

Ongoing Oversight: Monitoring the
Activities of the Justice Department's
Environment and Natural Resources
Division

Testimony before the Subcommittee on Regulatory
Reform, Commercial and Antitrust Law of the
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My name is Andrew Grossman. I am an Adjunct Scholar at the Cato Institute and a litigator in the Washington, D.C., office of Baker & Hostetler LLP. The views I express in this testimony are my own and should not be construed as representing those of the Cato Institute, my law firm, or its clients.

Alexis de Tocqueville famously observed, “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.”¹ That goes double for environmental policy. There is just about no question regarding the regulation of air and water quality, wildlife, and other natural resources that is not, or has not been, the subject of litigation. The Environment and Natural Resources Division of the Justice Department plays the central role in the bulk of those cases. Its policies and performance are therefore also central to the making and enforcement of environmental policy at the federal level, as well as the concomitant federalism and economic impacts of that regulation.

While ENRD does have an agency “client” in its cases, its position as a Department of Justice component reflects Congress’s judgment that litigation over environmental law be carried out by an entity that is independent of the agencies principally responsible for policymaking and enforcement of that law and that is capable of exercising independent judgment when necessary to uphold the law and to promote broader governmental interests. In short, the idea is to avoid agency parochialism. This is not to say that the relationship between ENRD and the agencies it represents should be antagonistic, but only that the Division must be willing and able to exercise its judgment in litigation, rather than simply defer to the wishes of the agencies in every instance and pursue agency priorities at all costs.

My testimony today identifies two areas of concern that merit oversight by this panel. First, in a recent decision, Judge Silberman of the United States Court of Appeals for the District of Columbia Circuit questioned whether ENRD is suffering what he called “litigation lapse[s]” to advance “the political views of its major ‘client’ (the EPA)” at the expense of broader governmental interests.² A federal judge, of course, does not raise such questions lightly, and Judge Laurence Silberman’s statement therefore raises a serious red flag about ENRD’s performance and priorities and whether it is deferring unduly to its agency clients.

¹ Alexis de Toqueville, *Democracy in America* 248 (J.P. Moyer and Max Lerner eds., Harper & Row 1996) (1832).

² *Ass’n of Battery Recyclers, Inc. v. EPA*, 716 F. 3d 667, 678 (D.C. Cir. 2013) (Silberman, J., concurring).

Second is the “sue and settle” phenomenon, which raises similar concerns about the conduct and resolution of litigation that seeks to set agency regulatory priorities and (in some instances) actually influences the content of those regulations. Since the House Judiciary Committee first directed its attention to the problem of collusive settlements in 2012,³ there have been a myriad of hearings and reports focusing on this problem, as well as the introduction of legislation to constructively address it. This is heartening. But the response from some in government and from the outside groups that pursue settlements has not been to debate the merits or discuss solutions, but simply to assert that there is no problem and that litigation brought for the very purpose of setting agency priorities has no real impact. That is not so. Recent examples show that the problem is real, it is serious, and it is, if anything, getting worse. Based on precedent and the incentives faced by agencies in the waning months of a presidency, there is a real risk over the next year and a half that the current administration may attempt to employ collusive settlements and consent decrees to bind its successor. Continued oversight by this subcommittee and those with jurisdiction over the relevant agencies will be crucial in the months ahead.

The final topic of this testimony is how to alter the incentives and the legal environment that facilitate collusive settlements. Over the past three years, Members of the House and Senate have developed several bills that seek to carry out the principles identified in my 2012 testimony on abuses of settlements and consent decrees. The most comprehensive of those bills, the Sunshine for Regulatory Decrees and Settlements Act, passed the House in the previous Congress, and (as reintroduced this Congress) has drawn strong support in the Senate. Although there is little prospect that any substantial regulatory reforms will become law in this Congress, now is the time to lay the intellectual and political groundwork for an aggressive first-one-hundred-days regulatory reform agenda for the next administration.

I. EPA v. DOJ?

The Department of Justice is a formidable adversary in litigation. It speaks for the federal government, which gives it great credibility. It has deep

³ See generally *The Use and Abuse of Consent Decrees in Federal Rulemaking: Hearing before the Subcommittee on the Courts, Commercial and Administrative Law, Committee on the Judiciary, United States House of Representatives, 112th Congress (Feb. 3, 2012)*, available at http://judiciary.house.gov/_files/hearings/Hearings%202012/Grossman%2002032012.pdf (written testimony of Andrew M. Grossman, Visiting Legal Fellow, The Heritage Foundation) [hereinafter “2012 Testimony”].

institutional knowledge. And it is a repeat player, working with the courts over the long haul to develop doctrines that apply across the range of the law and its activities. In the same way that the Solicitor General is often regarded as the “tenth justice,” the Justice Department’s litigating components play a special role in court, particularly in agency cases and particularly in the D.C. Circuit, due to its specialized docket. When the Justice Department speaks—for example, when it says that application of a particular doctrine would have consequences for other governmental activities—the D.C. Circuit listens, avidly.

And when the Justice Department *doesn’t* speak—when it fails to raise an argument that is all the more conspicuous for its absence—it also listens. In two recent cases, the EPA (represented by the Justice Department) has declined to argue that cases challenging agency rules be dismissed for want of prudential standing on the part of petitioners. While “standing” is a constitutional requirement derived from the “case or controversy” requirement of Article III, prudential standing concerns a litigant’s suitability with respect to the purposes of a particular statute. Under D.C. Circuit law, a litigant must demonstrate that “that the interest it seeks to protect is arguably within the zone of interests to be protected or regulated by the statute...in question.”⁴ It is common, particularly in the D.C. Circuit, for the government to argue that one or another (or every) party challenging an agency action lacks standing to do so.⁵ And it frequently prevails on that point, particularly against organizations seeking to advance a policy agency through litigation. So it is notable when, in a case where the doctrine may well apply, the government declines to raise it in defense.

Yet that is what happened in several recent cases involving the EPA. *Grocery Manufacturers Association v. EPA* was a challenge by trade associations representing the petroleum and food industries to EPA decisions approving the introduction of a high-ethanol fuel blend that, in turn, would raise corn prices and impose costs on the petroleum industry.⁶ And *Association of Battery*

⁴ *Nat’l Petrochem. Refiners Ass’n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (per curiam) (quotation marks omitted). Subsequent to the cases discussed here, the Supreme Court has cast doubt on the D.C. Circuit’s approach to prudential standing. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014). But the D.C. Circuit, in turn, has so far declined to revisit its precedents in this area. See *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1256 (D.C. Cir. 2014); *Mendoza v. Perez*, 754 F.3d 1002, 1016–17 (D.C. Cir. 2014).

⁵ *Int’l Bhd. of Teamsters v. U.S. Dep’t of Transp.*, 724 F.3d 206, 211 (D.C. Cir. 2013).

⁶ 693 F. 3d 169, 180–81 (2012) (Kavanaugh, J., dissenting).

Recyclers, Inc. v. EPA was a challenge to a revision of the emissions standards for lead-smelting facilities brought by, among others, a battery recycler that supported stricter standards on its competitors.⁷ In both cases, the prudential standing issue under D.C. Circuit precedent was plain. In both cases, the court dismissed the claims of certain petitioners for want of prudential standing.⁸ And in both cases, the EPA declined to raise the issue.

Judge Silberman, in a concurring opinion in *Association of Battery Recyclers*, felt the need to remark on this unusual occurrence:

[I]t is worth noting that this question—whether prudential standing should be raised by a federal court *sua sponte*—typically arises when the government neglects to raise the issue, which might be thought a rare occasion of litigation lapse. However, in both this case and *Grocery Manufacturers*, the Justice Department failed to do so, and in both cases, the government’s position was defended by the Environmental Division. It would seem that this division—perhaps reflecting the political views of its major “client” (the EPA)—declines to raise standing issues available as a defense. That practice has led to some dramatic contrasts between positions taken by the Civil Division and the Environmental Division. Indeed, in one case some years ago, a lawyer for the Environmental Division *fainted* during oral argument while attempting to explain a different position on standing than one argued a few days before by a Civil Division lawyer.

The justification for the Justice Department’s control over all executive branch litigation—a control that I, as a judge, think is even more important than I once thought as a Justice Department official—depends on its ability to ensure uniformity and sophistication in government litigation. It hardly serves that end to allow one division of the Justice Department to subordinate a government-wide litigation interest to the desires of one agency.⁹

The potential conflict to which Judge Silberman alludes is this: the Justice Department’s broad responsibility for nearly all executive branch litigation versus the EPA’s interest in its relationships in litigation and otherwise

⁷ 716 F. 3d 667, 674.

⁸ 693 F. 3d at 179 (holding that a statute regarding fuel waivers does not include within its zone of interests food prices); 716 F.3d at 674 (no prudential standing where business “objects not to any regulatory burden imposed on it but instead to the absence of regulatory burdens imposed on its competitors”).

⁹ 716 F.3d at 678–79.

with environmentalist groups, whose presence in litigation is often challenged on prudential standing grounds. In other words, the EPA's close relationship¹⁰ with these groups may lead it to forgo meritorious arguments that might undermine those groups' interests in other cases. Thus, these two cases provide a strong indication that, as Judge Silberman observes, government-wide litigation interests are being subordinated "to the desires of one agency," EPA. And there is no reason to believe that the EPA's desires are limited to the issue of prudential standing.

This raises serious questions regarding the EPA's litigation practices that merit further investigation. Has the EPA directed the ENRD or other Justice Department components to forgo arguments that the government would raise in similar circumstances involving other agencies? What other defenses or arguments has the EPA sought to deemphasize or forgo to protect non-governmental interests? To what extent do outside groups participate in the formulation and execution of the EPA's litigation strategies? Are those groups also in contact with ENRD attorneys? Do former EPA officials who have decamped to environmentalist groups remain in contact with current staff and participate in discussions or provide input regarding agency litigation? To what extent are EPA officials previously affiliated with environmentalist groups involved in the formulation of the agency's litigation strategies? To what extent has EPA collaborated with environmentalist groups in formulating regulations and developing their legal rationales? What has been the litigation impact of the "revolving door" between EPA and environmentalist groups?¹¹ What have been the consequences to the government of formulating litigation strategy to accommodate third-party interests?

It may be that these episodes are isolated incidents, and that would be worth knowing. But it may be that the ENRD's litigation actions in these cases are symptoms of a more serious pathology—in the same way that a single botched prosecution threw light on failures in supervision and oversight of the Justice Department's Public Integrity Section.¹² In short, Congress and the

¹⁰ See, e.g., Coral Davenport, Taking Oil Industry Cue, Environmentalists Drew Emissions Blueprint, N.Y. Times, July 6, 2014, available at <http://www.nytimes.com/2014/07/07/us/how-environmentalists-drew-blueprint-for-obama-emissions-rule.html>.

¹¹ See William Yeatman, Regulatory Capture Comes Full Circle at the EPA, May 15, 2014, <http://www.globalwarming.org/2014/05/15/regulatory-capture-comes-full-circle-at-the-epa/> (listing "current and recent EPA political appointees that have come from green litigation groups (and vice-versa)").

¹² See generally Henry F. Schuelke III, Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, Apr. 7, 2009, <https://www.wc.com/assets/attachments/Schuelke%20Report.pdf>. By refer-

public would be well-served by greater transparency regarding the role of the EPA in formulating the litigation strategies carried out by the ENRD and regarding the involvement of non-governmental third parties.

II. The Sue and Settle Phenomenon Is Real

A. The Issue, In General

Typically, the federal government vigorously defends itself against lawsuits challenging its actions. But not always. Sometimes regulators are only too happy to face collusive lawsuits by friendly “foes” aimed at compelling government action that would otherwise be difficult or impossible to achieve. In a number of cases brought by activist groups, the Obama Administration has chosen instead to enter into settlements that commit it to taking action, often promulgating new regulations, on a set schedule. While the “sue and settle” phenomenon is not new, dating back to the broad “public interest” legislation of the 1960s and 1970s, what is new is the frequency with which generally applicable regulations, particularly in the environmental sphere, are being promulgated according to judicially enforceable consent decrees struck in settlement. The EPA alone entered into more than sixty such settlements between 2009 and 2012, committing it to publish more than one hundred new regulations, at a cost to the economy of tens of billions of dollars.¹³

In the abstract, settlements serve a useful, beneficial purpose by allowing parties to settle claims without the expense and burden of litigation. But litigation seeking to compel the government to undertake future action 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. Settlements binding federal actors have been considered in cases concerning environmental policy, civil rights, federal mortgage subsidies, national security, and many others. Basically, settlements may become an issue in any area of the law where federal policymaking is routinely driven by litigation.

But they are especially prevalent in environmental law, due to the breadth of the governing statutes, their provisions authorizing citizen suits, and the great number of duties those statutes arguably impose on the relevant

ring to the prosecution of Sen. Stevens, I do not intend to suggest any misconduct on the part of the ENRD, its leadership, or its attorneys, but only to demonstrate how a lapse in one case may serve to reveal deeper problems.

¹³ U.S. Chamber of Commerce, *Sue and Settle: Regulating Behind Closed Doors* (2013), at 14.

agencies. The ENRD, being responsible for litigation in this area, represents the EPA and the other relevant agencies in striking settlements.

B. Implications for Democratic Governance and Accountability

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.¹⁴

The abuse of consent decrees in regulation 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 between government officials and (as is often the case) activist groups’ attorneys, it is the public interest that suffers. Experience demonstrates at least five specific consequences that arise when the federal government regulates pursuant to a consent decree or settlement:

¹⁴ Frank Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. Chi. L. Forum 19, 33–34 (1987).

- **Special-Interest-Driven Priorities.** Settlements 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. These 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 settlements 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 deadlines contained within settlements, as was the case with EPA's Mercury Rule, may provide the agency with a practical excuse (albeit not a legal excuse) to play fast and loose with the 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 settlement 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 settlement schedules can rarely achieve proper redress.

- **Practical Obscurity.** Settlements and 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.¹⁵ 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.¹⁶ 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 without subjecting its decisionmaking process to the public scrutiny and participation that such an action would otherwise entail. This is so despite the fact that a settlement or 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.** Abusive settlements 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.¹⁷ It is unusual, then, that when an agency acts pursuant to a settlement, it has substantially less discretion to select other means that may be equally effective in satisfying its statutory or constitutional obligations. In effect, settlements have the potential to “freeze the regulatory processes of representative democracy.”¹⁸ This is what the Reagan Administration learned when it entered office to find that its predecessor had already traded away its

¹⁵ 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.

¹⁶ *Id.* at 516.

¹⁷ *FCC v. Fox Television Stations*, 129 S. Ct. 1806 (2009).

¹⁸ *Citizens for a Better Env't. v. Gorsuch*, 718 F. 2d 1117, 1136 (D.C. Cir. 1983) (Wilkey, J., dissenting).

ability to adopt new approaches and respond to changing circumstances.¹⁹

- **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 agency officials is hindered when they act pursuant to settlements and 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 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.²⁰

C. The High Costs of Sue and Settle: Recent Examples

By design, sue and settle facilitates expensive, burdensome rules. First, as described above, it allows agency officials to evade political accountability for their actions by genuflecting to a judicially enforceable consent decree that mandates their action. As a result, officials face less pressure to moderate their approaches to regulation or to consider less burdensome alternatives. This, in turn, presents the risk of collusion and still more-burdensome rules that would be politically untenable but for a consent decree. Second, due to skirting of the notice-and-comment procedure, officials may not even be aware of alternatives. Third, even when alternatives do present themselves, officials may lack the time to analyze and consider them—assuming, of course, that alternative approaches are not barred altogether by one or another provision of the consent decree. In sum, it may be expected that the rules resulting from consent-decree settlements will be, on the whole, less efficient, more burdensome, and more expensive than those adopted through the normal rulemaking process.

¹⁹ See 2012 Testimony, supra n.3, at 6–10.

²⁰ *Id.* at 1136–37.

This has been borne out in recent practice:

- **EPA’s Mercury Rule.** My 2012 testimony describes the American Nurses litigation that resulted in a consent decree requiring EPA to propose one of its most complex and expensive rules ever in a matter of months.²¹ Since the rule was finalized, it has been amended and corrected on multiple occasions and reconsidered by the agency in numerous respects.²² The most recent corrections were proposed in February of this year—*three years* after the rule was finalized.²³ The legal challenges to it have been divided into a number of different proceedings, with one—alleging that in its haste EPA failed to properly consider the cost of its actions—currently before the Supreme Court.²⁴ Whether or not the Court ultimately vacates the rule, these events demonstrate the high costs, in terms of legal and regulatory uncertainty, of the compressed timetables that can result from agency settlements.
- **EPA’s Existing Source Performance Standards.** EPA arguably committed to regulate carbon dioxide emissions from new and existing power plants under Section 111 of the Clean Air Act in a 2011 agreement with environmentalist groups and states.²⁵ The settlement provides that EPA “will” propose “emissions guidelines for GHGs from existing [power plants]” and will promulgate “a final rule that takes final action with respect to the proposed rule,” despite considerable doubt as to the agency’s legal authority to regulate at all. In particular, Section 111(d) prohibits EPA from regulating the emission of “any air pollutant...emitted from a source category which is regulated under section [112],” which (following EPA’s Mercury Rule) power plants are.²⁶ Relying in part on the settlement agreement, EPA’s proposal includes an aggressive timetable for implementation that requires states to begin major preparations now and is already affecting planning and investment decisions in the energy sector. In short, whether or not EPA is ultimately found to have authority to regulate existing power plants—a coalition of states has challenged the settlement agreement, a

²¹ 2012 Testimony, *supra* n.3, at 10–12.

²² William Yeatman, *This Month in Sue and Settle*, Feb. 19, 2015, <http://www.globalwarming.org/2015/02/19/this-month-in-sue-and-settle/>.

²³ 80 Fed. Reg. 8,442 (Feb. 17, 2015).

²⁴ *Michigan v. Environmental Protection Agency*, No. 14-46.

²⁵ Settlement Agreement ¶¶ 1–4, EPA-HQ- OGC-2010-1057-0002.

²⁶ 42 U.S.C. § 7411(d)(1).

coalition of states and private parties has brought an All Writs Act challenge following EPA's issuance of the proposal, and a challenge to any final rule is inevitable—the agency will have used the settlement agreement to achieve much of what it sought to do: reduce the use of coal-fired generation.²⁷

- **EPA's Brick MACT Rule.** A consent decree entered to settle a lawsuit that the Sierra Club brought against the EPA committed the agency to propose and finalize National Emissions Standards for Hazardous Air Pollutants for brick manufacturers on an aggressive timetable. That rule was subject to a lengthy reconsideration and then ultimately vacated, and EPA (pursuant to another consent decree with the Sierra Club) has proposed a replacement that the agency estimates will be substantially more expensive and that may impose new compliance obligations on sources that already made substantial expenditures to comply with the first rule. In testimony before this Subcommittee, the President of the Columbus Brick Company, a small business in Columbus, Mississippi, explained that his industry was excluded from settlement discussions regarding timing issues and that the agency lacks the time to consider flexible alternatives that may ease compliance burdens.²⁸
- **Endangered Species Listing.** In two settlements executed in September 2011, the Fish and Wildlife Service agreed to make listing determinations for 251 species by September 2016 in an order negotiated with two environmentalist groups, Wildearth Guardians and Center for Biological Diversity.²⁹ In so doing, the agency abandoned its statutory

²⁷ See generally Comment from the Attorneys General of the States of Oklahoma, West Virginia, Nebraska, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota, Utah and Wyoming on Proposed EPA Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Docket ID No. EPA-HQ-OAR-2013-0602, available at <http://www.ok.gov/oag/documents/EPA%20Comment%20Letter%20111d%2011-24-2014.pdf>.

²⁸ Hearing on H.R. 1493, the “Sunshine for Regulatory Decrees and Settlements Act of 2013,” June 5, 2013 (written testimony of Allen Puckett III), available at http://judiciary.house.gov/_files/hearings/113th/06052013/Puckett%2006052013.pdf.

²⁹ Stipulated Settlement Agreement re Wildearth Guardians, *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10-377 (D.D.C.); Stipulated Set-

authority to determine that an endangerment finding is warranted, but precluded by higher listing priorities—a status that allows public agencies, private landowners, and other interested parties to take actions to reduce threats and gather data so as to reduce the likelihood of a listing or, at the least, to undertake long-range planning with awareness of possible listings.³⁰ Rather than rely on the best available science and its own judgment to set priorities in an open and transparent manner, the agency instead deferred to these private parties, both in the timing and the substance (by excluding “warranted but precluded” determinations) of its decisions.

Some would wave away these examples—as well as those in my 2012 testimony and 2014 Heritage Foundation monograph³¹—as saying little about the impact of settlement agreements. On the facts, that is a difficult position to maintain. Each of these examples illustrates how settlements can affect agency priorities and, in certain instances, the substance of their decisions. Even a recent Government Accountability Office report that claimed, based on comments by EPA staff, that settlements have only a “limited” impact on EPA rulemaking recognized that they do “affect the timing and order in which rules are issued”—in other words, the agency’s priorities.³² With statutes as capacious as the Clean Air Act and Endangered Species Act, agency priorities determine the regulatory agenda.

Agency priorities are particularly important now, in the waning days of the Obama presidency. This administration has been aggressive in the pursuit of its policy goals through non-legislative means, upsetting settled understandings regarding executive power and statutory constructions to implement policies that it has been unable to convince Congress to enact.³³ The agency offi-

tlement Agreement re Center for Biological Diversity, *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10-377 (D.D.C.).

³⁰ See generally 16 U.S.C. § 1533; Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 76 FR 66369, 66370–71 (Oct. 26, 2011) (describing listing process).

³¹ Andrew M. Grossman, Regulation Through Sham Litigation: The Sue and Settle Phenomenon, Heritage Foundation Legal Memorandum No. 110, Feb. 25, 2014.

³² U.S. Government Accountability Office, Impact of Deadline Suits on EPA’s Rulemaking Is Limited, December 2014.

³³ See generally Examining the Proper Role of Judicial Review in the Regulatory Process: Hearing before the Senate Subcommittee on Regulatory Affairs

cially responsible for carrying out this agenda have every incentive to attempt to force it on their successors through the use of settlements and consent decrees. There is precedent: in its final months, the Carter Administration entered into settlements that served to tie the hands of Reagan Administration officials on major policy question, including construction of public works, issuance of environmental regulations targeting particular industries, and education funding, among others.³⁴ Vigorous oversight is necessary to ensure that the next administration, which may have very different priorities than this one, is not stymied in its ability to exercise its policy discretion and is not bound by its predecessor's unwise policy choices.

III. Opportunities for Reform

Congress can and should adopt certain common-sense policies that provide for transparency and accountability in settlements and 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 settlements that commit the government to undertake future action that affects the rights of third parties:

- **Transparency.** Proposed settlements should be subject to the usual notice and comment requirements, as is generally the case under the Clean Air Act.³⁵ To aid Congress and the public in its understanding of this issue, agencies should be required to make annual reports to Congress on their use of settlements. In addition, Treasury should be required to report the details of cases that result in payments by the Judgment Fund.³⁶

and Federal Management of the Committee on Homeland Security and Governmental Affairs, Apr. 28, 2015 (written testimony of Andrew M. Grossman), at 22–25, available at http://object.cato.org/sites/cato.org/files/pubs/pdf/grossman_-_judicial_review_testimony.pdf (describing aggressive statutory interpretations under the Obama Administration)

³⁴ See 2012 Testimony, *supra* n.3, at 6–10.

³⁵ 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.

³⁶ To that end, the Judgment Fund Transparency Act, H.R. 1669, would require Treasury to publish the following for each disbursement from the Judgment Fund:

- (1) The name of the specific Federal agency or entity whose actions gave rise to the claim or judgment.

- **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 settlement, 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. Parties who would have standing to challenge an action taken pursuant to a settlement should have the right to intervene in a lawsuit where one may be lodged. As described below, these interveners should have the right to demonstrate to the court that a proposed settlement 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.
- **A Public Interest Standard.** Especially for settlements that concern future rulemaking, those parties in support of the settlement should bear the burden of demonstrating that it is in the public interest. In particular, they should have to address (1) how the proposed settlement would affect the discharge of other uncompleted nondiscretionary duties; and (2) why taking the regulatory actions required under the settlement, to the delay or exclusion of other actions, is in the public interest. The court, in turn, before ruling on the motion to enter the set-

(2) The name of the plaintiff or claimant.

(3) The name of counsel for the plaintiff or claimant.

(4) The amount paid representing principal liability, and any amounts paid representing any ancillary liability, including attorney fees, costs, and interest.

(5) A brief description of the facts that gave rise to the claim.

(6) A copy of the original or amended complaint or written claim, and any written answer given by the Federal Government to that complaint or claim.

(7) A copy of the final action by a court regarding the claim (whether by decree, approval of settlement, or otherwise), or of the settlement agreement in any action not involving a court.

(8) The name of the agency that submitted the claim.

A companion bill, S. 350, has been introduced in the Senate.

tlement, would have to “satisfy itself of the settlement’s overall fairness to beneficiaries and consistency with the public interest.”³⁷

- **Accountability.** Before the government enters into a settlement that affects the rights of third parties, 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,³⁸ 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 settlements 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 settlement or 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.

These principles are reflected in the Sunshine for Regulatory Decrees and Settlements Act, H.R. 712 and S. 378. That bill represents a leap forward in transparency, requiring agencies to publish proposed settlements before they are filed with a court and to accept and respond to comments on proposed settlements. It also requires agencies to submit annual reports to Congress identifying any settlements that they have entered into. The bill loosens the standard for intervention, so that parties opposed to a “failure to act” lawsuit may intervene in the litigation and participate in any settlement negotiations. Most substantially, it requires the court, before approving a proposed consent decree or settlement, to find that any deadlines contained in it allow for the agency to carry out standard rulemaking procedures. In this way, the federal government could continue to benefit from the appropriate use of settlements and consent decrees to avoid unnecessary litigation, while ensuring that the public interest in transparency and sound rulemaking is not compromised.

Other proposed legislation focuses on settlements under specific statutory regimes. For example, the Endangered Species Act (ESA) Settlement Re-

³⁷ *United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977) (internal quotation marks and citation omitted).

³⁸ Memorandum from Edwin Meese III Regarding Department Policy Regarding Consent Decrees and Settlement Agreements, Mar. 13, 1986.

form Act³⁹ would amend the ESA to provide, in cases seeking to compel the Fish and Wildlife Service to make listing determinations regarding particular species, many of the procedural reforms contained in the Sunshine for Regulatory Decrees and Settlements Act, such as broadening intervention rights to include affected parties and allowing them to participate in settlement discussions. In addition, as particularly relevant in this kind of litigation, the bill would require that notice of any settlement be given to each state and county in which a species subject to the settlement is believed to exist and gives those jurisdictions a say in the approval of the settlement. In effect, this proposal would return discretion for the sequencing and pace of listing determinations under the ESA to the Fish and Wildlife Service, which would once again be accountable to Congress for its performance under the ESA.

Similarly, the Reducing Excessive Deadline Obligations Act of 2013,⁴⁰ which was introduced in the last Congress and passed the House, would have amended the Resource Conservation and Recovery Act to remove a nondiscretionary duty that EPA review and, if necessary, revise all current regulations every three years and the Comprehensive Environmental Response Compensation and Liability Act to remove a 1983 listing deadline that has never been fully satisfied.⁴¹ The effect of these amendments would have been to reduce the opportunity for citizen suits seeking to set agency priorities under these obsolete provisions.

These bills suggest that, rather than proceeding in a piecemeal fashion, Congress may wish to consider a more comprehensive approach that limits the ability of third parties to compel Executive Branch action. Suing to compel an agency to act on a permit application or the like is different in kind from seeking to compel it to issue generally applicable regulations or take action against third parties. As Justice Anthony Kennedy has observed, “Difficult and fundamental questions are raised” by citizen-suit provisions that give private litigants control over actions and decisions (including the setting of agency priorities) “committed to the Executive by Article II of the Constitution of the United States.”⁴² Constitutional concerns aside, at the very least, the ability to compel agency action through litigation and settlements gives rise to the policy concerns identified above, suborning the public interest to special interests and sacrificing accountability.

³⁹ H.R. 585; S. 293.

⁴⁰ H.R. 2279 (113th Cong.).

⁴¹ *See generally* Reducing Excessive Deadline Obligations Act of 2013, House Report 113-179 (113th Cong.).

⁴² *Friends of the Earth, Inc. v. Laidlaw Env'tl Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring).

The sue-and-settle phenomenon is facilitated by the combination of broad citizen-suit provisions with unrealistic statutory deadlines that private parties may seek enforced through citizen suits. According to William Yeatman of the Competitive Enterprise Institute, “98 percent of EPA regulations (196 out of 200) pursuant to [Clean Air Act] programs were promulgated late, by an average of 2,072 days after their respective statutorily defined deadlines.”⁴³ Furthermore, “65 percent of the EPA’s statutorily defined responsibilities (212 of 322 possible) are past due by an average of 2,147 days.”⁴⁴ With so many agency responsibilities past due, citizen-suit authority allows special-interest groups (whether or not in collusion or philosophical agreement with the agency) to use the courts to set agency priorities. Not everything can be a priority, and by assigning so many actions unrealistic and unachievable non-discretionary deadlines, Congress has inserted the courts into the process of setting agency priorities, but without providing them any standard or guidance on how to do so. It should be little surprise, then, that the most active repeat players in the regulatory process—the agency and environmentalist groups—have learned how to manipulate this situation to advance their own agendas and to avoid, as much as possible, accountability for the consequences of so doing.

Two potential solutions suggest themselves. First, a deadline that Congress does not expect an agency to meet is one that ought not to be on the books. If Congress wants to set priorities, it should do so credibly and hold agencies to those duties through oversight, appropriations, and its other powers. In areas where Congress has no clear preference as to timing, it should leave the matter to the agencies and then hold them accountable for their decisions and performance. What Congress should not do is empower private parties and agencies to manipulate the litigation process to set priorities that may not reflect the public interest while avoiding the political consequences of those actions. To that end, Congress should seriously consider abolishing all mandatory deadlines that are obsolete and all recurring deadlines that agencies regularly fail to observe.⁴⁵

⁴³ William Yeatman, EPA’s Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, “Sue and Settle,” July 10, 2013, <http://cei.org/sites/default/files/William%20Yeatman%20-%20EPA%27s%20Woeful%20Deadline%20Performance%20Raises%20Questions%20About%20Agency%20Competence.pdf>.

⁴⁴ *Id.*

⁴⁵ One commentator endorses allowing agencies to set their own non-binding deadlines, subject to congressional oversight. Alden F. Abbott, The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal, 39 Admin. L. Rev. 171, 200–02 (1987).

Second, Congress should consider narrowing citizen-suit provisions to exclude “failure to act” claims that seek to compel the agency to consider generally applicable regulations or to take actions against third parties. As a matter of principle, these kinds of decisions regarding agency priorities should be set by government actors who are accountable for their actions, not by litigants and not through abusive litigation.

IV. Conclusion

Settlements 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 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.

I thank the subcommittee for the opportunity to testify on these important issues.

Attachment

A

LEGAL MEMORANDUM

No. 110 | FEBRUARY 25, 2014

Regulation Through Sham Litigation: The Sue and Settle Phenomenon

Andrew M. Grossman

Abstract

Typically, the federal government defends itself vigorously against lawsuits challenging its actions. But not always: Sometimes regulators are only too happy to face collusive lawsuits by friendly “foes” that are aimed at compelling government action that would otherwise be difficult or impossible to achieve. Rather than defend these cases, regulators settle them in a phenomenon known as “sue and settle.” This tactic has exploded under the Obama Administration, costing the economy tens of billions of dollars while eroding political accountability and public participation in government. There are solutions: The executive branch should return to the principles adopted during the Reagan Administration by Attorney General Edwin Meese III, and Congress should require transparency and accountability in settlements that commit agencies to action.

Typically, the federal government defends itself vigorously against lawsuits challenging its actions. But not always: Sometimes, regulators are only too happy to face collusive lawsuits by friendly “foes” that are aimed at compelling government action that would otherwise be difficult or impossible to achieve. Rather than defend these cases, regulators settle them in a phenomenon known as “sue and settle.”

In an increasing number of cases brought by activist groups, the Obama Administration has chosen to enter into settlements that commit it to taking action, often promulgating new regulations, on a set schedule. While the “sue and settle” phenomenon is not new, what is novel is the frequency with which generally applicable regu-

KEY POINTS

- “Sue and settle” is a tactic by which agencies settle cases through consent decrees that voluntarily cede lawful agency discretion. These cases typically arise from private lawsuits that seek to commit the defendant agency to issue regulations by a set deadline.
- This tactic has exploded under the Obama Administration, costing the economy tens of billions of dollars while eroding political accountability and public participation in government.
- The Obama Administration’s increased reliance on consent-decree settlements to further its regulatory agenda is a short-sighted strategy. Whatever benefits this model offers in the short term are undermined by the risk that poorly reasoned regulations will be struck down by the courts or reversed by a future Administration.
- There is, however, a solution to the sue and settle scheme: The executive branch should adopt the Meese Policy. Failing action by the executive branch, Congress should still force agencies to honor sound rulemaking procedures.

This paper, in its entirety, can be found at <http://report.heritage.org/lm110>

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lations—particularly in the environmental sphere—are being promulgated according to judicially enforceable consent decrees. For instance, the Environmental Protection Agency (EPA) alone entered into more than 60 such settlements between 2009 and 2012, committing the agency to publish more than 100 new regulations at a cost to the economy of tens of billions of dollars.¹

Perhaps greater still are the costs to political accountability. Especially in recent years, consent decrees have been used to skirt the inherently political process of setting governmental priorities.

At the most basic level, sue and settle compromises public officials' duty to serve the public interest. Outside groups, rather than officials, are empowered to further their own interests by using litigation to set agency priorities. In some cases, consent-decree settlements appear to be the result of collusion, with an agency's political leadership sharing the goals of those suing it and taking advantage of litigation to achieve those shared goals in ways that would be difficult outside of court.

At the same time, consent-decree settlements allow political actors to disclaim responsibility for agency actions that are unpopular, thereby evading accountability. Consent decrees also diminish the influence of other executive branch actors, such as the President and the Office of Management and Budget, and of Congress, which may use oversight and the power of the purse to promote its view of the public interest. By entering into consent-decree settlements, an Administration may also bind its successors to its regulatory program far into the future, raising serious policy and constitutional concerns.

Consent-decree settlements have also been used to short-circuit normal agency rulemaking procedures, to accelerate rulemaking in ways that constrain the public's ability to participate in the regulatory process. The Administrative Procedure Act (APA) and other statutes recognize the values of notice and transparency, public participation, and careful agency deliberation—the very elements that sue and settle undermines. Settlements that resolve important questions of policy—whether to issue a regulation, the timeline for doing so, what entities

will be covered, etc.—are struck behind closed doors, free from public scrutiny and input. By mandating aggressive regulatory timelines, settlements limit what opportunity for public participation remains while circumscribing officials' ability to accommodate the comments they do receive.

Tossing the normal rulemaking procedures by the wayside is, in some sense, the very point of sue and settle: Doing so empowers the special-interest group that brought suit in the first place at the expense of parties that might otherwise use their political leverage and the rulemaking process to force compromises that serve the broader public interest.

There are, however, solutions to the sue and settle phenomenon. For example, in order to preserve its powers and discretion, the executive branch should decline to enter into consent decrees that compromise either. But such reform takes fortitude and the willingness to pass up short-term gain for less tangible, longer-term benefits 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 Attorney General Edwin Meese III spearheaded its policy.² 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 by the executive branch to address this problem.

Congress can also play a critical role in these reforms. Although the ultimate decision on whether to enter into any given settlement should be left to high-ranking and accountable executive branch officials such as the Attorney General and agency heads, Congress can and should provide for greater transparency and public participation. Additionally, Congress can ensure that settlements are entered into and carried out in the public interest rather than as a means to circumvent usual rulemaking procedures or to evade accountability.

More fundamentally, though, the source of this problem—and its ultimate solution—lies with Congress. It should recognize that setting government-

1. U.S. CHAMBER OF COMMERCE, SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS 14 (2013) (hereinafter "CHAMBER REPORT").

2. Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys, Re: Department Policy Regarding Consent Decrees and Settlement Agreements (Mar. 13, 1986) (hereinafter "Meese Policy"), available at <http://www.archives.gov/news/samuel-alito/accession-060-89-1/Acc060-89-1-box9-memoAyer-LSWG-1986.pdf>.

tal priorities is an inherently political process and therefore act to limit the availability of “citizen suits” that seek to spur the government into furthering the litigants’ parochial view of the public good.

Background of Sue and Settle

The Phenomenon. “Sue and settle” is a tactic by which agencies settle cases through consent decrees that voluntarily cede lawful agency discretion. These cases typically arise from private lawsuits that seek to commit the defendant agency to issue regulations by a set deadline.

Typically, an outside group petitions the agency to undertake a rulemaking and then brings suit under either a “citizen suit” provision or the Administrative Procedure Act, which authorizes a reviewing court to “compel agency action unlawfully withheld or unreasonably delayed.”³ The Clean Air Act, Clean Water Act, and Endangered Species Act contain specific citizen suit provisions that authorize plaintiffs to bring suit to challenge an agency’s failure to perform mandatory acts under those statutes.⁴ Such causes of action do not, in themselves, necessarily constrain agency discretion, but rather provide a mechanism to compel an agency to make *some* decision: “[W]hen an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency’s discretion, a court can compel the agency to act, but has no power to specify what the action must be.”⁵

But “failure to act” lawsuits almost always go farther than merely seeking to require the agency to act on a rulemaking petition—such as by denying it. Instead, they typically argue that the governing statute mandates that the agency regulate in a specific manner and that the agency has failed to do so. The legal basis of such a claim may be that the statute sets a deadline for regulatory action—for example, that

the Food and Drug Administration propose “science-based minimum standards for the safe production and harvesting” of certain vegetables no later than January 4, 2012⁶—or that the statute requires certain substantive action—for example, as in *Massachusetts v. EPA*, that the EPA regulate automobile emissions of greenhouse gases because they fall within the Clean Air Act’s “capacious definition of ‘air pollutant.’”⁷

In other words, the very obligation of an agency to act is often contingent on answering some antecedent question of law or policy. Accordingly, when an agency settles such a lawsuit, it commits to issuing regulations, and that commitment often compromises the agency’s statutory discretion. For example, had the EPA settled *Massachusetts* rather than litigate the case, the likely consent decree would have required the EPA to issue emissions standards, committing the agency to determine that greenhouse gas emissions are a “pollutant” as that term is defined in the Act. This determination, which the Supreme Court of the United States in *Massachusetts* recognized may involve some degree of agency discretion,⁸ would have been made by the private agreement of the parties in the settlement and resulting consent decree.

Thus, when an agency settles a “failure to act” case, that settlement decides both the threshold question of whether it ought to regulate at all and important subsidiary questions such as the targets of its regulation. It also sets agency priorities through deadlines that compel the agency to issue the regulations sought by plaintiffs, even ahead of other actions that public officials may consider to be more pressing.

Sue and settle is not confined to any particular subject matter. Many prominent cases arise under environmental statutes due to their broad, aspirational language that affords regulators commensurately broad discretion to act;⁹ the high costs of the resulting regulations; and a concentrated and well-

3. 5 U.S.C. § 706(1).

4. Clean Air Act, 42 U.S.C. § 7604(a)(2); Clean Water Act, 33 U.S.C. § 1365(a)(2); Endangered Species Act, 16 U.S.C. § 1540(g)(1)(B).

5. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004).

6. See 21 U.S.C. § 350h.

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

8. *Id.* at 1462–63 (“We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA’s actions in the event that it makes such a finding.”).

9. As Chief Justice John Roberts recently noted, “Congressional delegations to agencies are often ambiguous—expressing ‘a mood rather than a message.’” *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) (quoting Henry J. Friendly, *Administrative Agencies: The Need for a Better Definition of Standards*, 75 HARV. L. REV. 1263, 1311 (1962)). For example, the Clean Air Act requires EPA to set national ambient air quality standards that “are requisite to protect the public health” and “the public welfare.” 42 U.S.C. § 7409(b).

funded environmental lobby. But consent decrees binding federal actors have also been considered in cases concerning food safety, civil rights, federal mortgage subsidies, national security, and many other areas. Basically, consent decrees may become an issue in any area of the law where federal policymaking is driven by litigation.

Both data and anecdotal evidence show that, under the Obama Administration, consent-decree settlements have become more frequent. A recent report by the U.S. Chamber of Commerce tallied draft consent decrees under the Clean Air Act, which (unlike under other statutes) require publication in the *Federal Register*.¹⁰ The report found that the EPA had entered into some 60 consent decrees requiring the issuance of rules of general applicability during President Barack Obama's first term—more than twice the 28 settlements of President George W. Bush's second term. At the same time, nearly all of the Obama EPA's most expensive rulemakings have been governed by consent decrees. This figure includes the "Utility MACT" rule discussed below, the "Boiler MACT" rule, and new air quality standards for ozone.

The Principles of Sound Rulemaking. At a minimum, the backroom dealing inherent in "sue and settle" cases conflicts with the norms of administrative rulemaking as prescribed by the Administrative Procedure Act and other statutes.¹¹ To begin with, the APA requires that an agency publish a proposed rule in the *Federal Register*. The proposal must include:

1. A statement of the time, place, and nature of public rulemaking proceedings;
 2. Reference to the legal authority under which the rule is proposed; and
 3. Either the terms or substance of the proposed rule or a description of the subjects and issues involved.¹²
- The agency must then "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments"—i.e., a public comment period.¹³ The amount of time that the agency must provide for public comment varies with the urgency and complexity of the proposed rule, from as little as 30 days for narrow, emergency fixes¹⁴ to a year or more for complex regulatory schemes.¹⁵ In general, courts review compliance with these requirements holistically; key is that the agency must "afford[] interested persons a reasonable and meaningful opportunity to participate in the rulemaking process."¹⁶
- The agency, in turn, is directed to consider the "relevant matter presented" in the comments and to incorporate in its final rule a "concise general statement" of the "basis and purpose" of the final rule. In other words, the agency must respond to comments, affording them adequate consideration and explaining how it has accounted for them. This then facilitates judicial review of the final rule to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and therefore must be set aside.¹⁷
- Furthermore, Congress has enacted a number of additional statutes to improve agencies' deliberative processes and, consequently, the results of their rulemakings. For example:
- The Regulatory Flexibility Act requires agencies to evaluate the impact of proposed regulations on small businesses and consider alternatives that may prove less onerous;¹⁸

10. CHAMBER REPORT at 13–14.

11. For example, the Clean Air Act specifies its own rulemaking procedures, largely in line with those of the APA. See 42 U.S.C. § 7607(d).

12. 5 U.S.C. § 553(b).

13. 5 U.S.C. § 553(c).

14. 5 U.S.C. § 553(b)–(d); see also *Petry v. Block*, 737 F.2d 1193 (D.C. Cir. 1984); *Fund for Animals v. Frizzell*, 530 F.2d 982 (D.C. Cir. 1975) (reluctantly approving 10-day comment period for good cause).

15. See, e.g., 74 C.F.R. § 27,265 (2009) (providing 120 days for comment on proposed National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry).

16. *Forester v. Consumer Product Safety Commission*, 559 F.2d 774, 787 (D.C. Cir. 1977).

17. 5 U.S.C. § 706(2)(A).

18. 5 U.S.C. § 603.

- The Paperwork Reduction Act requires agencies to estimate the paperwork burden of their proposals and scrap reporting requirements that are unnecessary or inefficient;¹⁹ and
- The Unfunded Mandates Reform Act requires agencies to assess the impact of their proposals on state, local, and tribal governments and either adopt “the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule” or explain why that option could not be adopted.²⁰

Each of these statutes relies on the APA’s notice-and-comment process to inform the regulated community of proposed rules and their consequences and solicit its feedback with the goal of crafting rules that reasonably account for the circumstances of those they will govern and are no more burdensome than necessary.

Taken together, these procedural requirements “reflect Congress’ judgment that informed administrative decisionmaking requires that agency decisions be made only after affording interested persons” an opportunity to communicate their views to the agency. “Equally important, by mandating openness, explanation, and participatory democracy in the rulemaking process, these procedures assure the legitimacy of administrative norms.”²¹ Attempts to circumvent these requirements necessarily undermine these values.

Sue and Settle in Action

Regrettably, when agencies enter into consent decrees that mandate accelerated rulemaking, sound policymaking often falls by the wayside. Several examples are illustrative.

EPA Utility MACT Rule. In December 2008, shortly after the presidential election, a coalition of environmental organizations sued the EPA, faulting

the agency’s failure to issue emissions standards for certain “hazardous air pollutants” emitted by power plants under Section 112 of the Clean Air Act.²² 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 (titled *American Nurses Assoc. v. Jackson*) was filed, a coalition of industry members was granted leave to intervene.

To the public, the case appeared stalled until October 2009, when the plaintiffs and the EPA concluded their private negotiations and lodged a proposed consent decree with the court. The decree stipulated that the EPA had failed to perform a mandatory duty under the Clean Air Act by not issuing a “maximum achievable control technology” (MACT) rule for power plants under Clean Air Act Section 112(d). The decree further specified that the 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.²³ At the same time, by trading away its discretion to consider a less burdensome regulatory regime, or no regulation at all, the EPA gained political cover to issue a rule that was far more costly than might otherwise have emerged from the regulatory process.

The utility industry challenged the proposed consent decree, which the plaintiffs and the EPA had negotiated without any industry participation. The agreement unduly constrained executive discretion, the interveners argued, because it required the EPA to conclude that Section 112(d) standards would be mandated. In turn, this requirement blocked the agency from either declining to issue standards²⁴ or implementing standards based, in whole or in part,

19. 44 U.S.C. § 3506.

20. 2 U.S.C. § 1535.

21. *Air Transport Ass’n of America v. Department of Transportation*, 900 F.2d 369, 376 (D.C. Cir. 1990) (internal quotation marks and citations omitted).

22. 42 U.S.C. § 7412.

23. See *Presidential Memorandum—Flexible Implementation of the Mercury and Air Toxics Standards Rule*, THE WHITE HOUSE (Dec. 21, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/21/presidential-memorandum-flexible-implementation-mercury-and-air-toxics-s> (describing the rule as “a major step forward in my Administration’s efforts to protect public health and the environment”).

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

on health-based thresholds rather than the more onerous MACT standard.

Further, the proposed decree, they argued, all but guaranteed violations of the Administrative Procedure Act; the vast complexity of the task before the EPA could not possibly be completed in such a short period under the APA's "arbitrary and capricious" standard.²⁵ As the interveners explained, the schedule contemplated by the proposal was far shorter than the 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 12 months for the industry and interested parties to undertake this task.

In its order and opinion approving the consent decree, the court ruled on none of these points. As to the language constraining the EPA's discretion in the final rule, the court simply stated that the agency believed itself to be legally obligated to issue Section 112(d) standards and that "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. And with regard to the schedule, while appreciating the interveners' position, the court refused to accord it any weight due to their status as third-party objectors: "If the science and analysis require more time, EPA can obtain it." Ultimately, the court held that third parties are powerless to block a consent decree, even one that intimately affects their interests.²⁶

Unfortunately, it appears that the interveners' claims were, as the court acknowledged, "not insubstantial." The 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 1,000²⁷); lacked technical support documents necessary for interested parties to assess it; and was in some instances sufficiently vague that regulated entities were unable to determine their compliance obligations.²⁸ The EPA, in its haste, had also 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 it take account of "energy requirements" and the possibility that the rule could conflict with requirements under the Federal Power Act.²⁹

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.³⁰ 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 proposed standards within the three-year compliance window, even with the possibility of an additional year to achieve compliance.³¹

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, the EPA would not avail itself of the consent decree's provision to seek the time needed to carry out its legal obligations. The court never ruled on the interveners' motion, and the EPA signed a final rule in late December.

25. 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).

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

27. *EPA Admits Error in Proposed Mercury MACT Rule*, POWER MAGAZINE (May 25, 2011), <http://www.powermag.com/epa-admits-error-in-proposed-mercury-mact-rule/>.

28. See *generally* Oversight: Review of EPA Regulations Replacing the Clean Air Interstate Rule (CAIR) and the Clean Air Mercury Rule, Hearing Before the Subcomm. on Clean Air and Nuclear Safety, Testimony of Dr. Bryan W. Shaw, Chairman of the Texas Commission on Environmental Quality, http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=eedf7d18-3b2f-4a1c-b267-713eca4fc1cd.

29. 42 U.S.C. § 7412(d)(2).

30. FERC, OFFICE OF ELECTRIC RELIABILITY, POTENTIAL RETIREMENT OF COAL FIRED GENERATION AND ITS EFFECT ON SYSTEM RELIABILITY; NERC, 2011 LONG-TERM RELIABILITY ASSESSMENT 73, 76 (2011).

31. 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).

Regulated entities brought challenges to many aspects of the final rule, and their case is currently pending before the United States Court of Appeals for the District of Columbia Circuit. The rule, meanwhile, has gone into effect at an estimated cost of \$9.6 billion per year.³²

Habitat for the Hine’s Emerald Dragonfly. The Hine’s emerald dragonfly has, according to the Fish and Wildlife Service (FWS), “brilliant green eyes” and is distinguished “by its dark metallic green thorax with two distinct creamy-yellow lateral lines, and distinctively-shaped male terminal appendages and female ovipositor.”³³ In 1995, the insect was listed as endangered, and in 2004, a coalition of environmentalist groups “filed a lawsuit to stand up for the Hine’s emerald dragonfly” by forcing the FWS to provide “critical habitat” for it to breed.³⁴

The agency was reluctant to do so, citing the lack of scientific knowledge regarding this particular dragonfly and the “significant social and economic cost” of removing lands from many productive uses.³⁵ It explained that litigation over critical habitat designations was actually distracting the agency from focusing on “urgent species conservation needs.”³⁶

Nonetheless, the agency settled the case to forestall still more litigation, agreeing to an aggressive rulemaking schedule.³⁷ In 2007, it designated 13,221 acres in Illinois, Michigan, and Wisconsin as critical habitat for the dragonfly.³⁸ Within the year, some of the same plaintiffs filed suit again, charging that the agency had improperly excluded national forest lands in Michigan and Missouri from the dragonfly’s critical habitat.

The agency initially contested the suit, but that opposition was dropped shortly after the Obama Administration began. On February 12, 2009, the court entered a consent decree that required the FWS to revisit its decision. The agency committed to issue a new proposed rule no later than April 15 and then a revised final rule within the following year. It also agreed to pay the plaintiffs’ attorneys’ fees, totaling \$30,000. A little more than a year later, the FWS issued the revised final rule more than doubling the size of the dragonfly’s critical habitat designation.

Education Funding. A final example demonstrates how sue and settle can be used to bind future policymakers to their predecessors’ policy choices.³⁹ In September 1980, the Carter Administration’s Department of Justice and Chicago’s public school system entered into a consent decree that required the federal government “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.”⁴⁰ The district court ruled in 1983 that the Reagan Administration had failed to satisfy this vague 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 [Chicago] Board [of Education], and ‘not [to] fail[] to seek appropriations that could be used for desegregation assistance to the Board.’”⁴¹

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-

32. 77 C.F.R. § 9,304, 9306 (2012).

33. 71 C.F.R. § 42,442, 42,444 (2006).

34. *Saving the Hine’s Emerald Dragonfly*, CENTER FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org/species/invertebrates/Hines_emerald_dragonfly/index.html (last visited Feb. 18, 2014).

35. 71 C.F.R. §. 42,443.

36. *Id.*

37. See 75 C.F.R. §. 21,394 (2010).

38. 73 C.F.R. §. 51,102 (2007).

39. For more on this topic, see 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).

40. *United States v. Board of Education of Chicago*, 744 F.2d 1300 (1984). While, technically, the settlement was to resolve civil rights claims brought by the federal government against the school system, it also committed the federal government to take action. For that reason, despite its unusual posture, the settlement raises the same concerns as other “sue and settle” cases.

41. *Id.* at 1301.

imposed remedies.⁴² As to the government’s argument that its legislative activities are unreviewable by the judiciary, however, the court allowed that the district court, rather than impose a penalty for the executive branch’s lobbying Congress to cut off some funding to Chicago schools, 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.”⁴³ The Seventh Circuit also chastised the government for actions that, “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.”⁴⁴

Thus, the Reagan Administration found itself bound to an unwise and open-ended obligation willingly entered into by its predecessor.

An End Run Around Democratic Governance and Accountability

The abuse of consent decrees in regulation 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 between government officials and (as is often the case) activist groups’ attorneys, it is the public interest that often suffers.

Experience demonstrates at least five specific consequences that 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. These 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. Indeed, an agency may be committed to taking particular regulatory actions at particular times—actions that may be executed 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 insulate the rulemaking process from political pressures that may 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 the 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

42. *Id.* at 1306.

43. *Id.* at 1308.

44. *Id.*

cases—for example, where agency misconduct and party prejudice are manifest. In practical terms, citizens 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 criticized as “secret regulations” because they occur outside of the usual process designed to guarantee public notice and participation in policymaking.⁴⁵ 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.⁴⁶ Even when the public is technically provided notice, that notice may be far less effective than would ordinary be required under the Administrative Procedure Act.

Consequently, the agency may make very serious policy determinations that affect the rights of third parties in serious ways without subjecting its decision-making process to the standard public scrutiny and participation. This is so despite the fact 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. 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. Recognizing the value of flexibility in administering the law, the Supreme Court has clarified that agencies need not provide any greater justification for a change in policy than for adopting a new policy.⁴⁷ 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.”⁴⁸ This is what the Reagan Administration learned when it entered office to find that

its predecessor had already traded away its ability to adopt new approaches and respond to changing circumstances.

Evading Accountability. What the preceding points share in common is that they all reduce the accountability of government officials to the public. The formal and informal control that Congress and the President wield over agency officials is hindered when they act pursuant to consent decrees, and as this control wanes, the influence of non-elected bureaucrats grows.

At its very center, government by consent decree enshrines those special-interest groups that 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 government that 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 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.⁴⁹

The High Costs of Sue and Settle

According to the Chamber of Commerce analysis, which is based on the agencies’ own cost estimates that accompany proposed rules, consent-decree settlements struck during the first term of the Obama Administration are costing the economy tens of billions of dollars. Such an impact should come as little surprise, given that the Utility MACT rule is the EPA’s most expensive regulation ever. What is surprising, though, is how many other costly rules are the result of sue and settle.

By design, sue and settle facilitates expensive, burdensome rules.

45. 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.

46. *Id.* at 516.

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

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

49. *Id.* at 1136-37.

TABLE 1

Ten Costly Regulations Resulting from Sue and Settle Agreements

1. Utility MACT Rule	Up to \$9.6 billion annually
2. Lead Renovation, Repair and Painting (LRRP) Rule	Up to \$500 million in first year
3. Oil and Natural Gas MACT Rule	Up to \$738 million annually
4. Florida Nutrient Standards for Estuaries and Flowing Waters	Up to \$632 million annually
5. Regional Haze Implementation Rules	\$2.16 billion cost to comply
6. Chesapeake Bay Clean Water Act Rules	Up to \$18 billion cost to comply
7. Boiler MACT Rule	Up to \$3 billion cost to comply
8. Standards for Cooling Water Intake Structures	Up to \$384 million annually
9. Revision to the Particulate Matter (PM _{2.5}) National Ambient Air Quality Standards (NAAQS)	Up to \$350 million annually
10. Reconsideration of 2008 Ozone NAAQS	Up to \$90 billion annually

Source: U.S. CHAMBER OF COMMERCE, *SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS* 15 (2013).

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First, as described above, it allows agency officials to evade political accountability for their actions by genuflecting to a judicially enforceable consent decree that mandates their action. As a result, officials face less pressure to moderate their approaches to regulation or to consider less burdensome alternatives. This, in turn, presents the risk of collusion and still more burdensome rules that would be politically untenable but for a consent decree.

Second, due to skirting of the notice-and-comment procedure, officials may not even be aware of alternatives.

Third, even when alternatives do present themselves, officials may lack the time to analyze and consider them—assuming, of course, that alternative approaches are not barred altogether by one or another provision of the consent decree.

In sum, it may be expected that the rules resulting from consent-decree settlements will be on the whole less efficient, more burdensome, and more expensive than those adopted through the normal rulemaking process.

In some instances, sue-and-settle litigation imposes more direct costs as the federal government

commits to make payments to favored litigants. For example, the Department of the Treasury maintains the federal government’s “Judgment Fund,” a permanent, indefinite appropriation intended to pay monetary awards against the United States.⁵⁰ Often, settlements that commit the government to take action also require it to pay the “prevailing” plaintiff’s costs of litigation, including attorneys’ fees.⁵¹ In this way, activist groups can be compensated for bringing collusive litigation intended to facilitate regulatory action. In other cases, settlements provide for payments to litigants. When such settlements rely upon novel legal theories or dubious evidence, the effective result is to authorize new government benefits while sidestepping Congress.⁵² Not only do such settlements undermine transparency and accountability, but they also (like other instances of sue and settle) compromise the constitutional separation of powers.

Regrettably, due to “cryptic” reporting by Treasury, few details are available regarding most settlements that draw on the Judgment Fund in these ways. This makes it impossible to say how much money in the aggregate is being paid to the plaintiffs and attorneys who bring sue-and-settle lawsuits.⁵³

50. 31 U.S.C. § 1304(a).

51. See, e.g., 42 U.S.C. § 7607(f) (Clean Air Act provision). See generally CONGRESSIONAL RESEARCH SERVICE, *AWARD OF ATTORNEYS’ FEES BY FEDERAL COURTS AND FEDERAL AGENCIES*, CRS REPORT FOR CONGRESS NO. 94-970 (2008), available at <http://www.fas.org/sgp/crs/misc/94-970.pdf>.

52. See Sharon LaFraniere, *U.S. Opens Spigot After Farmers Claim Discrimination*, N.Y. TIMES, April 26, 2013, at A1 (reporting how the Departments of Agriculture and Justice acted to “sidestep Congress and compensate the Hispanic and female farmers out of a special Treasury Department account, known as the Judgment Fund,” to settle claims of discrimination unlikely to prevail in litigation).

53. See Hans von Spakovsky, *Transparency in Government: Finding Out How Much the Government’s Mistakes Are Costing Us*, THE FOUNDRY (Jan. 18, 2013), <http://blog.heritage.org/2013/01/18/transparency-in-government-finding-out-how-much-the-governments-mistakes-are-costing-us/>.

Basic Principles for the Executive: The Meese Memorandum

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 led Attorney General Edwin Meese III to rethink the federal government's approach to settlements. 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, Attorney General Meese looked to the broader principles of the Constitution in formulating a policy that would take the opposite tack. Specifically, Attorney General Meese sought to limit the permissible subject matter of consent decrees "in a manner consistent with the proper roles of the Executive and the courts"⁵⁴ while promoting sound policymaking principles.

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.
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.⁵⁵

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 to 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.⁵⁶

With respect to settlement agreements unsupported by consent decree, the Meese Policy imposed similar limitations buttressed by the following 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.⁵⁷ In all instances, the Attorney General retained the 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."⁵⁸

54. See *supra* note 2.

55. *Id.* at 1-2.

56. *Id.* at 3.

57. *Id.* at 4.

58. *Id.*

The Meese Policy addresses the fundamental problem of sue and settle: It blocks agencies from relinquishing their discretionary authority to outside groups, thereby reinforcing traditional norms of administrative rulemaking. An Administration that embraces the Meese Policy will benefit from greater flexibility, improved transparency, and, ultimately, better policy results.

Suggestions for Reform

In an ideal world, the executive branch would take full responsibility for the exercise of its powers and refuse to cede its authority to the courts and 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. 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.⁵⁹ 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. In addition, the Department of the Treasury should be required to report the details of cases that result in payments by the Judgment Fund.⁶⁰

- **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.

- **A Public-Interest Standard.** Especially for consent decrees that concern future rulemaking, parties in support of the decree should bear the burden of demonstrating that it is in the public interest. In particular, they should 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,"⁶¹ which supporters of the consent decree

59. 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.

60. To that end, the Judgment Fund Transparency Act, H.R. 317, 113th Cong. (2013), would require Treasury to publish the following for each disbursement from the Judgment Fund: (1) the name of the specific federal agency or entity whose actions gave rise to the claim or judgment; (2) the name of the plaintiff or claimant; (3) the name of counsel for the plaintiff or claimant; (4) the amount paid representing principal liability and any amounts paid representing any ancillary liability, including attorney fees, costs, and interest; (5) a brief description of the facts that gave rise to the claim; (6) a copy of the original or amended complaint or written claim and any written answer given by the federal government to that complaint or claim; (7) a copy of the final action by a court regarding the claim (whether by decree, approval of settlement, or otherwise) or of the settlement agreement in any action not involving a court; and (8) the name of the agency that submitted the claim. A companion bill, S. 1420, has been introduced in the Senate.

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

should 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 constrain executive discretion or require it to undertake future actions.
- **Flexibility.** Finally, Congress should act to ensure that consent decrees do not freeze in place a particular official's or Administration's policy preferences, but rather 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.

Each of the above-numerated principles are reflected in the Sunshine for Regulatory Decrees and Settlements Act, H.R. 1493 and S. 714. Representing a leap forward in transparency, this bill requires agencies to publish proposed consent decrees before they are filed with a court and to accept and respond to comments on proposed decrees. It also requires

agencies to submit annual reports to Congress identifying any consent decrees into which they have entered.

The bill loosens the standard for intervention so that parties opposed to a "failure to act" lawsuit may intervene in the litigation and participate in any settlement negotiations. Most substantially, it requires the court, before approving a proposed consent decree, to find that any deadlines contained in the decree allow for the agency to carry out standard rulemaking procedures. In this way, the federal government could continue to benefit from the appropriate use of consent decrees to avoid unnecessary litigation while ensuring that the public interest in transparency and sound rulemaking is not compromised.

Conclusion

The Obama Administration's increased reliance on consent-decree settlements to further its regulatory agenda is a shortsighted strategy. Whatever benefits the sue and settle model offers in the short term are undermined by the risk that poorly reasoned regulations will be struck down by the courts or reversed by a future Administration. The political benefits of evading accountability may also be fleeting as Congress and the public begin to hold the Administration and its agencies accountable for their regulatory actions.

The better course, in terms of the public interest, is for the executive branch to exercise policymaking discretion itself rather than outsourcing it to third parties. But even if the Administration continues to engage in regulation through litigation, Congress should still force agencies to honor sound rulemaking procedures.

—*Andrew M. Grossman is a Visiting Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.*

Attachment

B



Congressional Testimony

The Use and Abuse of Consent Decrees in Federal Rulemaking

**Testimony before the
Subcommittee on the Courts, Commercial and
Administrative Law,
Committee on the Judiciary,
United States House of Representatives**

February 3, 2012

Andrew M. Grossman
Visiting Legal Fellow
The Heritage Foundation

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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