it would operate the assignment program for five years in accordance with its newly-revised handbook’; that ‘it

¹⁸ *Id.* at 1128 (internal quotation marks and citation omitted).

¹⁹ *Id.* at 1130 (Wilkey, J., dissenting).

²⁰ *Id.* at 1134 (footnote omitted).

²¹ *Id.* at 1136.

²² 743 F.2d 454 (7th Cir. 1984).

²³ *Id.* at 455.

would not, during this period curtail the ‘basic rights’ of participating mortgagors’; that it would ‘give notice to plaintiffs’ counsel prior to final action on any modification’; and, that after the expiration of the five year period, it would continue the assignment program or an ‘equivalent substitute.’ In 1980, on HUD’s recommendation, Congress enacted the Temporary Mortgage Assistance Program (“TMAP”) as a means of coping with skyrocketing costs under the mortgage assignment program. Under TMAP, HUD would not take over mortgages when insured, low-income homeowners were threatened with foreclosure, but would simply assist them in meeting their monthly payments to the original mortgagees. When HUD sought further to amend the 1979 amended stipulation in *Ferrell* to specify that TMAP assistance would satisfy its requirements, the district court judge refused to allow the change. HUD’s implementing regulations for TMAP, the district judge found, had tightened eligibility requirements and lowered the quality of mortgage assistance in various ways so that it was not really an ‘equivalent substitute.’²⁴

The Reagan Administration appealed, urging the Seventh Circuit “to read the Amended Stipulation as not governing TMAP in order to avoid ‘difficult constitutional issues’” regarding the scope of an executive official’s discretion “to bind his or her successors in office to substantive policy interpretations of a not-as-yet enacted statute.”²⁵ The court dismissed the argument for its “novelty” and found it waived regardless.²⁶

As Judge Coffey explained in dissent, the result of this decision was to require substantial federal expenditures where Congress had designed and enacted an alternative, “an unprecedented infringement upon the legislative process.”²⁷

United States v. Board of Education of Chicago (1984).²⁸ In September 1980, the Carter Administration’s Department of Justice entered into a consent decree to resolve claims regarding its funding to support desegregation of the Chicago school district by requiring it “to make every good faith effort to find and provide every available form of financial resources (sic) adequate for the implementation of the desegregation plan.” The district court ruled in 1983 that the Reagan Administration had failed to satisfy this obligation and ordered it “to provide presently available funds, to find every available source of funds, to support specific legislative initiatives to meet the obligations of the Board, and ‘not [to] fail[] to seek appropriations that could be used for desegregation assistance to the Board.’”²⁹

²⁴ *Constitutional Limits* at 252-53.

²⁵ 743 F.2d at 462-63.

²⁶ *Id.* at 463 (“Even if the constitutional issue were properly before us, we doubt that it would be so substantial as to require us to ignore the plain language of the consent decree.”).

²⁷ *Id.* at 471.

²⁸ 744 F.2d 1300 (Seventh Circuit).

²⁹ *Id.* at 1301.

The Seventh Circuit vacated the district court's order, taking care to interpret the consent decree narrowly on the ground that "a government's attempts to remedy its noncompliance with a consent decree are to be preferred over judicially-imposed remedies."³⁰ But as to the government's argument that its legislative activities are unreviewable by the judiciary, the Court allowed that the district court, rather than impose a penalty for the government's lobbying activities, should instead have entered a civil contempt citation that "ordered the government either to refrain from specific efforts to make desegregation funds unavailable to the Board or to inform Congress about the funding obligations of the government under the Decree" and that, if the government persisted, "criminal contempt charges might have been appropriate."³¹ It also chastised the government for actions, "while perhaps within constitutional limits, cannot enhance the respect to which this Decree is entitled and do not befit a signatory of the stature of the United States Department of Justice."³²

American Nurses Association v. Jackson (2011). Finally, let's conclude with a more recent example. A coalition of environmental organizations sued EPA in December 2008, shortly after the presidential election that year, faulting the agency's failure to issue emissions standards for certain "hazardous air pollutants" issued by power plants under § 112 of the Clean Air Act, 42 U.S.C. § 7412. In its final months in office, the Clinton EPA had issued a predicate finding that such regulations were "appropriate and necessary," but the George W. Bush Administration subsequently attempted to reverse that finding. Soon after the lawsuit was filed, a coalition of industry members was granted leave to intervene.

There was little movement of the case until October 2009, when the plaintiffs and EPA concluded their private negotiations and lodged a proposed consent decree with the court. The decree stipulated that EPA had failed to perform a mandatory duty under the Clean Air Act by failing to issue a "maximum achievable control technology" ("MACT") rule for power plants under Clean Air Act § 112(d). It further specified that EPA would sign a proposed rule by March 16, 2011, and would then sign a final rule no later than November 16, 2011—just eight months later. EPA leaders, far from adverse to the plaintiffs who had initiated the suit, publicly touted the rulemaking as a signal achievement of the Obama EPA.

The interveners challenged the proposed consent decree, which the plaintiffs and EPA had negotiated without any industry participation. The agreement unduly constrained executive discretion, the interveners argued, because it required EPA to conclude that § 112(d) standards would be required and thereby blocked the agency from either declining to issue standards³³ or implementing standards based, in whole or in part, on health-based thresholds rather than the more onerous MACT standard. Further, the proposed decree, they argued, all but guaranteed violations of the Administrative

³⁰ *Id.* at 1306.

³¹ *Id.* at 1308.

³² *Id.*

³³ *See New Jersey v. EPA*, 517 F.3d 574, 582 (EPA may delist power plants under Clean Air Act § 112(d)(9)).

Procedure Act due to the vast complexity of the task before EPA, which could not possibly be completed in such a short period under the Administrative Procedure Act's "arbitrary and capricious" standard.³⁴ As the interveners explained, the schedule contemplated by the proposal was far shorter than EPA had employed in less-complicated rulemakings that did not require the agency, as in this instance, to evaluate its proposed rule's impact on the nation's electric generating fleet. The public interest, it concluded, required at least twelve months for the industry and interested parties to undertake this task.

The court ruled on none of these points in its order and opinion approving the consent decree. As to the language constraining EPA's discretion in the final rule, the court missed the gravamen of the argument entirely, stating that EPA believed itself to be legally obligated to issue § 112(d) standards and, "and by entering this consent decree the Court is only accepting the parties' agreement to settle, not adjudicating whether EPA's legal position is correct." The interveners, the court explained, could simply challenge the final rule. As for the schedule, while appreciating the interveners' position, the court refused to accord it any weight, presumably due to their status as third-party objectors: "If the science and analysis require more time, EPA can obtain it." Finally, the court cited somewhat inapposite language from *Local Number 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986), which concerned the rights and obligations of private parties, in support of the proposition that third parties may not block a consent decree.³⁵

Unfortunately, it appears that the interveners' claims were, as the court acknowledged, "not insubstantial." EPA's proposed rule, rushed out in a matter of months, contained numerous errors—one emission standard, for example, was off by a factor of 1,000—was lacking technical support documents necessary for interested parties to assess it, and was, in some places, sufficiently vague that regulated entities were unable to determine their compliance obligations. EPA had also, in its haste, declined to assess the implications of its rule on electric reliability or to provide sufficient time for industry and regulators to do so, despite a statutory requirement that EPA take account of "energy requirements" and the possibility that the rule could conflict with requirements under the Federal Power Act. Several preliminary assessments—by the Federal Energy Regulatory Commission and North American Electric Reliability Corporation—suggested that the rule would force enough shutdowns to threaten reliability in some areas.³⁶ Those assessments, as well as industry evaluations, also raised the prospect that significant numbers of sources would be unable to come into compliance with the

³⁴ See *Motor Vehicle Manufacturers' Association v. State Farm Insurance*, 463 U.S. 29, 43 (1983) (action is arbitrary and capricious where agency "entirely failed to consider an important aspect of the problem" before it).

³⁵ Memorandum Opinion, *American Nurses Assoc. v. Jackson*, No. 1:08-cv-02198-RMC (Apr. 15, 2010).

³⁶ FERC, Office of Electric Reliability, *Potential Retirement of Coal Fired Generation and its Effect on System Reliability*, Oct. 27, 2010; NERC, *2011 Long-Term Reliability Assessment* 73, 76 (2011).

proposed standards within the three-year compliance window, even with the possibility of an additional year to achieve compliance.³⁷

Late in 2011, industry interveners brought these concerns to the district court, seeking relief from the consent decree on the basis of changed circumstances—specifically, the unforeseen circumstance that, faced with overwhelming evidence that more time was necessary to craft a rule that complied with all procedural and substantive requirements, EPA would not avail itself of the consent decree’s provision to seek the time needed to carry out its legal obligations. Although EPA signed a final rule in late December, the court has yet to rule on the interveners’ motion.³⁸

The Meese Memorandum

It was the Carter Administration’s abuse of consent decrees, and the courts’ willingness to hold the government to agreements that bound the Reagan Administration to its predecessor’s unwise policy choices, that led Attorney General Edwin Meese III to rethink the federal government’s approach to settlement. While a partisan might have seized the opportunity to enter into more consent decrees, on every possible topic, so as to entrench the present administration’s views for years or decades to come in vital policy areas, Attorney General Meese looked to the broader principles of the Constitution in formulating a policy that would take the opposite tack, by limiting the permissible subject matter of consent decrees “in a manner consistent with the proper roles of the Executive and the courts.”³⁹

In particular, the Meese Policy identified three types of provisions in consent decrees that had “unduly hindered” the Executive Branch and the Legislative Branch:

1. A department or agency that, by consent decree, has agreed to promulgate regulations, may have relinquished its power to amend those regulations or promulgate new ones without the participation of the court.
2. An agreement entered as a consent decree may divest the department or agency of discretion committed to it by the Constitution or by statute. The exercise of discretion, rather than residing in the Secretary or agency administrator, ultimately becomes subject to court approval or disapproval.

³⁷ See, e.g., Comments of Southern Company, Docket No. EPA-HQ-OAR-2009-0234-18023, at 35-37 (Aug. 4, 2011) (presenting current timelines for installation of scrubbers and fabric filter systems).

³⁸ On behalf of several non-profit groups, I filed an *amicus curiae* brief in support of that motion. Amicus Brief by Americans for Prosperity, Cause of Action, Center for Rule of Law, Institute for Liberty, and the National Black Chamber of Commerce in Support of Motion for Relief from Judgment, *American Nurses Assoc. v. Jackson*, No. 1:08-cv-02198-RMC (Dec. 1, 2011). In addition, 21 states and Guam also filed a brief supporting the request for additional time for the rulemaking.

³⁹ Memorandum from Edwin Meese III Regarding Department Policy Regarding Consent Decrees and Settlement Agreements, Mar. 13, 1986, at 1 [hereinafter Meese Policy].

3. A department or agency that has made a commitment in a consent decree to use its best efforts to obtain funding from the legislature may have placed the court in a position to order such distinctly political acts in the course of enforcing the decree.⁴⁰

These categories corresponded closely to the arguments that the Department of Justice had raised, with varying degrees of success, in *National Audubon Society v. Watt, Ferrell*, and *Chicago Board of Education*.

Accordingly, the Meese Policy propounded policy guidelines prohibiting the Department of Justice, whether on its own behalf or on behalf of client agencies and departments, from entering into consent decrees that limited discretionary authority in any of three manners:

1. The department or agency should not enter into a consent decree that converts into a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations.
2. The department or agency should not enter into a consent decree that either commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization.
3. The department or agency should not enter into a consent decree that divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.⁴¹

With respect to settlement agreements, the Meese Policy imposed similar limitations, buttressed by the requirement that the sole remedy for the government's failure to comply with the terms of an agreement requiring it to exercise its discretion in a particular manner would be revival of the suit against it.⁴² In all instances, the Attorney General retained his authority to authorize consent decrees and agreements that exceeded these limitations but did not "tend to undermine their force and is consistent with the constitutional prerogatives of the executive or the legislative branches."⁴³

The new policy was announced at a press conference by Charles Cooper, then head of Department's Office of Legislative Counsel. Cooper stated that the Government had, over the years, entered into "scores, perhaps hundreds, of consent decrees," and that

⁴⁰ *Id.* at 1-2.

⁴¹ *Id.* at 3.

⁴² *Id.* at 4.

⁴³ *Id.*

the Reagan Administration had felt hamstrung as a result in a number of cases.⁴⁴ He described and cited *Ferrell, Citizens for a Better Environment v. Gorsuch*, and *Chicago Board of Education*.⁴⁵

Going by news reports, the reaction among activist groups that sue to effect changes in government policy was negative. Ralph Neas, for example, told the *Washington Post*, “It appears that Justice once again is abandoning enforcement policies used by previous Democratic and Republican administrations.” “The net result,” he predicted, “would be a narrowing of remedies that would be available to victims of unlawful discrimination” and more “prolonged and costly legal proceedings.”⁴⁶ A former Reagan Department of Justice official complained that the Administration was, in effect, “tying its own hands.”⁴⁷

The controversy, however, died down quickly, as it became apparent that the change was, in practical terms, a small one that would effect relatively few cases. This was in line with Cooper’s prediction of how the Department would operate under the new policy. For example, he hypothesized, it might agree to construct a new prison wing to relieve overcrowding, but would not allow that obligation to be the subject of a consent decree. In most cases—perhaps nearly all—the prison wing would be constructed, and that would be that.⁴⁸ But in the rare case where circumstances or policies change, the court could not attempt to compel the government to spend the money on the project. It could, for example, choose to relocate prisoners, to renovate existing facilities, or any of a number of options. In this way, the federal government would retain its flexibility and policy discretion. Only in the case of an adverse judgment, and commensurate remedial order, would the federal government be bound as to the specifics.

The Meese Policy was, and remains, notable for its identification of a serious breach of the separation of powers, with serious consequences, and its straightforward approach to resolving that problem. By reducing the issue, and its remedy, to their essentials, the Meese Policy identifies and protects the core principles at stake. This explains its continued relevance.

An End-Run Around Democratic Governance and Accountability

Beyond the broad principles identified by the Meese Policy, the abuse of consent decrees in regulation also raises a number of practical problems that reduce the quality of policymaking actions and undermine representative government. In general, public policy should be made in public, through the normal mechanisms of legislating and administrative law and subject to the give-and-take of politics. When, for reasons of convenience or advantage, public officials attempt to make policy in private sessions

⁴⁴ Robert Pear, *Meese Restricts Settlements in Suits Against Government*, N.Y. Times, Mar. 22, 1986, at A1.

⁴⁵ *Id.*

⁴⁶ Howard Kurtz, *Attorney General Reduces Scope of Consent Decrees*, Wash. Post, Mar. 22, 1986, at A2.

⁴⁷ Pear, *Meese Restricts*.

⁴⁸ *Id.*

between government officials and (as is often the case) activist groups' attorneys, it is the public interest that often suffers. Experience demonstrates at least three specific consequences that may arise when the federal government regulates pursuant to a consent decree:

- **Special-Interest-Driven Priorities.** Consent decrees can undermine presidential control of the executive branch, empowering activists and subordinate officials to set the federal government's policy priorities. Regulatory actions are subject to the usual give and take of the political process, with Congress, outside groups, and the public all influencing an administration's or an agency's agenda, through formal and informal means. This include, for example, congressional policy riders or pointed questions for officials at hearings; petitions for rulemaking filed by regulated entities or activists; meetings between stakeholders and government officials; and policy direction to agencies from the White House. Especially when they are employed collusively, consent decrees short-circuit these political processes. In this way, agency officials can work with outside groups to force their agenda in the face of opposition—or even just reluctance, in light of higher priorities—from the White House, Congress, and the public. When this happens, the public interest—as distinct from activists' or regulators' special interests—may not have a seat at the table as the agency reorganizes its agenda by committing to take particular regulatory actions at particular times, in advance or to the exclusion of other rulemaking activities that may be of greater or broader benefit.
- **Rushed Rulemaking.** The public interest may also be sacrificed when officials use consent decrees to accelerate the rulemaking process by insulating it from political pressures that may reasonably require an agency to achieve its goals at a more deliberate speed. In this way, officials may gain an advantage over other officials and agencies that may have competing interests, as well as over their successors, by rushing out rules that they otherwise may not have been able to complete or would have had to scale back in certain respects.

In some instances, aggressive consent decree schedules, as in *American Nurses*, may provide the agency with a practical excuse (albeit not a legal excuse) to play fast and loose with Administrative Procedure Act and other procedural requirements, reducing the opportunity for public participation in rulemaking and, substantively, likely resulting in lower-quality regulation. Although a consent decree deadline does not excuse an agency's failure to observe procedural regularities, courts are typically deferential in reviewing regulatory actions and are reluctant to vacate rules tainted by procedural irregularity in all but the most egregious cases, where agency misconduct and party prejudice are manifest. In practical terms, members of the public and regulated entities whose procedural rights are compromised by overly-aggressive consent decree schedules can rarely achieve proper redress.

- **Practical Obscurity.** Consent decrees are often faulted as “secret regulation,” because they occur outside of the usual process designed to guarantee public

notice and participation in policymaking.⁴⁹ As one recent article argues, “[W]hen the government is a defendant, the public has an important interest in understanding how its activities are circumscribed or unleashed by a decree,” but too often these settlements are not subject to any public scrutiny.⁵⁰ And even when the public is technically provided notice, that notice may be far less effective than would ordinarily be required under the Administrative Procedure Act. The result is that the agency may make very serious policy determinations that affect the rights of third parties in serious ways without subjecting its decisionmaking process to the public scrutiny and participation that such an action would otherwise entail. This is so despite that a consent decree may be more binding on an agency than a mere regulation, which it may alter or abandon without a court’s permission.

- **Eliminating flexibility.** As the Reagan Administration learned, abusive consent decrees may reduce the government’s flexibility to alter its plans and to select the best policy response to address any given problem. The Supreme Court has recently clarified that agencies need not provide any greater justification for a change in policy than for adopting a new policy, recognizing the value of flexibility in administering the law.⁵¹ It is unusual, then, that when an agency acts pursuant to a consent decree, it has substantially less discretion to select other means that may be equally effective in satisfying its statutory or constitutional obligations. In effect, consent decrees have the potential to “freeze the regulatory processes of representative democracy.”⁵²
- **Evading Accountability.** What the preceding points share in common is that they all serve to reduce the accountability of government officials to the public. The formal and informal control that Congress and the President wield over agencies is hindered when they act pursuant to consent decrees. Their influence is replaced by that of others:

Government by consent decree enshrines at its very center those special interest groups who are party to the decree. They stand in a strong tactical position to oppose changing the decree, and so likely will enjoy material influence on proposed changes in agency policy. Standing guard over the whole process is the court, the one branch of our government which is by design least responsive to democratic pressures and least fit to accommodate the many and varied interests affected by the decree. The court can neither

⁴⁹ See, e.g., Margo Schlanger, *Against Secret Regulation: Why and How We Should End the Practical Obscurity of Injunctions and Consent Decrees*, 59 DePaul L. Rev. 515 (2010). Such concerns may be overblown, however, when they concern settlements between private parties or settlements with the government that predominantly affect private rights.

⁵⁰ *Id.* at 516.

⁵¹ *FCC v. Fox Television Stations*, 129 S.Ct. 1806 (2009).

⁵² *Citizens for a Better Environment*, 718 F.2d at 1136 (Wilkey, J., dissenting).

effectively negotiate with all the parties affected by the decree, nor ably balance the political and technological trade-offs involved. Even the best-intentioned and most vigilant court will prove institutionally incompetent to oversee an agency's discretionary actions.⁵³

Recommendations for Congress

In an ideal world, the Executive Branch would take full responsibility for the exercise of its powers and would refuse to cede its authority to the courts and to private-party litigants, despite the promise of some short-term gain from doing so. Barring settlements that restrain executive discretion by statute would itself raise constitutional and policy questions and would be, in any case, incongruous with the many provisions of law that afford private parties license to compel the government to take future actions.

But Congress can and should adopt certain common-sense policies that provide for transparency and accountability in consent decrees that compel future government action. Any legislation that is intended to address this problem in a comprehensive fashion should include the following features, with respect to consent decrees that commit the government to undertake future action of a generally-applicable quality:

- **Transparency.** Proposed consent decrees should be subject to the usual notice and comment requirements, as is generally the case under the Clean Air Act.⁵⁴ In addition, to aid Congress and the public in its understanding of this issue, the Department of Justice should be required to make annual reports to Congress on the government's use of consent decrees.
- **Robust Public Participation.** As in any rulemaking, an agency or department should be required to respond to the issues raised in public comments on a proposed consent decree, justifying its policy choices in terms of the public interest; failure to do so would prevent the court from approving the consent decree. These comments, in turn, would become part of the record before the court when it rules on the consent decree. Parties who would have standing to challenge an action taken pursuant to a consent decree should have the right to intervene in a lawsuit where a consent decree may be lodged. As described below, these interveners should have the opportunity to demonstrate to the court that a proposed decree is not in the public interest.
- **Sufficient Time for Rulemaking.** The agency should bear the burden of demonstrating that any deadlines in the proposed decree will allow it to satisfy all applicable procedural and substantive obligations and further the public interest.

⁵³ *Id.* at 1136-37.

⁵⁴ Clean Air Act § 113(g), 42 U.S.C. § 7413(g). Note that this provision, however, does not require EPA to respond to comments, only that, "as appropriate," it "shall promptly consider" them.

- **A Public Interest Standard.** Especially for consent decrees that concern future rulemaking, those parties in support of the decree should bear the burden of demonstrating that it is in the public interest. In particular, they would have to address (1) how the proposed decree would affect the discharge of all other uncompleted nondiscretionary duties; and (2) why taking the regulatory actions required under the consent decree, to the delay or exclusion of other actions, is in the public interest. The court, in turn, before ruling on the supporters' motion to accept the consent decree, would have to "satisfy itself of the settlement's overall fairness to beneficiaries and consistency with the public interest"⁵⁵ which supporters of the consent decree would be required to demonstrate by clear and convincing evidence..
- **Accountability.** Before the government enters into a consent decree that contains any of the types of provisions identified in the Meese Policy, the Attorney General or agency head (for agencies with independent litigating authority) should be required to certify that he has reviewed the decree's terms, found them to be consistent with the prerogatives of the Legislative and Executive Branches, and approves them. In effect, Congress should implement the Meese Policy, consistent with the Executive Branch's discretion, by requiring accountability when the federal government enters into consent decrees or settlements that cabin executive discretion or require it to undertake future actions.
- **Flexibility.** Finally, Congress should act to ensure that consent decrees do not freeze into place a particular official's or administration's policy preferences, but afford the government reasonable flexibility, consistent with its constitutional prerogatives, to address changing circumstances. To that end, if the government moves to terminate or modify a consent decree on the grounds that it is no longer in the public interest, the court should review that motion *de novo*, under the public interest standard articulated above.

Conclusion

No less than in institutional-reform litigation, consent decrees that govern the federal government's future actions raise serious constitutional and policy questions and are too often abused to circumvent normal political process and evade democratic accountability. Congress can and should address this problem in a comprehensive, yet targeted, fashion to ensure that such consent decrees are employed only in circumstances where they advance the public interest, as determined by our public institutions, not special interests.

⁵⁵ United States v. Trucking Employers, Inc., 561 F.2d 313, 317 (D.C.Cir.1977) (internal quotation marks and citation omitted).

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