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A REVIEW OF FEDERAL CONSENT DECREES

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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TUESDAY, JULY 19, 2005

UNITED STATES SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS, COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:32 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Jeff Sessions, Chairman of the Subcommittee, presiding.

Present: Senators Sessions and Schumer.

OPENING STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Chairman SESSIONS. The hearing will come to order.

Today's hearing is an important hearing that deals with a matter that people who have been a Governor, like Governor Alexander, or Attorney General, as I have, know something about and understand the importance of. It is the question of a consent decree that may have been entered into at one point in time between an attorney for a governmental institution—sometimes it is the Attorney General; sometimes it may be the attorney for the school board or the county or the city—and to what extent for all time does that consent decree bind that Government entity. It is a matter of legitimate concern.

Private companies settle lawsuits, and they enter into agreements. Governmental entities can settle lawsuits also. But sometimes it implicates constitutional questions to an important degree.

We have an excellent panel today, a group of people who have thought about these issues and who have given serious consideration to them. It is a question of How do we best preserve the proper balance between executive, legislative, and judicial branches? How do we preserve the power of the American people to control the policies of their Government? And to what extent should an Attorney General or Governor or school board superintendent who 15 years ago, perhaps now in the grave, to what extent can they control the school board policy of today and how do you deal with that?

So those are questions that are relevant. We will hear some good testimony. We will have panelists on both sides, and I look forward to hearing the discussion today.

I will not worry about particularly doing our introductions. There is all the information I got, but I do not need it. Senator Alexander, we are pleased that you are here today. This is an issue that I know you care about and have gathered quite a few cosponsors on legislation that would deal with some of what you perceive as the

excesses here. You have served as the Governor of Tennessee. You are a lawyer. I know you clerked for Judge John Minor Wisdom of the Fifth Circuit Court of Appeals. And you understand the issues and have written and read deeply about it.

Congressman Berman, we are delighted to have you with us. You serve on the Judiciary Subcommittee on Courts, as this Subcommittee is the Court Subcommittee for the Senate, and we are delighted to have you with us and to hear your thoughts on the subject.

Senator Alexander, would you set forth your thoughts on this subject? Then we will go to Representative Berman, who has a different view.

STATEMENT OF HON. LAMAR ALEXANDER, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator ALEXANDER. Thank you very much, Mr. Chairman, and, Representative Berman, it is good to see you again. I thank you for being here and contributing to this.

I want to thank you, Senator Sessions, for chairing a hearing on this important subject, the Federal Consent Decree Fairness Act. If I could sum up what we are about today, it is this: It is passing legislation, this legislation, which I believe would help leave policy decisions where they ought to be—in the hands of officials elected through the democratic process—and leave the protection of individual rights where that ought to be—in the hands of the courts. I think that is what the discussion is about today, and I believe this bill helps do that.

I might also say that this is not the first hearing on this legislation. The House has had a hearing on the legislation and I am sure gathered useful information. And I participated, and others did, in a hearing at the American Enterprise Institute earlier this year where a number of people of various points of view from around town came, offered their suggestions, and the bill has gradually been improved as we tried to take into account those suggestions. So the hearings have a very useful role.

This legislation was introduced in March of this year. I was cosponsor, along with Senator Mark Pryor of Arkansas. The legislation now has 24 cosponsors, both Democrats and Republicans, in the United States Senate. A companion bill has been introduced by Democratic Congressman Jim Cooper and Republican Whip Roy Blunt in the House of Representatives, and it has also received significant bipartisan support.

The House bill has received a hearing, as I mentioned, before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Judiciary Committee.

The bill addresses a problem that can best be summed up by the phrase "Democracy by Federal court decree." This is a phrase that was coined by Professor Ross Sandler and David Schoenbrod in their book "Democracy by Decree: What Happens When Courts Run Government." I guess lots of times people wonder where does the idea for a piece of legislation come from. Does it come from a lobbyist? Does it come from the brain of a House Member or a Senator? In this case, it came from the brains of these two professors and from their background and experience. Both of them began as

lawyers with the Natural Resources Defense Fund. In fact, they were the lawyers who were bringing the kinds of cases that often negotiate Federal court consent decrees. And they produced a remarkably balanced book, and the contents of the book were endorsed by a variety of individuals, including former Senator Bill Bradley; Ed Koch, the former Mayor of New York City; John Sexton, the president of New York University; Chris DeMuth, president of the American Enterprise Institute.

They have contributed substantially to the development of this bill in this book. They refer to what I would call an alarming trend of taking public policy decisions out of the control of elected officials—the Governor, the legislature, the mayor, the city council—and putting them indefinitely in the hands of a small group of plaintiffs' attorneys and an unelected Federal judiciary.

The Federal Consent Decree Fairness Act addresses these problems by establishing new principles and procedures for creating, managing, and eventually ending Federal court supervision of State and local policy decisions. The bill levels the playing field for State and local governments without undermining the role of the Federal courts. And as I mentioned at the outset, passing this bill would leave policy decisions where they ought to be: in the hands of officials elected through the democratic process. It would also leave the protection of individual rights where it ought to be: in the hands of the courts.

The bill takes a three-pronged approach.

One, it sets out a series of findings based on dicta in the 2004 Supreme Court decision *Frew* v. *Hawkins* that suggests that consent decrees should be narrow in scope and return policy decision to State and local governments as soon as possible.

Two, the legislation places term limits on consent decrees. The bill does not automatically end consent decrees, but it does allow State and local governments, after 4 years or the end of the term of the official who authorized the consent order, to go back into court and ask that a decree be reviewed.

Three, when the decree is reviewed by the court, the burden of proof is now shifted to the plaintiffs to demonstrate that there is an ongoing violation of Federal law that requires continued court supervision to correct.

So, you see, Mr. Chairman, from beginning to end the court still has supervision over the matter. This just makes it easier for the newly elected Governor or newly elected mayor to get into the court, and then it is up to the person who feels aggrieved to persuade the court in the first place or to carry the burden of proof that this order still needs to be in effect.

I believe this takes a balanced approach to the problem of outdated consent decrees. It is based on scholarship, as I mentioned. It reflects the thinking of the Supreme Court. And it creates a fair approach that puts the plaintiffs and the State and local governments on a level playing field.

Mr. Chairman, consent decrees are a useful tool. However, some consent decrees have lingered far too long and have become outdated. Yet they remain in force because the burden on State and local governments to modify or vacate them is too great.

For example—and these are examples that Mr. Sandler may in his testimony refer to, so I will be brief about it. But, for example, in New York there is a 1974 consent decree that mandated the provision of any form of bilingual education for more than three decades. The result is a program that forces children into certain types of bilingual classes—

Chairman SESSIONS. Senator Alexander, would you repeat that? Bilingual education for how long?

Senator ALEXANDER. The consent decree was entered into in 1974 in New York City, and it established a form of bilingual education for children in New York City at that time for more than three decades. I believe what it said is that there needed to be a teacher in a particular language for any group of children of more than 10 who speak a particular language.

Now, today, parents in New York City would like to have their children in a different kind of class called English as a Second Language where they learn English more rapidly. But the fact is that because of the outdated consent decree, today's parents and today's school officials cannot move to that kind of education.

In Los Angeles, a 1996 consent decree has forced the Metropolitan Transit Authority to spend 47 percent of its budget on city buses only, leaving just over half the budget to cover all the other transportation needs of the Nation's second largest city. Now, maybe that was the right thing to do in 1996, but the consent decree mandated the purchase of 582 buses in the first 6 years it was in effect, the net result of which was only a 3-percent increase in ridership. In 2004, in spite of this track record, the court ordered the MTA to purchase 145 more buses, even though elected officials would like to spend their transportation money in a different, more effective way.

And, finally, in Tennessee, my home State, the Democratic Governor, Governor Bredesen, found his attempts to reform our State's Medicaid program, called TennCare, blocked by three outdated Federal court consent decrees. They went back so far that they included consent decrees that were entered into when I was the Governor of Tennessee. The limits imposed by these decrees forced the Governor to scale back benefits for 300,000 beneficiaries in order to afford both TennCare and the public education program. And he was able to accomplish this only after a lengthy and expensive Federal court battle. In other words, the Governor was elected to try to reform Medicaid in Tennessee. He could persuade his administration. He could persuade the legislature. He persuaded the Federal Government. But, still, he then had three Federal courts to persuade of what he expected to do. And every month that went by, while he was waiting for the court to make a decision, it cost millions and millions of dollars, enough money to give Tennessee teachers a pretty big pay increase.

Now, this latest example emphasizes why I believe it is important for Congress to move this legislation quickly alongside the medication legislation that we will consider this fall. If I may, I will finish up with about a couple more pages, if I have time for that.

Chairman SESSIONS. Please. We have a goal of 10 minutes, but you are free to go over.

Senator ALEXANDER. I am a member of the Budget Committee, and I have listened very carefully to this year about how States are unable to control the growth of Medicaid spending. As we know, the Federal Government spends about 60 percent of Medicaid costs, and the States come up with the other 40 percent under Federal rules.

For example, the State of Tennessee, when I left the Governor's office in 1987, we were spending 51 cents out of every State tax dollar on education and 15 cents on health care. Today, Tennessee spends 40 cents on education and 31 cents on health care, with Tennessee's Medicaid program accounting for most of that increase. Meanwhile, State college tuitions go up, teachers' salaries stay flat, art and music programs are shut down, and pre-K and after-school programs are never started. It is the same story in State after State.

In other words, who is going to decide whether to increase Medicaid spending or increase teachers' salaries or start a pre-K program? In our State, we believe we elect Governors and legislators to do that, not Federal judges.

The budget resolution we are considering in Congress calls for the Federal Government to slow the growth of Medicaid spending by $10 billion over the next 5 years out of approximately $1.12 trillion total. I support that. But I argued on the floor that to reduce the Federal deficit, we must curb Medicaid spending, but we cannot simply cut back on Federal Medicaid spending without giving States the tools they need to also reduce the growth of State Medicaid spending.

States are caught in the middle when Congress tells them to curb spending and then the Federal court, because of some outdated consent decree, tells the State find your savings somewhere else.

So it is my belief that the Federal Consent Decree Fairness Act is an essential piece of the Medicaid reform package that we will consider this fall. And if we are going to ask States to help bring health care costs under some control, then we must allow them the tools they need to make these decisions. We should put those decisions and other decisions on issues that have traditionally rested with elected officials in the hands of elected officials who are held accountable for those choices.

I appreciate the opportunity to testify here today. I look forward to working with members of the Judiciary Committee to advance this legislation. I ask to include in the record with these remarks a copy of a Legal Times article that I wrote in April of this year describing the legislation.

Thank you, Mr. Chairman.

Chairman SESSIONS. Thank you, Senator Alexander, for your thoughtfulness and your hard work on this project.

Congressman Berman, we are delighted to have you on this side, and we would be delighted to hear from you at this time.

STATEMENT OF HON. HOWARD BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Representative BERMAN. Well, thank you very much, Mr. Chairman. I thank you very much for inviting me and allowing me to testify. I have tremendous respect and affection for Senator Alexander, whom I have gotten to know in other circumstances, and so I am sorry to be here opposing a bill that he obviously is both deeply committed to and has thought a great deal about.

I understand the motivations behind the bill. There are a number of consent decrees which govern various bodies in and around my own district, at least one of which I find in certain respects problematic. But the overarching problem with this bill essentially is that it allows the city or State to move to vacate or modify, and by the city or State making that motion to go forward, the burden then is with the plaintiff in that original consent decree to reprove his case simply because the defendant has asked for a review of the consent decree.

You are going to hear from other witnesses a lot of the specifics, but I want to just touch on a few of them, if I might, and what I think the implications are.

Under the proposed law, consent decrees may be reviewed every 4 years or after any change of Government. So, for example, if after years of negotiation a decree was signed in the midst of a mayor's term or, more likely, near the end of his term, a new mayor could immediately review and dismantle the decree. And I mean here dismantle the decree whether the problem has been addressed or not.

To further complicate matters, it is unclear what constitutes change of Government. How many of the five-member Board of Supervisors would have to change before it constitutes a change of Government? Would one supervisor suffice? Would two or three be required? Would they have to be replaced or would their simple reelection trigger this provision?

With the ability to subject a consent decree to review at almost any point, given this formulation, I cannot imagine—and this I think is one of the biggest consequences should this bill become law—why any plaintiff, whether the Federal Government or a private party, will ever settle a case? Why settle a long-term problem by consent decree if the settlement is essentially void in 4 years or, more likely, much sooner than that? The whole consideration to produce that kind of consent decree is gone in the minds of the plaintiff and his or her attorney because of the fact that he does not have really a final order for a long period of time.

Consider the impact of this bill where one State sues another under original Supreme Court jurisdiction. These cases can take many years to litigate, and when they settle, the consent decrees can last many years. California and Arizona, a big fight about Colorado River water. The consent decrees, they operate under a water rights agreement stemming from a 1952 lawsuit, a 1964 consent decree, several supplemental decrees, a 1989 motion to reopen the decrees to allot additional water rights for Indian reservations, and a 2000 Supreme Court ruling on whether that motion was precluded.

Under this regime, that whole case would have to be relitigated every 4 years or whenever a new Governor wanted to. In the context of either California or Arizona, depending on who is moving, these are serious issues that we thought had been settled that are now opened up for relitigation. There are several procedural issues, each having profound impact on the viability of consent decrees.

Consider the requirement that the judge has to rule within 90 days or the decree is automatically terminated. This time frame is unrealistic. Many decrees will be dissolved simply as a result of the passage of that time. Because the bill shifts the burden to the plaintiff to re-establish the burden of proof, there will always be need for a full retrial on the decree's merits. Courts are often simply unable to work that fast given their existing caseload. The court can still decide the motion if it fails to rule within 90 days, but the decree is vacated during that time. As discovery for many of these cases is time-consuming, it could be years before the consent decree is reinstated.

The bill proposes a compensation cap of no more than $75 an hour. That is about one-fifth or one-eighth of what Special Masters normally get in their law practice. It is unlikely we are going to be able to get a truly skilled, in-demand person to give up the time necessary to supervise a consent decree with that kind of limitation.

Finally, the proposed legislation recognizes that there are certain things that are so sensitive that they should not be subject to the bill—in this case, consent decrees involving school desegregation on the basis of race, color, or national origin. But I think as the Committee thinks about it, they are going to find some other areas where it is also very sensitive, employment discrimination cases, public accommodations cases, under the Civil Rights Act of 1964, discrimination in terms of grant monies going, Voting Rights Act cases. There are critical decisions in these areas that will be vacated by virtue of this bill as it is presently drafted.

I do not want you to get me wrong. I am very sympathetic to the pressures faced by local governments when dealing with consent decrees. I mentioned this case involving the Metropolitan Transit Authority in Los Angeles that Senator Alexander spoke to. Take, for example, the New York City—not the case about bilingual. I am not familiar with that, but on special education. There a consent decree requires a huge amount of money be spent on special education, pulling money from other priorities, and substantial amounts of money. Why? Because in 1975 Congress created a Federal right to special education in the Education for All Handicapped Children Act. What we did not do was appropriate the funds to local districts to meet the obligation we imposed on them through law.

The issue here is not the consent decree. It is that we should either fund the mandate or change the nature of the Federal law. These lawsuits that result in these consent decrees do not come out of the good ideas and utopian ideas of a plaintiff's attorney or a plaintiff or the judge's sense of what is right to do. They come based on the obligations of Federal law. And if there are consent decrees that are imposing too heavy a burden, we are the people who can revisit that issue through taking a look at the Federal law

or our failure to appropriate and meet mandates we have imposed on State and local governments. I do not think we should avoid accountability for those decisions by instead providing this method for the consent decrees.

And coming to a conclusion here, this is all done in the context of a 2004 decision in *Frew* v. *Hawkins*, and the authors and proponents of the bill say it is consistent with that decision. But I read that decision totally different. All nine Justices were on the same side—Scalia, Thomas, Rehnquist—all nine of them. They all upheld the concept of consent decrees, and they set standards that district courts should use when reviewing them. They did not say to get rid of consent decrees. They did not say to require the plaintiffs to reprove their case. What they suggested was a prescription to fix the problem. They wrote, "If the State establishes reason to modify the decree, the court should make necessary changes. Where it has not done so, however"—that is, where the State has not established a reason to modify—"the decree should be enforced according to its terms." And in the context of that decision, all nine Justices talked about giving a great deal of deference to the local governments and the State governments in making their decisions.

So I disagree in the first instance that State and local officials' hands are truly tied at the present time. They can go in to modify. Even if they were, the answer would not be the effective elimination of all consent decrees. Congress should either fund the mandate or change the underlying Federal law. Consent decrees I think have tended to become a bit of a scapegoat, and I think the underlying problems will continue to exist and that this bill may create more problems than it solves.

Thank you.

Chairman SESSIONS. Well, thank you. Those were very, very interesting and important comments both of you have made.

I think about a situation that was most stark to me when I was Attorney General—actually, before I became Attorney General. The Alabama Supreme Court had one African-American out of nine on it. Statistically speaking, maybe two would have been appropriate with the population. But two African-Americans had run for the Supreme Court and won, and the only two that had ever run in recent years, and both had won. And a lawsuit was filed to challenge that. Normally they make the challenges that run from districts. But that would not have helped apparently the plaintiffs, who were also working with the trial lawyers, who had a majority on the Supreme Court.

And so a proposal was entered into with the Attorney General, my predecessor, and the proposal was, an offer as a consent decree, that the plaintiffs would nominate two additional judges, the court would go from nine to eleven judges. We would add two new judges. They would not be elected by the people but would be appointed by the committee, and presumably the State legislature would fund them, and nobody was particularly concerned that it was in total violation of Alabama's constitutional creation of the judicial branch of government. Shortly before he left office, my predecessor signed that agreement, and it was approved by the Federal judge.

When I got elected Attorney General, I appealed and the court rejected it and threw it out, said there was not a sufficient foundation for that.

Senator Alexander, I am sympathetic with the idea that a departing office holder, for whatever reasons—good intentions or maybe not—can enter into a decree that could impact very important governmental relations in a way that may be unforeseeable even 5, 10 years down the road. So I appreciate that.

Let me ask both of you, if you would—this is an important issue—would you join me at the panel and stay and participate in the questioning? Congressman Berman, we are delighted to have you, if you have got the time. And, Senator Alexander, we would be delighted to have you join me as we discuss this issue more in depth.

Representative BERMAN. I just have to leave about 3:45.

Chairman SESSIONS. That will be fine. You can stay as long as you like. You are interested in this issue, and I think it would help us as we discuss it.

Chairman SESSIONS. We have a panel now, our second panel. We have both governmental officials who have firsthand knowledge of how consent decrees can bind future Government officials and expert witnesses.

Our first witness is Alabama Attorney General Troy King, who is doing a terrific job in the State. He served as Alabama's Attorney General since 2004. It was a position I held for 2 years before being elected to the Senate, and he replaced former Attorney General William Pryor, who is now a U.S. circuit judge.

Our second witness is Judge Nathaniel R. Jones. Judge Jones served on the Sixth Circuit Court of Appeals and is currently a partner with the law firm of Blank Rome LLP in Cincinnati, Ohio. Judge Jones has dealt with consent decrees throughout his career as a Federal appellate judge, as a litigator on behalf of the NAACP, and as assistant general counsel to the National Advisory Commission on Civil Disorders.

Our third witness is Professor Ross Sandler. I believe you have been referred to by Senator Alexander. Professor Sandler is a professor at New York University School of Law and the director of its Center for New York City Law. He was one of the authors of "Democracy by Decree: What Happens When Courts Run Government," the book upon which the Federal Consent Decree Fairness Act is based.

The fourth witness is Tim Jost. Professor Jost is the Robert L. Willett Family Professor of Law at Washington and Lee University. Professor Jost has published numerous scholarly books, articles, and book chapters on health law and policy and comparative health law and policy. He also published a Law Review article on Federal consent decrees. We are glad you are with us.

Our fifth witness is Dr. Michael Greve. Dr. Greve is the John G. Searle Scholar at the American Enterprise Institute for Public Policy Research and the director of AEI's Federalism Project. He has written extensively on the problems underlying Federal consent decrees. Dr. Greve also served as the director of a public interest law firm.

Our final witness is Ms. Lois Schiffer. Ms. Schiffer is currently an attorney in private practice with Baach, Robinson & Lewis. She is also a former Assistant Attorney General with the U.S. Department of Justice's Environment and Natural Resources Division. During her time as an Assistant Attorney General, Ms. Schiffer personally approved hundreds of environmental consent decrees.

So I will ask the panel to limit your opening remarks to 5 minutes so that we can have time for a full round of questions. Without objection, your full testimony will be placed in the record.

All right. Attorney General King, we are delighted that you are here. I know the State of Alabama has a number of decrees in place. I do remember thinking when I was elected Attorney General in 1994 that we needed to end the *Reynolds* case. And I got our team together, and I said, "This thing needs to be ended. The lawyer fees are killing us. Why can't we get it settled?" I understand it is not settled yet. It was already old when I started to try to fix it.

But, at any rate, we would be delighted to hear your remarks in general on this entire situation and how you view it. Attorney General Troy King.

STATEMENT OF TROY KING, ATTORNEY GENERAL, STATE OF ALABAMA, MONTGOMERY, ALABAMA

Mr. KING. Thank you, Mr. Chairman. My name is Troy King. I am the State Attorney General for Alabama. Thank you for inviting me to address this Subcommittee today and to share my State's experiences with consent decrees and my support of S. 489 as a vehicle to address some of the abuses that accompany many consent decrees.

The Federal Consent Decree Fairness Act will provide a much needed change in the law regarding consent decrees. The Act will make it easier for State governments to end oppressive consent decrees by taking the policymaking discretion away from Federal judges and returning it to those who have been elected or appointed to make those decisions.

I will share with you today three of the most egregious examples that have the greatest impact on our home State of Alabama.

First I will talk about *Reynolds* v. *McInnes*, which is the case you just mentioned. It is a case where the costs continue to soar as the plaintiffs' lawyers continue to frustrate their own client's objectives in this case, and it is due to the entry by the State of Alabama into a consent decree.

Second is the case of *RC* v. *Walley* with impacts Alabama's delivery of child welfare systems and extra consent decree activities, the activities the State is being required to engage in that are not required by the terms of the consent decree and, in fact, are counter to them.

And third, *Wyatt* v. *Stickney*, which involves the State's Department of Mental Health and Mental Retardation and the changing standards that continue to frustrate the State's ability to comply with consent decrees.

An example of the first oppressive, out-of-control consent decree in my State stems from *Reynolds* v. *McInnes*. In *Reynolds*, African-American employees and former employees of the Alabama Depart-

ment of Transportation commenced a racial discrimination class action lawsuit against the Department of Transportation. Governor Jim Folsom, Jr., entered into a consent decree in March of 1994 that was originally set to expire in December of 2000. To date, over four dozen appeals and petitions have been filed and the consent decree remains in effect. The Eleventh Circuit Court of Appeals recently addressed the obscene amount of public funds that have been spent on the *Reynolds* consent decree, saying: "[T]his unwieldy litigation has been afflicting the judicial system and draining huge amounts of public funds from the State of Alabama for much too long. The amounts are staggering. Fifty million dollars in public funds has been spent on attorney's fees alone in this case..bringing the total litigation costs to the State of Alabama to more than $112 million, and that cost is growing at a rate of around $500,000 each and every month."

With these funds, every mile of interstate in Alabama could have been resurfaced—

Chairman SESSIONS. Just as a point, since the plaintiffs are prevailing presumably by obtaining orders, the State has to pay both their own lawyers and the plaintiff lawyers also?

Mr. KING. I was coming to that, Mr. Chairman.

Chairman SESSIONS. All right.

Mr. KING. In fact, under this consent decree we pay whether they prevail or not. We pay for every minute they spend on this case, whether it is a worthwhile endeavor, whether they ultimately prevail or not. It is an example of the oppressiveness of consent decrees where people do things they would not ordinarily have a Federal right to obtain, but they agree to do it by striking a bargain that is to the detriment of the people of my State.

The lead plaintiff in this case, you may be interested to know, Johnny Reynolds, died shortly after receiving long-awaited settlement proceeds. His attorneys, on the other hand, have long ago grown rich, and the people of Alabama continue to grow more and more disillusioned with the system that could allow this to occur. The court addressed the long-term effect of this agreement saying: "The promise of fees for time spent without regard to the outcome of a motion or appeal in a case that apparently has endless potential for dispute may be the kerosene that has fueled the litigation fires, which have raged out of control in this case."

You see, when you award attorney fees for every minute spent by the plaintiffs in a case, regardless of whether their claims are frivolous, regardless of whether they have an entitlement to them, it is an example of a contract provision that successive administrations have been helpless to alter, even as its unsoundness becomes more and more evident even to the most objective and detached observer. The Federal Consent Decree Fairness Act will provide a vehicle for modifying such provisions, provisions that are later found to be unworkable or unsound after they have been approved.

Another example of the difficulties that exist in modifying consent decree provisions can be found in the *Reynolds* case again. The *Reynolds* consent decree contained a no-overlap provision that governed the measurement of candidates' job qualifications.

Despite a good-faith effort by both parties to comply with the provisions of this part of the consent decree, the defendant were

forced to pay millions in finds as the plaintiffs blocked, litigated, and otherwise frustrated the achievement of compliance. After the defendants had paid over $4.5 million in sanctions for noncompliance, the court agreed that these provisions were unworkable and removed them from the consent decree, yet there has been no refund of these monies to the State for the monies they were required to pay to achieve a result that was completely unworkable in the beginning.

I will stop there. I see the red lights are on, but, unfortunately, I could go on and on and on.

[The prepared statement of Mr. King appears as a submission for the record.]

Chairman SESSIONS. Thank you.

Judge Jones, it is a delight to have you, and we would be pleased to hear your comments at this time.

STATEMENT OF NATHANIEL R. JONES, JUDGE (RET.), AND PARTNER, BLANK ROME LLP, CINCINNATI, OHIO

Judge JONES. Thank you, Mr. Chairman, and members of the Committee. It is my pleasure to offer this testimony on this important legislation.

My name is Nathaniel R. Jones, and I, as has been indicated, served for 22 years as a member of the Sixth Circuit Court of Appeals, and prior to that time, I served as general counsel of the NAACP for some 10 years, and for the preceding years I served in various positions, including assistant general counsel to the National Advisory Commission on Civil Disorders. That was a commission appointed by President Johnson to study the cause of civil disorders, and in that report, which I commend to your reading, along with the other reading that has been proposed to you, you would have an appreciation, Mr. Chairman, of the reasons why remedies that were formulated by Congress came into being and remedies that were formulated by State legislature came into being to correct the causes of frustration and the anger and the disruption that was costing our taxpayers millions and millions of dollars in the period of the 1960's and prior to that.

The legislation that has been proposed, in my judgment, is overdrawn, and it will have the effect of applying a wrecking ball to a judicial process that has been invaluable in resolving very knotty and contentious legal problems and social problems that we have in this country.

There is no problem that needs fixing in the way that is formulated by this legislation. The unanimous 2004 Supreme Court decision in *Frew* v. *Hawkins* directed district courts to do, in effect, what they have been doing, and that is, pay close attention and give deference to the local officials who were bringing claims of repressive conduct and the effects that they were feeling from these consent decrees. The various claims that were being filed were already being carefully monitored and scrutinized by Federal district courts. Rule 23 requires a procedure for dealing with claims that were resolved by agreement, and before a Federal court can agree—before it will enfold and adopt into a consent decree an agreement, the court has to hold in the first instance a preliminary hearing. It must determine before it issues a preliminary approval

whether or not the agreement is fair, whether it is adequate, and whether it is reasonable. And then following in that process, all members of the class are notified, and they are invited to attend and participate in a fairness hearing. And at that time, they may set forth their views with regard to the adequacy of the agreement.

Upon the approval of that agreement, the court then will include into a court decree and it will be then thereafter enforced. Now, if there are differences with regard to it over time, if there are problems in connection with it, any party, including Governors, mayors, or any other State officials, may apply to the court for modification. And this happens all the time. I can cite cases. I sat on 25 cases alone in the Sixth Circuit in which there were challenges to consent decrees. And what we looked at very carefully was whether or not those agreements were fair, were they adequate, and were they in need of any kind of reform or modification. And we took a very careful look to see whether the district courts had accorded due process to the officials who were protesting and claiming that they were not being treated fairly.

I must say very candidly that there were cases in which I wrote the opinion to reverse and remand the case to the district court with direction to hold a hearing and ensure that all of the T's were crossed and all the I's were dotted. So there is a process in place, and we do not need to have a cannon to go after a gnat.

There has been a lot of testimony here about the *Reynolds* case. I am not familiar with the case to the extent that the Attorney General is, but I noticed that a reference was made to the Eleventh Circuit. Well, why didn't the Eleventh Circuit reverse it? There must be something wrong. The fact of the matter is that the parties agreed to the consent decree. They agreed to the penalties that were set forth that the district court applied when there were breaches. The State acknowledged that it was in violation of the consent decree.

So given that situation, the court of appeals' hands were fairly tied given that we had an agreement and that the parties had agreed to the sanctions that were contained in the order.

I see the light is on, but I would suggest and I trust that you will read my full testimony because I discuss in greater detail the reasons why this legislation is most inappropriate.

[The prepared statement of Judge Jones appears as a submission for the record.]

Chairman SESSIONS. Thank you, Judge Jones.

Professor Sandler?

STATEMENT OF ROSS SANDLER, PROFESSOR OF LAW, AND DIRECTOR, CENTER FOR NEW YORK CITY LAW, NEW YORK LAW SCHOOL, NEW YORK, NEW YORK

Mr. SANDLER. Thank you very much. I am very pleased to be here, Senator Sessions, and to speak on this panel.

I come at this in a rather unique way. I was an attorney for 10 years at the Natural Resources Defense Council and litigated these cases. I then became a Commissioner in the City of New York, where I became a defendant in the cases. So I have been on both sides.

Chairman SESSIONS. The Natural Resources Defense Council, that would be a pro-aggressive environmentalist group. Is that correct?

Mr. SANDLER. Yes, sir, and an effective one, and still a very effective one.

I then became a law professor, and one of the areas I was interested in was the rules that governed the remedies of these institutional reform cases.

The Federal Consent Decree Fairness Act allows courts to protect rights but, otherwise, let's elected officials run State and local government. Bargains written into consent decrees, the Act makes clear, are not contracts but are judicial remedies to be measured against Federal law. This prevents a hobbling of State and local officials by prior bargains, a situation that has been described here several times, such as that in Tennessee described by Senator Alexander.

The major criticism of the Act is that it would lessen the capacity of Federal judges to protect rights. Plaintiffs would not enter into consent decrees. Defendant officials would avoid complying with Federal law. Both of these criticisms are easily refuted. Consent decrees will still be used for several powerful, compelling reasons.

First, when parties do not consent—and none of the people have spoken to this—the rules that govern remedies tightly limit what a judge can order. Judge-made remedies are limited to correcting proven violations. Judges may not stray from that standard.

For example, plaintiffs might prove that special education students have been deprived of adequate transportation. The judge under the rules could only order a remedy to correct the transportation violation. In a consent decree, however, the parties might expand the decree. They might include such items as school accessibility and classroom activities. This is a powerful incentive for both plaintiffs and defendants. It allows more give and take, expands the potential for compromise, and offers greater opportunities to achieve long-term goals.

But there are other compelling reasons as well. Consent avoids delay. It accelerates the time when defendants become subject to contempt proceedings. It avoids the expenses and uncertainties of trial. It allows plaintiffs to begin getting fees. It prevents appeals.

But having said that, would officials use this Act to avoid complying with the decrees that are entered? Officials today fail to comply with consent decrees, and officials will no doubt fail in the future? The relevant question is this: Will the Act make it more difficult for judges to compel compliance? I believe that the Act will make it easier to compel compliance.

First, the Act does not affect any of the existing enforcement tools. Judges will still be able to hold officials in contempt, fine officials and their agencies, incarcerate recalcitrant officials, compel explanations and reports, appoint monitors, and hold officials up to public scorn as lawbreakers.

Building on these powers, which are untouched by the Act, the Act actually improves the potential for enforcing compliance since it is tied so closely to Federal law and not to the bargains.

First, State and local officials will still have to have a program to comply with Federal law. It is, with all due respect, dema-

goguery to say that this will blast apart the ability of courts to enforce. It will not be enough for officials to say the old plan failed. They must still satisfy the judge that they will remedy existing violations of Federal law. And this is a helpful change since it allows officials to quickly adjust remedial programs to meet contemporary challenges and new circumstances.

Second, in order to terminate court supervision, the State or local officials must be able to overcome plaintiffs' proof that the court is still needed to prevent future violations. Officials not in compliance will be faced with the certainty of judicial hearings and a finding that they are violators.

Third, the Act requires the judge to keep in sharp focus the Federal rights that the plaintiffs may enforce in court. This gives judges a firmer basis to compel defendants to meet their obligations.

Now, there are areas that might be improved in this statute, and I would like to mention a couple. I think that the Committee may consider the 90-day limitations. It may be too short. The provisions about Special Masters might be looked at and whether they are as important as others. The application of the Act to decrees where the Department of Justice is the primary plaintiff might be looked at, as well as the items that Representative Berman brought out, State versus State with original jurisdiction of the Supreme Court. They might not be appropriate for this legislation. And there are definitions in it which might also be looked at. But the important point is that the consent decrees can be enforced and the rights will be sustained.

Now, lastly, some say the consent decree problems disappeared with the Supreme Court's opinion in *Frew* v. *Hawkins*. I wish that were so. David Schoenbrod, my colleague, and I have written about that, and the opinion is dictum. It does not change the law, and the rules on modification remain as arduous and rigid as, in some cases, Judge Jones has even mentioned in some of his cases.

There is still need for Congress to make clear that judges are to continue to enforce Federal rights while also making clear that State and local officials should be able to rid themselves of decrees that are broader than necessary to vindicate Federal law and protect rights.

Thank you.

[The prepared statement of Mr. Sandler appears as a submission for the record.]

Chairman SESSIONS. Thank you, Professor Sandler.

Professor Jost, if you would yield for a moment, Senator Schumer has been over consulting with the President on who will be our Supreme Court nominee, and he has just arrived.

[Laughter.]

Senator Schumer. I would like to let everybody know who it is going to be—after 9 o'clock.

Chairman SESSIONS. Senator Schumer is a very active member of our Court Subcommittee and Judiciary Committee, and I would be pleased to recognize you at this time for an opening statement.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Well, thank you, Mr. Chairman, and I want to thank all the witnesses.

First, I do want to thank you, Mr. Chairman, for your fairness here. We have an equal number of witnesses on both sides in a very complicated and difficult issue, and I appreciate it.

Let me say first at the outset, you know, somebody like myself who believes that the courts are an important tool to enforce people's rights, but at the same time I am a pro-government guy. I am pro-government. I think governments represent people, and we kick them around a lot, but they are very important. So you have two sort of worthy groups colliding with each other, and I have seen consent decrees do both. I have seen consent decrees do miraculous things for people who need help. I have also seen consent decrees that have been in effect for a very, very long time and sometimes outlive their usefulness, and yet it is very hard to get out of them, particularly when they are signed in perpetuity.

So I am very interested in this subject and in this hearing, and I do not approach it in a doctrinaire way. I want to put my entire statement in the record, and I do not think I am going to—although if Jeff is outside, he may want me to read it, or we can go on to the next witness. But I would say this, a couple of points here, as somebody who understands the impetus for the legislation and at the same time understands the need for consent decrees to have effectiveness. I would make a couple of points that sort of stand out.

Four years seems awfully short, or 4 years or when the highest official who was the party to the agreement, you know, when his term or her term expires, that seems even shorter still. These consent decrees should not be tied to who is in office. They should be tied to the Government, which has long-term and effective interests here. So that part of it I think—those two parts I think should be re-examined.

The 90 days, the court has to rule on the motion within 90 days or the consent decree is automatically nullified. That seems if the pendulum may be too far in one direction, that swings the pendulum already too far in another direction.

So I would say those are two parts of the bill that I think go too far, but that does not mean that some kind of compromise could not come about. I don't know who the sponsors are in the House. As I look at the list of sponsors here, they tend—I saw Ben Nelson is the only Democrat—and Mark Pryor, okay. I think you could probably, I would say to my friend from Tennessee, you might get broader support by some modifications. I am not committing to that, but it is something that I would be open to.

I think I will leave it at that. I have a statement, but I will leave it at that. Since I was late, I do not want to bore people with it. This is a real problem, and yet there are lots of other real problems out there consent decrees tend to help with. And I think, at least in my experience in New York City, Professor Sandler, it is the ones that have been on the books for 15 or 20 or 25 years that seem to be—you know, they sort of outlive their usefulness. I have done a lot to help the homeless, and yet I have seen the homeless

consent decrees in New York used for purposes that went way beyond the intention, I think, of what they were supposed to do after a period of time.

So this is very interesting. First I want to salute our Chairman in bringing the issue up. I want to salute Mr. Alexander for putting this together. As I said, I think it goes a little too far in one direction, but maybe there is some kind of compromise that after a certain longer period of time, maybe 10 years, an ability to re-examine the consent decree in a way makes it a little easier to do that than now. If the judge is immutably on one side or if the plaintiffs obviously say that is our only interest, you may need some pushback a little bit.

With that, Mr. Chairman, I thank you.

Chairman SESSIONS. And we will put your full statement in the record.

Chairman SESSIONS. Professor Jost, we would be glad to hear your observations at this time.

STATEMENT OF TIMOTHY STOLTZFUS JOST, ROBERT L. WILLETT FAMILY PROFESSOR OF LAW, WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW, LEXINGTON, VIRGINIA

Mr. JOST. Thank you very much, Mr. Chairman and Senators.

In addition to qualifications that Mr. Sessions presented, I also have served as an employee of local government, as an appointed State official, and have also done a great deal of work on the legal systems of other countries, particularly the very activist roles the German courts play in health insurance in that country. So if anyone wants to engage in a comparative discussion, I would be happy to talk about what other countries do.

If enacted, S. 489 would vitiate the enforcement of four decades of Federal legislation, including the Voting Rights Act, the Americans with Disabilities Act, the Nursing Home Reform Act of 1986, and would not only block private parties from enforcing these laws, but would also tie the hands of the Department of Justice by largely eliminating consent decrees as a means of settling disputes.

As Senator Alexander has just told us, this bill has two primary impetuses. The first is Professors Sandler and Schoenbrod's book, "Democracy by Decree." I have read this book, and it seems to me it has two fundamental objections to consent decrees. First, they can be messy, they can be expensive, they can take a long time to wrap up, and they do not always achieve their goals. This is true, of course, with every effort to implement a complex government program, with or without consent decrees.

As Congressman Blunt, one of the House sponsors of this legislation, admitted at the recent AEI seminar, "I really think this is more about inactive public officials than about overly active judges." But the problem of irresponsible government officials will not be solved by getting rid of consent decrees. In all likelihood, it will, rather, get worse.

Second, if you read Professors Schoenbrod and Sander's book, they argue that consent decrees are used to implement "soft rights," by which they mean the rights created by all of the landmark statutes passed by this body over the past 40 years to assure

all Americans clean air, safe drinking water, basic medical care, and freedom from invidious discrimination. Their fundamental problem, that is, is not with the courts. It is with Congress. They first begin by talking about Congress and then move on to talk about the courts.

If you agree with them that Americans should no longer enjoy these rights, take away the rights, but don't do it sub silentio by limiting the remedies.

The second factor driving this legislation, I believe, is the situation of the Medicaid program in Tennessee. Last year, the Federal Government spent over $5 billion Federal taxpayer dollars in Tennessee on Medicaid. For every dollar Tennessee spends on its TennCare program, the Federal Government spends two. It is not unreasonable to expect Tennessee to comply with Federal law in spending these Federal taxpayer dollars.

The TennCare program is bound by four consent decrees to which it agreed to correct violations of the Federal Medicaid law. In 2003, current Governor Bredesen personally renegotiated all these decrees. He stated at that point that the negotiated changes "put the State back in the driver's seat." The former director of TennCare testified in court 2 weeks ago that Governor Bredesen was heavily involved in renegotiating these consent decrees in 2003, that the State got most of what it wanted in those negotiations, and that the consent decree is not to blame for TennCare's mushrooming costs. Now he has decided that it is no longer convenient to comply with these decrees, and this legislation would free him from those constraints.

I come from Virginia, and in the Old Dominion we still believe in honor. If you sign an agreement in court, you live by that agreement. You do not try to walk away from it. And I believe that is what Tennessee is trying to do here.

It is vital to understand that the proposed legislation only limits the effectiveness of consent decrees, not of litigated decrees. Consent decrees save our country vast sums of money in legal costs. They cut dramatically the need for discover, pretrial preparation, and trial time. And perhaps even more importantly, as Professor Sandler acknowledged, they allow both parties, including the State, to shape the decision of the court.

Two years ago, Tennessee stated to the court that the modifications Governor Bredesen agreed to were designed to "enable the State to achieve significant savings" and were "materially advancing the State's ability to stabilize and preserve the TennCare program."

The State represented to the court that that consent decree was not just good for the plaintiffs, it was good for the State as well. A fully litigated decree could have had a very different effect.

I disagree with Professor Sandler, my colleague, that consent decrees will still be entered into if this legislation is adopted. I believe that no responsible plaintiff's attorney will enter into a consent decree again with State or local government. Most cases now that are settled by the consent decrees would have to be litigated to judgment or else the plaintiff would risk the possibility of the decree simply disappearing as soon as a new public official was elected or 4 years elapsed.

The Supreme Court unanimously last year in *Frew* v. *Hawkins* recognized a flexible standard for modification of consent decrees. If Tennessee wants yet more modifications in this consent decree, it can ask the courts to modify them. It is, in fact, doing that right now as we speak. The Court is reconsidering that consent decree. Recently, the circuit court of appeals reversed a decision of the district court rejecting a modification. There is not a problem here that needs to be fixed.

If this bill is enacted, however, it will cause untold new problems and impose significant litigation expenses on the Department of Justice, the beneficiaries of Federal programs, and the States. Please vote against letting this legislation out of Committee.

I would also like to ask to submit to the record my response to Senator Alexander's article that appeared a week later in the Legal Times. I recognize that I do not have his standing, but I would like for you to read my humble response.

Thank you.

Chairman SESSIONS. We will make it a part of the record.

[The prepared statement of Mr. Jost appears as a submission for the record.]

Chairman SESSIONS. Dr. Greve?

STATEMENT OF MICHAEL S. GREVE, JOHN G. SEARLE RESIDENT SCHOLAR, DIRECTOR, AEI FEDERALISM PROJECT, AND CO-DIRECTOR, AEI LIABILITY PROJECT, AMERICAN ENTERPRISE INSTITUTE, WASHINGTON, D.C.

Mr. GREVE. Thank you, Mr. Chairman. I too, for obvious reasons of professional self-interest, want to start with the AEI event that has been mentioned repeatedly several weeks ago where Senator Alexander and Congressman Blunt were kind enough to appear, and both of them made what I think is the crucial point. This is not about restraining activist courts. This is about restoring political responsibility, and I think that is exactly the right analysis.

What is the crucial problem here? Whence this flight from political responsibility? And I think the answer is the proliferation of entitlement statutes over the past three decades. The way it works is Congress gives States or local governments some money, and in exchange imposes some conditions, and it then makes the conditions privately enforceable. And as it turns out, that structure dilutes political responsibility up and down the chain.

The local governments or the recipients, the State governments that receive these funds, usually have their own incentives to expose themselves to consent decrees, and tons of these so-called consent decrees are, in fact, collusive. There is decision after decision after decision where Federal judges and justices have complained about that tendency, and the reason and the incentive is perfectly obvious. If you have to run these programs, you want to shield your particular program and your budget from State legislative oversight. And the most convenient way to do that is to say, hey, we are under a court order, we have to spend this money.

Congress is off the hook under these conditions because if something goes wrong at the local level in consequence of a consent decree, Congress can always complain about activist courts or "We're

shocked," shocked to learn that these local governments don't comply with our conditions.

The court is off the hook because it can always say, "What do you mean I am being activist? I am just doing the will of the Congress here."

And the plaintiff groups are off the hook because they can always say, look, we won these entitlements in Congress, we won them fair and square; it is only a matter of simple justice that we now get to enforce them.

And so at the end of the day, nobody is responsible. Nobody has an incentive to cut through all of this.

I entirely agree with Congressman Berman that at the end of the day, what is desirable is a change in the underlying law, but I disagree respectfully with the contention that this is not a very, very good first step that deals very, very effectively with a particularly extreme example of outlier of entitlement statutes. And the reason why I am saying that is that what consent decrees do is that they allow these far-reaching remedies that intrude very, very deeply into the political management of a State or local government without any finding of any violation of any law. And what this bill blissfully and mercifully does is it gives a chance not to relitigate the original question because it has never been litigated before, but finally focus the court's attention and the parties' attention on the crucial question, which is: Is there an underlying right or was there an underlying right that was violated in the first place, yes or no?

I would finally add that it is either Congress that fixes this program or nobody can. The Supreme Court has over the past two decades, two and a half decades now almost, tried to address some of the problems of, loosely worded, entitlement statutes. To summarize the jurisprudence very, very briefly, it is Congress may expose State and local governments to suit, but only if it makes its intention to do so absolutely clear in this language of the statute itself. The purpose of that jurisprudence is precisely the purpose of this bill. It is to focus responsibility. The court wants to make Congress say, "Do you really mean to do this, yes or no?" It wants to give State and local governments a chance to know and realize in advance what they are in for when they subscribe to these kinds of programs so that at the tail end they do not have an excuse anymore.

The effort to end or terminate consent decrees or to allow State and local governments to move for termination is fully consistent with that jurisprudence, and it acts at a front where the Supreme Court itself has been incapable of acting. Everybody in the literature agrees, it is very, very hard to terminate these consent decrees, very, very hard for appellate courts and the Supreme Court to do anything about it.

Thank you.

[The prepared statement of Mr. Greve appears as a submission for the record.]

Chairman SESSIONS. Thank you.

Ms. Schiffer?

STATEMENT OF LOIS J. SCHIFFER, FORMER ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Ms. SCHIFFER. Thank you, Mr. Chairman, for the opportunity to testify today about the grave problem that S. 489 poses for effective environmental protection in our country. I am Lois Schiffer, currently an attorney in private practice at Baach, Robinson & Lewis in Washington, D.C., and from 1994 to 2001, Assistant Attorney General in charge of the Environment and Natural Resources Division in the U.S. Department of Justice. That division is responsible for working with U.S. Attorney's Offices on virtually all Federal civil and criminal environmental enforcement actions under the laws Congress has passed to protect against and clean up pollution.

I have approved and signed literally hundreds of consent decrees and have negotiated many. A number have been in cases against State and local governments and would be directly affected by S. 489. That bill, if enacted, has fatal flaws that would undercut environmental protection in this country.

First, despite what Mr. Sandler says, the bill will virtually eliminate use of consent decrees and environmental enforcement actions against State and local governments because no responsible Government attorney or citizens group would enter an agreement where the other party, a defendant State or local government, could decide not to keep its word and then could tie the agreement up in litigation over termination in 4 years or less.

Second, S. 489 would thus eliminate one of the essential tools for implementing and enforcing our Nation's environmental laws. Since Congress has through law committed to the American public clean water, clean air, safe drinking water, and other protections, Congress itself should be dismayed. Once it appears that a State or local government has failed to comply with an environmental law, everyone benefits if attention is turned to how to fix the problem rather than litigating over whether and how the problem occurred. That is why so many environmental enforcement actions, whether brought by the United States, by States, or by citizens groups as specifically recognized in the environmental laws, turn to settlement discussions and consent decrees. The remedies that the enforcers seek and that the State or local governments agreed to may take long periods of time to implement, often because extensive work is involved. I will outline a few useful examples, then make four quick points about the problems of S. 489 that the examples illustrate.

First, sewage treatment cases. In New Orleans, the 50-year-old system for collecting sewage worked so poorly that when it rained, raw human sewage ran in the streets. Not very pleasant. The United States and the New Orleans Sewerage and Water Board entered into a consent decree—I negotiated part of it myself—that committed New Orleans to take specific steps over 11 years to build a new sewage collection system. The massive nature of the project dictated the length of the decree.

We negotiated a similar consent decree, I am sure you will be interested to know, for wastewater collection and treatment in Jefferson County, Alabama, which is still in place, and I am sure, Sen-

ator, that your constituents are happy not to have sewage improperly treated.

In Wayne County, Michigan, which covers Detroit, the United States and the county just returned to court to ask for termination of a consent decree after 11 years because the county had essentially fixed the problem, and that is an example of how the system works. People know how to get decrees terminated when they have lived their useful life.

Finally, this past February, the Federal court in Tennessee—Senator Alexander, you will be particularly interested in this—signed a consent decree entered into as plaintiffs United States, the State of Tennessee, and the City of Knoxville—they were the plaintiffs—and the Knoxville Utilities Board, an independent agency of the city, was the defendant, requiring the board to take specific steps to analyze and fix sewage overflows. The work will cover 12 years, and the press release states it is estimated to cost $530 million. Of necessity, that work is going to take a long time. It is important to note that it was Senator Alexander's State as the plaintiff.

A second type of example, the consent decree to restore the Everglades, which was entered into after a lawsuit was brought in 1992, and there, there is great commitment by the United States, the State of Florida, and the South Florida Water Management District, as well as this Congress and the present Governor of the State, to really clean up and restore the Everglades. It is a very long-term project and of necessity that consent decree has to run a while.

All of these would be stabbed in the heart by S. 489, and I will conclude with four quick reasons.

First, this bill would mean that the Justice Department and citizens groups would stop entering into consent decrees to resolve environmental cases brought against State and local governments since complying with the laws passed by Congress can take time, as I have indicated. A law that means consent decrees may be terminated after a short time eliminates them as a useful tool.

Second—and I will be quick—this bill would increase, not reduce, the amount and scope of litigation in our courts with greatly added expense and grave burden on resources of the Justice Department and U.S. Attorneys, State governments that both bring enforcement cases and defend them, local governments that would face trials, not settlements, and Federal courts. This is also completely contrary to efforts in every Federal court to encourage cases to settle and is encouraged by a law of this Congress, 28 U.S. Code 651, the Alternative Dispute Resolution Act.

Third, the bill will seriously set back the enforcement of environmental laws passed by this Congress and give us all dirtier air, water, and land.

And, finally, the bill is completely unnecessary because particularly under the recent Supreme Court decision in *Frew* v. *Hawkins* that you have heard about, State and local governments and courts already have good tools to address the concerns it seeks to remedy.

Thank you.

[The prepared statement of Ms. Schiffer appears as a submission for the record.]

Chairman SESSIONS. Thank you very much. Those are excellent discussions that we have had today, and we thank you for it. Each one of you brings an important perspective to the matter.

It just strikes me that prior to the common nature of consent decrees, if a community polluted the water and were sued, they had to pay. And if they did it again, they would get whacked again, and then get whacked again, and pretty soon a jury or the judge would really whack them if they failed to fix it.

But I as a United States Attorney for 12 years did enter into and enforce decrees that probably were helpful in the sense that it established a time period to accomplish a goal, Ms. Schiffer, that you mentioned it might take more than 4 years to accomplish. But the problem is, what if after 4 years somebody has solemnly agreed to a plan and it is plainly obvious that the plan would be better if it were modified? What is the current standard of review by a court to establish that?

Ms. SCHIFFER. May I respond, Senator?

Chairman SESSIONS. Yes.

Ms. SCHIFFER. Well, first, of course, if it is clear that it needs to be changed—and the Everglades is a perfectly good example of something where everyone agreed after a while they had learned more and it needed to be changed—the first thing is to go back to the parties on the other side and say, "We think this should be changed." And often those agreements can be worked out in that fashion.

Chairman SESSIONS. Sometimes, but a great power rests in the plaintiff's hands. Correct?

Ms. SCHIFFER. Well, that is if you can have agreement, and if not, it has certainly been the standard before the *Frew* case and reiterated in *Frew* that if there is a change in circumstances, a party can go back to court and say there is a change of circumstances, the consent decree should be modified. And I would add that *Frew* specifically urges that deference should be given to elected officials, to State and local governments, in looking at whether there should be modifications to consent decrees.

But I would also note that even apart from the consent decree issue, what we are really talking about here is a set of pollution control obligations that are imposed on State and local governments by the laws of this Congress. So that even without the consent decree, the obligation on the local government to, as you say, fix the pollution problem does not go away.

But the courts have shown themselves perfectly capable, if there is a change of circumstances, if people find new technologies, if there is a better, more efficient way to do it, to modify the consent decree.

Chairman SESSIONS. Well, in certain circumstances—and I think the U.S. Department of Justice probably has a better reputation as a plaintiff than most. Maybe others—or, Professor Sandler, would you like to comment on what it takes to amend some of these decrees?

Mr. SANDLER. Yes, I would very much like to answer that. Thank you.

The leading case is called *Rufo*, R-u-f-o, and it requires that the parties seeking the modification—usually the defendant—has to

show unforeseen circumstances, not just change of circumstances, as Ms. Schiffer said, but unforeseen circumstances; and, secondly, that the modification presented to the court must be suitably tailored, that is to say, a minimum change necessary to essentially preserve the bargain. And that is why it is so difficult to get modifications. So let me give you an example.

In the 1970's, the New York City Housing Authority was evicting tenants in a way that was unconstitutional, so there was a lawsuit brought, and a consent decree was entered which supplied a very elaborate year-long process to evict, far greater than what the local statutes required. Twenty years later, crack cocaine is devastating parts of the Housing Authority. Some tenants were using their apartments to sell cocaine, so the tenants and the Housing Authority said, "We have got to get rid of these people if they are convicted of using their apartments for selling cocaine. Let's use the quick eviction proceeding to sustain the safety of the Housing Authority."

Plaintiffs' attorneys said, "Oh, no, we have this 22-year-old consent decree. You have to take a year to evict people." And so they had to have a trial before Judge Prescott. And what were the issues? Was crack cocaine unforeseen when they had heroin 22 years later? So they had experts testify as to how unforeseen crack cocaine was or whether it was not or whether it was the same; and, secondly, they had experts come and testify as to whether or not there were other suitably tailored things to do other than evict, such as hire more police. And so you had a battle of experts. Three days of hearing, 55 pages of opinion, 18 months, the court finally says it is okay to evict cocaine sellers who would use their apartments to sell.

During that time, the tenants were so beside themselves with what their lawyers were doing, they hired another lawyer to attack the old lawyer. And this is a typical—this is what can happen under the current rule, which is why this legislation is so important, because it says, wait a second here, the measure of Federal court jurisdiction is the laws that Congress passes and the Constitution. It is not the private bargains that get written into these consent decrees.

I wish Representative Berman was here. He talked about the *Jose P.* case, with which I am enormously familiar. He says it cost a lot of money. One of the reasons it cost a lot of money is that Federal law says every child is entitled to an evaluation by one person. New York in 1979 said, well, let's do three people; in other words, three times what Federal law requires. That is still the requirement. And when the city tried to get out from under that, the social worker union, which is one of the three groups, intervened in the case and said, "You have to keep hiring social workers, whether you want to or not, because the consent decree says you have to." And then went back to Federal law and said only one, but the court said, "I am sorry, a bargain is a bargain." And in the words of my colleague here, honor it. But consent decrees should not be about honor. You honor them when you sign them for sure, but the measure of Federal court jurisdiction is what the Federal laws require, what Congress passes, and what the Constitution—and those other bargains hobble elected officials and subsequent of-

ficials who are trying to manage these very complicated programs, social programs and other programs on a day-to-day basis within real budgets and with real choices, and the consent decrees close in on the elected official and prevent them from doing their job.

And, lastly, I would like to just object, if I could, to the discussion about treatment plants, with which I am also very familiar. Of course, it takes a long time to build a treatment plant, and consent decrees under this statute would not be terminated. You would still have to comply with the Water Act. And if you could do it without a treatment plant, God bless you. But if you cannot, you are going to have to build a treatment plant. And no statute of this kind of going to stop the impact of the Clean Water Act.

Chairman SESSIONS. That is something you are familiar with, I am sure. I recall, as you talk about the settlements and how they are entered into, I know Ms. Schiffer would have a high opinion of the Department of Justice and how they do these things, but the Attorney General of Alabama, my predecessor, met in a secret room with plaintiffs' attorneys and agreed, in violation of the Alabama Constitution, to add two new judges to the Alabama Supreme Court. And the judge approved this agreement without any public hearings.

Now, there was a hearing to decide whether or not to accept the consent decree, but judges tend to accept the decrees entered into by the parties on the presumption that they are honest, good-faith litigators and they are defending the issues. But sometimes things go awry and they are not really sound judgments.

Everybody is willing to talk, and who should I recognize? All right. My time has not turned to yellow yet, so I would go in this order: Ms. Schiffer, Mr. Greve, and Mr. Jones. And if you all would keep your comments sort of brief so I can recognize Senator Alexander, because my time will soon be out.

Ms. SCHIFFER. I will be very quick. Two points.

One, *Rufo* was decided 2 years before *Frew*. *Frew* clearly said if the State establishes a reason to modify the decree, the court should make the necessary changes, and it also said deference should be given to elected officials. So he really does not have the current standard right.

Secondly, as to whether it takes place in closed doors, under the pollution statutes there are either specific requirements in the statutes or in regulations that the court have a notice and comment process and an opportunity for the public. So under these laws, closed doors does not work.

Chairman SESSIONS. Well, it really is a closed door in the sense that there is no public Congressional hearings by the people who are going to pay the money. It is the lawyers. Ms. Schiffer, the Department of Justice is not empowered to run the Prichard, Alabama, sewer system. Yet they go into a private meeting with a lawyer for the city, and they agree how the system should be fixed. That is the way it works, and the city and the taxpayers are basically told that this is what the court said and you are stuck with it.

Now, sometimes it is justified. Dr. Greve?

Mr. GREVE. Very briefly. Thank you, Mr. Chairman. Just two brief points.

First, what everybody agrees on in this very contentious debate is that we have very little empirical evidence as to how these agreements actually work, how many are there, how many are terminated. So we do not know very much about the termination, but we know about one context in which the Supreme Court has laid down much more specific, much more precise guidelines with respect to the termination of the decrees, and that is school desegregation, which is not covered by this bill but I am mentioning it because it is the only systematic empirical study that I am aware of in this context. And there those standards have done absolutely nothing—nothing—to help district courts terminate these desegregation decrees.

With all due respect, the notion that some abstruse Supreme Court standard, whether it is that of *Frew* v. *Hawkins* or that of *Rufo* v. *Inmates*, might conceivably help district courts, might have some administrable rule that it actually applicable is just erroneous.

I just want to say one more thing about the modification of consent decrees. It is true, yes, you can modify consent decrees somewhere along the way, and even that is, in my judgment, harder than it ought to be. But what is crucial, the crucial difference between the current modification procedures and this bill is this: In current modification procedures, the only reference point is the working of the remedy itself. Nobody ever gets to the question: Do these people, do these plaintiffs, are they entitled to be in this court? And are they entitled to this remedy? You never get to that because everybody is obsessing over, well, we agreed to the remedy 11 years ago, or whatever, and now it doesn't really work anymore. It is completely self-referential over time. This bill would change that. That is a good thing.

Chairman SESSIONS. Professor Jost and Judge Jones, briefly.

Mr. JOST. Just very briefly, I would like to reiterate one point that Dr. Greve made. Professor Sandler caught himself when he said this is a typical situation; then he said this is one example. I do not think we know what the typical situations are, and I think we could sit here all day with him coming up with examples of consent decrees that do not work and some of us on the other side coming up with examples of consent decrees that did their job and were terminated.

I guess what I am really worried about is the drop-dead solution that is proposed here. A number of people have put a lot of pressure on the President to say, okay, one more year and we are out of Iraq or two more years and we are out of Iraq. And I think he has sensibly said, "As soon as you say one more year or two more years, then it tells people how much longer they are going to have us around and then we are gone."

One of the consent decree that Professor Sandler refers to in his book was a child-care consent decree in Utah that did have a 4-year limit. And what happened was that the State simply did not do anything for 4 years, and at the end of the 4 years they said, "We are out of here." And the plaintiffs went back in and said, "No, they have not complied yet. We need to have a modification of this consent decree." And the court did modify it to extend the consent decree, and it was upheld by the circuit court of appeals, which

said, "The State has refused to comply. They have to comply before we can end this."

And I think that that is the situation we see here. I mean, there may be a problem here that needs to be fixed, but I think this is a solution that is going to cause far more problems than it will fix.

One final thing, and that is with respect to the 90 days. The Judicial Conference has sent this Committee a letter saying that the 90-day period is completely unrealistic. Nobody can retry a case in 90 days. And so if you are going to have the 90-day period, you might as well just say it ends at the end of 4 years because it is not going to be—no one can completely retry a case in 90 days. Nobody believes that that is possible.

Chairman SESSIONS. Judge Jones?

Judge JONES. First of all, I have to respond to Dr. Greve's comment about school desegregation. I do not know what he has been reading, but the landscape is full of cases being terminated on the finding of courts that the district has reached unitary status—The Columbus case, the Detroit case, *Bradley* v. *Millican*, the Dayton case, the St. Louis case, in which the parties themselves reached an agreement. After many, many years of functioning under a consent decree, they concluded that they had achieved the objectives of the settlement. So in school desegregation cases, we are barking up the wrong tree.

We can sit here and throw out all kinds of horribles about consent decrees that may not have been the best or there may have been flaws in them. But why don't we talk about the causes that led to the litigation that resulted in the consent decrees, the conditions that resulted from the default by State governments and by municipal governments in meeting their obligations to citizens. Why don't we talk about the remedies that were provided by Congress that the citizens were availing themselves of, and in order to avoid the divisiveness that is associated with litigation, they agreed to conclude the matter by consent decree.

Now, if communities wanted to have their dirty linen aired, if they want these protracted trials, if they wanted to undergo the expense of demonstrating from A to Z what is happening to citizens by virtue of the cities and States violating Congressional statutes or constitutional requirements, then we are going to jam up the courts, and we are going to have a horrible bottleneck.

The courts are now understaffed. The budgets are being reduced. All the judges will tell you that they are functioning at less than optimum strength. They do not have the personnel. The clerk's offices are working part-time. All the requirements of conducting full-scale litigation are not being fully funded.

So we are going to have a situation in which lawyers are going to tell their clients there is no point in entering into a consent decree. Their clients are going to say, listen, after 4 years if we have to fight this battle all over again, let's just fight the battle now. And the costs of attorneys' fees that you have referred to will be nothing compared to what they will be if these cases are litigated to the nth degree.

And what we have tried to avoid—if I may just have a second.

Chairman SESSIONS. Just one second.

Judge JONES. When I was litigating the NAACP and during my period on the court in which I was supportive of the direction the courts were taking to settle and solve cases and to initiate alternative dispute resolution strategies, it was to avoid the scorched-earth policy, the scorched-earth strategy of tearing communities apart by having all this litigation, having all these issues aired, getting people together, agreeing on a problem, agreeing on a solution, and then asking the court to endorse it by a consent decree following its fairness hearing in which all parties agree and the public agrees.

And so I think we are—we may focus on the horribles, but let's look at what led people to resort to the courts. And if we want people to lose faith in the court system, then I think we will go down this road of choking off remedies that are clearly made available.

Chairman SESSIONS. Senator Alexander?

Senator ALEXANDER. Thank you, Senator Sessions, and this is very, very helpful. I want to make a comment, and then I have got a couple of questions that would help me.

As I listen to this, the 90 days requirements, it depends on what side you are on. If you are a Government official, if you are a Federal judge, if you are a plaintiff's lawyer, you do not like 90 days. But what if you are the Governor of Tennessee and every month that goes by that the Attorney General has to run from the Federal district judge in Nashville, who is trying to run the Medicaid system, up to see Judge Jones in Cincinnati to get overruled, every month costs $43 million, and $43 million is an $800 pay raise for every single Tennessee teacher.

And Professor Sandler, as was pointed out, said typical and then said maybe not typical. I am not sure these are not so typical. I think the people of my State, if presented with a question of should we want to be the number one State in America in the number of prescription drugs that we use, or would it better to spend a little less on prescription drugs and more on pre-school education, we elect our legislators and our Governor to make that decision. And we do not expect the Federal judge and a master and a plaintiff's lawyer and someone in Washington to make it. That is not what we want out of a democracy.

And if we are in Los Angeles and if in 1994 we want to ride more buses and in 2004 we want to ride more mass transit, we want our elected officials to make that decision for us. And if between 1974 and 2004 we move from preferring bilingual education to English as a second language, we would like to have that be responsive to us.

And I think Judge Jones' point that the courts are busy just underscores the fact that when these policy decisions get lost in the Federal court today, the judges are really too busy to manage them. And they are turned over to faceless plaintiffs' lawyers and to well-paid masters who run these programs instead of the elected officials.

So I think fundamentally we are trying to restore some balance here and said rights are in the courts and policy is for elected officials. And, Mr. Jost, I think you are overspeaking a little bit when you say retry the case. This case has never been tried. This is a consent decree. This is where two people walk into the court and

say, "Judge, this is our agreement. Will you approve it?" There is no retrying here.

And as far as 90 days go, I would be real impatient with anything more than 90 days if I knew that I could give my teachers an $800 pay raise while we are waiting for the Attorney General to yo-yo back and forth between the Federal judge in Nashville and the circuit judge in Cincinnati to do what I thought I was elected to do.

Now, let me ask this: Does anyone have any idea how many existing Federal court consent decrees there are today or what record there is of them? So if, say, I were elected Governor of California or mayor of Los Angeles, if I were elected mayor of the city of New York, how many consent decrees are there governing things that I thought I might be elected to do? And how would I find out a list of those Federal court consent decrees?

Mr. SANDLER. That is a wonderful question. When we were writing the book, we tried very hard to get that answer. It turns out that no one knows.

Most of the cases are private cases brought against State and local government where the Federal Government is not named as a defendant, so the Department of Justice does not track the cases.

The agencies responsible, say the Department of Education for special education or the Department of Transportation or EPA, they do not track the cases either because they are not involved with them. So the agencies do not know.

What I found, in order to find out where the cases were, the best sources were the organizations of attorneys who bring the cases. For instance, if you want to find out where the foster care—somebody mentioned a foster care case. There is an organization that tracks all the foster care cases across the country. It is pretty easy to do because there is only a handful of lawyers who bring them. And the organization not only tracks them where they are but the status of the case. And they print that on the website. So I was able to find out and it turns out that virtually every State has foster care litigation, and you can track it. But the Department of Justice does not know; the court judicial system does not know.

Senator ALEXANDER. Do you have any guess how many there are, in New York City, for example?

Mr. SANDLER. In New York City, hundreds. Hundreds. And probably thousands across the country because every State has them.

Chairman SESSIONS. You mean hundreds in New York City that affect some agency—

Mr. SANDLER. Oh, yes.

Chairman SESSIONS.—of New York City government.

Mr. SANDLER. Like there is a consent decree on vending machines in the schools under Federal law. You know, there is a consent decree, as we mentioned, on bilingual education. There are multiple consent decrees on bilingual education. Every aspect of social programs that Congress enacts, either under the Spending Clause or the Commerce Clause, will ultimately result in consent decrees.

Senator ALEXANDER. Could I ask Judge Jones—I see he has his hand up. Judge Jones, would there be any objection to trying to

keep some record of Federal court consent decrees? And if there were a way to do it, what would be the appropriate way to do it?

Judge JONES. There are records and they are available.

Senator ALEXANDER. Where are they available?

Judge JONES. They are available in the executive office of every circuit.

Senator ALEXANDER. In what?

Judge JONES. The circuit executive office of every circuit. Every year the district judges file reports with the Office of the Circuit Executive of the—in my case, the Sixth Circuit. And there is an annual report prepared which breaks down the dockets of the district judges, the status of the cases, whether they are in litigation, in what stage, are they in discovery, are they in trial, have they been resolved by consent decree, and if the court is overseeing the decree.

So those are available. They exist. And I am sure every circuit by order of—and I think at the Administrative Office of U.S. Courts, Mr. Mecham's office, would have those records.

Senator ALEXANDER. So if I am elected Governor of Tennessee, I could go to the Sixth Circuit and say, Please tell me every Federal court consent decree which is currently in effect which might affect the job I was elected to do?

Judge JONES. Yes. You could get a report on the consent decrees that are under supervision in the district courts, in your case the Middle District of Tennessee, or within the Sixth Circuit; or you could go to the Administrative Office of U.S. Courts and get their annual report, which has the reports, compiles the reports of all of the circuits in the Federal system. So those numbers are available.

Mr. SANDLER. They just do not tell you what you want to know. A decree has been entered. They do not tell you about modifications, and they do not tell you anything else about it.

You know, I think it is important to understand how consent decrees get done. A complaint is filed. The first motion is either a motion for certification or a motion for preliminary injunction or summary judgment. There may never be a written decision in the case because those motions generate the discussions that lead to the decrees. So a case such as the *Jose P.* case, which Representative Berman mentioned, there has not been a written decision in that case in 15 years. Yet the parties are meeting every other week adjusting the consent decree. It just lives a life of its own.

So the answer to your question is, Governor, if you really want to know, there is no source that will give you the information you really want to know.

Judge JONES. May I just respond to that? This is tit for tat. A court speaks through its orders, and I do not know whether Professor Sandler has tried any class action cases or whether he has been a litigator in this arena or whether he has adjudicated these cases. But I can tell you, as a litigator for 10 years, plus I was Assistant United States Attorney in the Northern District of Ohio, I was a Federal court of appeals judge for 22 years, and I am now a litigating partner with a major law firm in which I am involved in many mediations and arbitrations and settlement of class action cases, a judge does not enter an order on his own whim. When a case is filed, the parties engage in discovery. There is a require-

ment under the Federal rules now that parties must first explore settlement possibilities.

If in the process of discovery it appears that there can be settlement, the parties can come to terms, then they will submit an agreement to the court for preliminary approval. The court will examine very meticulously the settlement against the claims that were contained in the complaint. Then if the court is satisfied that there has been—that this settlement is arm's length and that it is fair and adequate and reasonable, the court will then give preliminary approval. Notice will be given to all members of the class, and they will be then notified to attend a hearing after they comment, either enter an objection or agree to opt out of the settlement.

Then the court schedules this settlement agreement, and it is like a town meeting. Anybody can come—the Governor of the State, the Attorney General, the cabinet officers, the public at large, members of the class—and they can come and the court gives them full sway. They can address the issues. They can enter their objections. And if the court feels that there is merit to their objections, the court will deny the approval. If the court feels that the settlement is fair and adequate and reasonable, the court will approve the settlement and, therefore, enter a consent decree.

Now, if in a year or two or three or four or 5 years there is some aspect about the settlement which is open to question, the party can repair to the court and ask the court for a hearing to modify and correct or even terminate the settlement agreement. And the court will then conduct a hearing and enter an order. So it is not the lawyers who run the courts. The courts run the courts. And the courts make a decision as to whether they are going to grant the relief that is being sought.

So it is not accurate to say that private lawyers are calling the shots here. They have to petition the courts, and the courts make the decision, and they enter the orders, and courts speak through their orders.

Chairman SESSIONS. Thank you, Judge.

Do you want to follow up?

Senator ALEXANDER. My red light is on.

Chairman SESSIONS. Attorney General King, as a practical matter, have you found it difficult to alter or end the consent decrees that have continued for a long time? I do not think you got in your opening statement to refer to maybe other cases that you do in your written statement. What is the practical reality for Attorneys General? And have you an impression of how Attorneys General and Governors feel about protracted consent decrees?

Mr. KING. I have an opinion about how the Attorney General of Alabama and the Governor Alabama feel about them, and they feel that they are oppressive. They feel that too often they evolve into an exercise where the lawyers frustrate their own client's purposes, where you attempt to come into compliance to correct past discrimination practices, for example, and the lawyers object because in Alabama's case they are being paid whether they win or lose, whether what they do is frivolous or whether it is helpful. And that creates a scenario by which plaintiffs' lawyers are getting rich while the State of Alabama continues to suffer, continues to be unable to correct abusive practices.

We have instances in Alabama, for example, in a case involving the delivery of child welfare services, where we agreed to come into compliance with certain standards. There is a court monitor in place whose job it is to make sure that the State of Alabama does that. We have now brought all 67 counties into compliance. We have asked the judge on the recommendation of the monitor he selected to release the State of Alabama from that consent decree. And, in fact, our experience is that now they are revisiting the counties again. They are doing something that falls completely outside the scope of the consent decree that the State of Alabama is a party to. And in many regards, the State of Alabama is helpless to do anything about it.

Chairman SESSIONS. Are they paid for the time they spent doing that by the State?

Mr. KING. Of course they are. Everybody is being paid.

Chairman SESSIONS. By the State of Alabama.

Mr. KING. By the State of Alabama.

Chairman SESSIONS. The taxpayers.

Mr. KING. Our lawyers, their lawyers, the court monitor—everybody is being paid. And in Alabama's experiences, these also develop into an opportunity for the bureaucrats to use the courts as a mechanism to do what they cannot persuade the legislature to do.

Chairman SESSIONS. That is an important subject. I hope we will listen to that. I have seen that.

Mr. KING. I hope you will, too, because what we find in this case of which I speak right now, what we find is a judge who holds court, he listens to the legal arguments, then he opens it up to everybody in the room, and he says, "Tell me, do you have enough money to run your department? Do I need to order more money to be spent?" That is not the role of the Federal judiciary. That is the role of the Governor and the legislature of the State of Alabama.

Chairman SESSIONS. Attorney General King, let me interrupt and get to this point precisely. In other words, sometimes the governmental entity being sued is happy to be in the fix to be thrown into this pot because he or she may hope that the plaintiffs will win and somehow the Federal court will order more money to go to their agency. Is that correct?

Mr. KING. No, it is more serious than that, Mr. Chairman. This is an instance where they do not even have to win, where the bureaucrats come in and they say, "We need more money in order to come into compliance, in order for this to ever be completed," and it becomes a funding mechanism.

It is difficult for me to explain to Alabamians why bureaucrats are allowed to go to the Federal courts and make their budget requests, but that is what is happening.

Now, there are a lot of people here who have a lot of expertise and they are talking about a lot of academic exercises. I am telling you, as the Attorney General of a State who is charged with complying with unwieldy and difficult consent decrees, our ability to comply, our ability to do what has been required of us is being hampered by the very consent decrees under which we operate.

We have a consent decree to operate the Department of Mental Health in my State. We agreed to meet certain clinical standards—

clinical standards that continue to evolve, that continue to change, and the Federal courts continue to require the State of Alabama to alter its ability—its attempts to come into compliance with new and higher standards.

We are not being asked to comply with the bargain that we struck. We are being asked to comply with a bargain that continues to be changed by the plaintiffs and by Federal judges and by court monitors and that the State is a helpless victim of.

I am not here to say that consent decrees are not important. I am not here to say that governments do not have important duties to those who depend upon them. I am not here to say that when the States fail to act responsibly those who are injured should not have a recourse. Of course they should. But I am here to say that the State of Alabama is requesting your assistance and your relief in giving us the ability to run our own State, to act responsibly, and to take the Federal judiciary and to take a limited group of plaintiffs' attorneys out of the process, to give us the ability to get relief that the citizens of Alabama expect when they elect a Governor he is going to be able to deliver to them. And right now he simply cannot do that. Right now, as Attorney General, I cannot do that. And that is wrong.

Chairman SESSIONS. Thank you very much. I think you spoke eloquently of the reality that I hear. I was with a Governor just an hour—actually, 20 minutes before this hearing began from a State far distant from Alabama, and I asked her about it. I said I had to go to this consent decree hearing. She said, "That is great. They are driving us crazy. It is interrupting my ability to do my job." So I think it is a reality.

Senator Alexander?

Senator ALEXANDER. I do not have any more questions, Senator Sessions. This is a well-informed and distinguished panel of a variety of views. It would be hard to imagine how we can get a broader perspective than we have had today on this subject. And so I would invite any of them—and I imagine you will do this before the hearing ends—if there are things that you wanted to say that you did not get to say or if there are points that you would like for us to consider or if there are specific changes in the bill that you think would make a difference, if you could submit those to Chairman Sessions, I am sure Senator Schumer and other members of the Subcommittee and then those of us like Representative Berman and I, Senator Pryor and others—I will certainly be glad to read them and consider them, and that will be an important part of the process.

Chairman SESSIONS. Well, thank you so much. This was a spirited panel. It raises some important issues. Consent decrees are going to be and will remain an important part of the settlement of litigation in America. The idea that after 4 years that the plaintiff would have to justify the continuation of that decree does not strike me as eviscerating the power of a decree. Some decrees, in my view, will automatically need to be continued. Everybody would know that the time had not sufficiently run to complete the remedy. Some decrees may be clearly entitled to be terminated, in which case that would be done. Some decrees will require the judge

to give some thought, well he or she should if they are now managing an agency of a State or a county or a city.

We do not need to treat too lightly the concept that a consent decree is virtually the equivalent of a legislative enactment. It binds everybody under that decree—a school system, the entire mental health system, the entire Department of Transportation. These are bound by these decrees, and it is virtually the equivalent of a legislative act, except if we pass a legislative act this year, the next Congress can change it. If they get the same number of votes we had this year to change, they can change it. But these decrees are powerful. And it is dangerous. I fundamentally believe it is not a healthy thing when an unelected, lifetime-appointed judge who is not accountable for the operation of the Department of Transportation or the Department of Education is now substantially managing that, is approving a decree that mandates it for indefinite periods of time in the future. So the decrees are valid. The decrees can be good and healthy. But as the Supreme Court is telling us, we ought to be respectful and understanding that it does impact in a significant way our separation of powers, the entire nature of our democracy, because it is removing the power from the people and putting it into the hands of an unelected judge who is not accountable.

So I think it is a worthy thing, Senator Alexander, that you have raised, you and Senator Mark Pryor. He was an Attorney General, of course, a Democratic Senator. He shares your concerns about it. Mr. King has expressed his as another Attorney General.

I think we ought to listen to the good suggestions that have been made here, listen to the concerns that have been made here, and I hope that you will continue to pursue your view that perhaps this Congress can do something that would make this system work better.

Do you have any final comments you would like to make?

Senator ALEXANDER. No. The only thing that went through my mind a few times, everyone was talking about the short period of time that Governors and mayors serve. Most of us hope to serve longer than 4 years. Most of us do. The last mayor of Knoxville served 16 years. So the idea that suddenly—just to boil it all the way down, if I am running for Governor of Tennessee and I am elected and I want to improve the schools or fix the roads, and I persuade people to do that and they vote for me, then I think I ought to be accountable for that and have the authority to do that. To the extent I interfere with the constitutional or federally guaranteed rights of any citizen of Tennessee, then I ought to be hauled into court. Otherwise, I ought to be kicked out of office and accountable if I do not do my job.

And so really we are talking about what set of decisions should be made and changed in the election process democracy and what set of decisions should be reserved for the independent third branch of Government, the judiciary. And it has always been a balance, and this has been a good discussion.

Thank you.

Chairman SESSIONS. Thank you very much. It has been a very interesting hearing.

We will keep the record open one week to allow for any comments to be submitted to the record, and Senator Leahy has a statement for the record, and we will stand adjourned.

[Whereupon, at 4:25 p.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

TESTIMONY

Before the

SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON ADMINISTRATIVE
OVERSIGHT AND THE COURTS

On the

FEDERAL CONSENT DECREE FAIRNESS ACT (S. 489)

Michael S. Greve
John G. Searle Scholar
American Enterprise Institute

Mr. Chairman, Members of the Committee:

I respectfully submit this testimony as an independent but not an indifferent expert. My first law review publication two-plus decades ago argued for the congressional termination of certain consent decrees. I have since followed the scholarly literature, and I have written extensively for both academic and general audiences on the federalism questions that in my estimation lie at the core of the proposed Federal Consent Decree Fairness Act ("FCDFA").[1] In my former professional capacity as the director of a public interest law firm, I have enjoyed (in a manner of speaking) a close-up, practical view of the inordinate difficulties that attend the modification of consent decrees. I strongly support the proposed legislation.

Introduction

The purpose of the FCDFA is to facilitate the modification and termination of consent decrees by (1) permitting state or local defendants to apply for modification or vacation of a consent decree four years after its entry or upon a change in the elected government; (2) imposing on the plaintiffs the burden of proof to demonstrate that the decree is still necessary to uphold a Federal right, rather than requiring the defendants to demonstrate the necessity for modification; and (3) providing for automatic termination if the court

[1] See, e.g., Michael S. Greve, "Terminating School Desegregation Lawsuits," 7 Harv. J. L. & Pub. Pol'y 303 (1984); Greve, "Against Cooperative Federalism," 70 Miss. L. J. 557 (2000-01); Greve, *Real Federalism: Why It Matters and How It Could Happen* (AEI Press, 1999): at 76-86, 119-32; Greve, "Washington and the States: Segregation Now," Federalist Outlook No. 17 (May 2003), available at www.aei.org/publications/pubID.17053/pub_detail.asp. My resume and a list of publications have been submitted with this Testimony.

fails to rule on the motion to modify or vacate within ninety days. These provisions would effect a well-targeted reform at the intersection of two pervasive and profoundly problematic institutional practices: "institutional reform litigation," and the private enforcement of federal programs against state and local governments.

Institutional reform litigation—that is, lawsuits on behalf of broad constituencies to bring about lasting change in the programs and operation of public agencies—may take the form of judicially imposed injunctions as well as consent decrees, and it often proceeds under the Constitution rather than federal statutes. The FCDFA is limited to statutory rather than constitutional cases, and it applies only to consent decrees, not to judicially imposed, post-liability injunctions.[2] In addition, S. 489 exempts school desegregation decrees.[3] By all accounts, however, the FCDFA would affect a very wide range of federal statutes and reach a significant segment of the institutional reform litigation "market."

Many thoughtful scholars have ably described the many problems of institutional reform litigation, and some of them have testified on the proposed legislation.[4] For that reason, my remarks principally address the private enforcement of federal statutes (typically "conditional spending" statutes) against state and local governments.

The problems in this area fall under the general heading of "federalism." As discussed below, the private enforcement of conditional spending statutes erodes the states' and local governments' position in the federal architecture, erodes political responsibility and accountability at all levels, and expands federal programs beyond the envisioned and authorized levels.[5] While these problems arise even where private enforcement does not take the form of structural, long-lasting consent decrees, such decrees are particularly troublesome. Moreover, the United States Supreme Court has recognized the problematic nature of private enforcement and, over the past two decades, has developed limiting doctrines. The FCDFA effectively complements that jurisprudence.

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[2] The most natural reading of the proposed statutory language is that a liability determination would preclude application of the FCDFA even where the *remedy* is crafted, pursuant to judicial instruction, wholly or in part by agreement among the parties.

[3] In its current version, the parallel House Bill (H. 1229) exempts decrees entered in litigation to remedy race discrimination under Title VI and Title VII of the Civil Rights Act.

[4] See especially Ross Sandler and David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* (Yale University Press, 2003). See also Schoenbrod's testimony to the House Judiciary Committee, Subcommittee on Courts, the Internet, and Intellectual Property (June 21, 2005) (available at judiciary.house.gov/HearingTestimony.aspx?ID=297).

[5] The import of my Testimony is that government consent decrees are substantially less problematic when the underlying action is initiated by federal enforcement agencies, rather than private litigants. S. 489 covers consent decrees regardless of the plaintiff's identity. The question of whether actions by federal agencies—which are subject to political controls that do not operate on private litigants—should be subject to the provisions of the FCDFA may merit further discussion with executive branch officials and experts.

1. Private Enforcement of Conditional Funding Statutes Is Inherently Problematic.

The contention that the private enforcement of federal conditional funding or "entitlement" programs is problematic (at least where Congress has not unmistakably authorized that mechanism) may sound heretical. But while the practice seems well-entrenched in American government, it is in fact quite exceptional—and ill-advised. It is not the practice of other federal countries, and it was not the practice of the New Deal. The U.S. Supreme Court's federalism decisions of the past two decades reflect grave doubts about the legitimacy and utility of private enforcement.

Virtually all federal systems, from Germany to India, feature intergovernmental, federal-to-state payments to implement welfare, health, environmental, and education policies. Almost always, however, the negotiation of funding levels *and the enforcement of funding conditions* are left to intergovernmental processes. The United States is virtually alone in entrusting the enforcement of intergovernmental bargains largely to third-party private litigants and to courts.

Even in the United States, broad-based private enforcement is of relatively recent vintage. The New Deal, which first implemented intergovernmental transfer payments on a large scale, thought of "entitlement programs" as entitlements *for the states*, not private beneficiaries. That understanding prevailed for the following three decades. In 1964, when Congress enacted Title VI of the Civil Rights Act, is was very careful to specify that the enforcement of the statute against recalcitrant state and local officials should be the province of the federal government, rather than private litigants and courts. The Medicaid statute, enacted in 1965, likewise lacks a private enforcement mechanism.

The creation of private entitlements and enforcement rights—sometimes under so-called "implied" private rights of action, more often under 42 U.S.C. §1983—was principally the work of the United States Supreme Court in the 1960s and 1970s. Its essential *modus operandi* is the transformation of funding conditions into private "rights" or entitlements that are judicially enforceable against state and local governments.

That activist jurisprudence reached its zenith in 1980,[6] only to be decisively rejected soon thereafter. Beginning in the mid-1980s, the Supreme Court changed course and cut back on the recently created "rights." Those curbs have taken several forms, including constitutional limitations on private parties' ability to enforce statutory entitlements by means of damages judgments against state and local governments;[7] more restrictive canons of statutory interpretation with respect to "implying" private rights of action;[8] a

[6] *Maine v. Thibotout*, 448 U.S. 1 (1980).

[7] E.g., *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimmel v. Florida Bd. Of Regents*, 528 U.S. 62 (2000).

[8] E.g., *Alexander v. Sandoval*, 532 US 275 (2001).

sharper distinction between private entitlements and programmatic funding conditions;[9] the rule that a "detailed remedial scheme" created by statute forecloses private remedies under §1983;[10] and, foremost, the so-called "clear statement" rule, which holds that courts may entertain private suits to enforce federal programs against state and local governments only when Congress has made that intention unmistakably clear in the language of the statute.[11]

All these doctrines are firmly rooted in the Court's concern for federalism. The clear statement rule in particular reflects the presumption that Congress should not lightly be presumed to have altered the federal balance to the states' disadvantage[12]—a presumption that in turn presupposes that private enforcement statutes *do* alter that balance. That premise is buttressed by substantial evidence. The private enforcement of federal conditional funding statutes compromises federalism in several ways.

(a) Private Enforcement Erodes the Recipient-Governments' Autonomy. As the Supreme Court has put it, conditional spending statutes are "in the nature of a contract."[13] State and local governments receive federal funds in exchange for performing certain functions, subject to certain conditions. To entrust the monitoring and enforcement of that bargain to third-party beneficiaries is to bias the system against the recipients.

A bargain "in the nature of a contract" presupposes that the parties have fair notice of the scope and content of the agreement. State or local governments that accept federal funds must of course abide by the funding conditions and, in the event of noncompliance, countenance the prospect of unilateral federal enforcement action, either by legal or fiscal means. (The quid pro quo is that the recipients can terminate the bargain at any time.) Third-party enforcement, however, places the bargain—more often than not, a highly complex regulatory regime—at the discretion of private litigants and federal courts. Given the vagaries of that process, no state or local government can fairly be said to have been on notice as to what its acceptance of the funds might entail. Statutes that fail to state the recipients' exposure to suit with clarity and specificity expose the states to unforeseeable liabilities.

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[9] E.g., *Gonzaga University v. Doe*, 536 U.S. 273 (2002); *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) ("[T]o seek redress through §1983, ... a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." (emphases in original)).

[10] *Middlesex County Sewage Authority v. Sea Clammers* 453 U.S. 1 (1981); *Smith v. Robinson*, 468 U.S. 992 (1984).

[11] E.g., *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984).

[12] See *Will v. Michigan State Dept. of Police*, 491 U.S. at 65 ("[I]f Congress intends to alter the 'usual balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute'" (citations omitted).

[13] *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

That risk, moreover, is entirely one-sided. Private enforcement that transforms grant conditions into irreducible entitlements changes the "mix" of funds and obligations to the recipient-governments' disadvantage. But there is (generally speaking) no recognizable legal claim to make the federal government adjust its end of the bargain correspondingly—*e.g.*, to pony up more money. For these reasons, third-party enforcement systematically erodes the position of state and local governments in the federal scheme.

(b) Private Enforcement Erodes Political Responsibility. Private enforcement greatly exacerbates the most troublesome feature of intergovernmental programs—the erosion of political responsibility and accountability at all levels.

A cottage industry of lawsuits under the Individuals With Disabilities and Education Act, for example, has created severe fiscal and disciplinary problems for local school districts.[14] No one, however, appears responsible. School administrators complain about rigid federal mandates and inadequate funding. Legal advocacy groups protest that they won their clients' entitlements fair and square in Congress, and that the enforcement of those entitlements is a matter of simple justice. Judges assert that they are only enforcing the will of the Congress. Congress, in turn, blames "activist judges" for the untoward consequences of its legislation. In short, political actors up and down the chain get to shift blame—and parents have no way of assigning responsibility.

While accountability problems can arise under any intergovernmental program, third-party enforcement greatly increases the risk by conferring substantial power and authority upon two sets of actors—advocacy groups and federal judges—that are beyond any political control. Careful studies have shown that litigation is often the linchpin of an unaccountable political process.[15]

(c) Private Enforcement Generates Program Expansions on Autopilot. Federal conditional funding statutes embody rough compromises between the statutory beneficiaries' claims, the taxpayers' concerns, and rival constituencies' claims on the same limited funds. Private enforcement systematically tilts the balance in the implementation phase toward the beneficiaries. In the legislative process, taxpayers and rival interests have a voice. In a litigation-driven process, they are sidelined. There are no plaintiffs for fiscal responsibility or a more flexible administration of grant conditions; due to plaintiff self-selection and to limitations on legally recognizable claims, the enforcement process cuts in only one direction. The plaintiffs' claims, moreover, are

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[14] See, e.g., Angela Hamilton, "Damage Control: Promoting the Goals of the Individuals with Disabilities Act by Foreclosing Compensatory Damage Awards," 2001 Utah L. Rev. 659 (2001).

[15] See, e.g., R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* (The Brookings Institution, 1994) at 141 (cycles of reform-minded litigation, legislation, and judicial interpretation of statutes culminate in "incrementalism, credit taking, and blame avoidance of a peculiar sort").

brought against government bureaucracies that have an interest in expanding their constituencies' entitlements and in shielding their programs from budgetary and political control. Those agencies often lack adequate incentives to defend against private claims. Sometimes, their conduct borders on outright collusion, a problem that is particularly pronounced in the context of consent decree litigation (see 2.(a) below).

(d) A Note on Beneficiaries. It is widely assumed that the private enforcement of grant conditions is *ipso facto* a boon to the intended statutory beneficiaries—and any restriction on that enforcement mechanism, *ipso facto* an assault on their interests. That is not so. Private enforcement undoubtedly augments the power and influence of legal advocacy groups, but it does not necessarily benefit their purported clients' interests.

Statutes of the type here at issue attempt to distribute scarce public resources to large numbers of potential beneficiaries. In that context, "rights" amount to an assertion that some claimants shall prevail over other potential beneficiaries, whose claims may be equally pressing. The distributional conflict is palpable in the protracted litigation over the consent decrees that govern Tennessee's Medicaid programs ("TennCare"). Each month of TennCare administration under the decree rules cost the State an extra $43 million—funds that would otherwise have been available for school improvements or other public purposes.[16] The longer the decrees run, the harsher future cuts will have to be, thus prompting the loss of Medicaid benefits for individuals who might otherwise have continued to receive them.

Congress has intermittently recognized the potentially destructive impact of private enforcement provisions. The one unambiguous domestic policy success of the past decade, the 1996 welfare reform, explicitly repealed any and all statutory entitlements.[17] That provision diminished the role of poverty rights groups—and benefited the poor (in the aggregate): post-enactment, welfare rolls have been cut in half. While many factors have contributed to that success, the statutory design has played a crucial role. But for the repeal of private enforcement provisions, poverty rights lawyers would have litigated welfare reform into the ground.

2. Consent Decrees Pose Special Problems.

The termination and modification provisions of the FCDFA are carefully calibrated to redress private enforcement problems in the context of consent decrees, where those problems are particularly acute. Moreover, they dovetail perfectly with the U.S. Supreme

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[16] See Senator Lamar Alexander's remarks at the AEI Conference, "Government by Consent Decree?" June 9, 2005 (transcript available at www.aei.org/events/filter.,eventID.1078/transcript.asp).

[17] 42 U.S.C. § 601(b), The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 ("This part shall not be interpreted to entitle any individual or family to assistance under any State program under this part.").

Court's federalism jurisprudence by fashioning an institutional remedy that the Court itself cannot provide.

(a) Consent Decrees Increase Federalism Risks. Opponents of the FCDFA have argued that consent decrees preserve (1) the parties' ability to "move on" without having to resolve time-consuming and needlessly divisive questions of past liability and (2) their ability to tailor flexible remedies.[18] These perceived advantages, however, correspond directly to the most serious deficiencies of consent decrees.

Without a determination of liability, far-reaching consent decrees may be entered without any finding of a legal violation, let alone a violation of the plaintiffs' rights. Consequently, *consent decrees often afford "relief" that no plaintiff could rightfully demand, that no judge could order, and that no bureaucracy could administer without the artifice of a consent decree.* This feature of consent decree litigation enormously exacerbates the dangers of eroding political accountability and of unauthorized program expansions.

State and local bureaucracies have powerful incentives to put themselves under a consent decree that will immunize their decisions and averred budgetary "needs" against legislative control and budgetary claims by rival agencies and their constituencies. Politicians have equally powerful incentives to shirk political responsibility for the administration of public programs, and "Sorry, we are under a court order" is a ready means to that end. Thus, the institutional "defense" in institutional reform litigation may range from diffidence to naked collusion with the plaintiffs.[19] Federal courts have noted this danger with striking frequency. Consent decrees, Judge Easterbrook of the U.S. Court of Appeals for the Seventh Circuit has noted, should not become "a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them."[20]

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[18] See, e.g., Testimony of the Hon. Nathaniel R. Jones, House Judiciary Committee, Subcommittee on Courts, the Internet, and Intellectual Property (June 21, 2005) (available at judiciary.house.gov/HearingTestimony.aspx?ID=294).

[19] See, e.g., Melnick, *Between the Lines* at 75-82, 142-148 ("[In some cases] named defendants have spent days preparing defenses for the suit, and nights assisting the plaintiffs to prepare their arguments." (quoting official of the Council for Exceptional Children)).

[20] *Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 341-2 (7th Cir.1987). See also *United States v. City of Miami*, 2 F.3d 1497, 1507 (11th Cir. 1993) ("[E]xperience teaches us that on some occasions public employers prefer the supervision of a federal court" to confronting political decisions); *Arthur v. Nyquist*, 712 F.2d 809, 813 (2nd Cir. 1983) (criticizing "attempts of school boards throughout the country, operating under desegregation decrees, to secure funding ostensibly ... needed to carry out court-ordered remedies); *Milliken v. Bradley*, 433 U.S. 267, 293 (1977) (Powell, J., conc.) (accusing parties of having "joined forces apparently for the purpose of extracting funds from the state treasury"); *Missouri v. Jenkins*, 495 U.S. 33, 76 (1990) (similar observation by Kennedy, J. conc.).

Once a consent decree has been entered and administered for some time, its administration becomes increasingly self-referential. The question of whether there ever was a legal basis for the decree falls by the wayside, and the remedy itself takes center stage. Paradoxically, this gives the parties an incentive to negotiate consent agreements that are "written to be violated." A clearly written consent agreement imposing manageable obligations might terminate—precisely the opposite of the result intended by the parties. In short, consent decrees in excess of the statutory scheme have a tendency toward self-perpetuation.

(b) The FCDFA Effectively Remedies the Inadequacy of Appellate Judicial Oversight. Consistent with its over-all federal jurisprudence, the Supreme Court has articulated a growing concern with the detrimental effects of consent decrees on democratic governance at the state and local level. In *Rufo v. Inmates of Suffolk County Jail*,[21] the Court relied on those considerations in formulating a more flexible standard for the modification of governmental consent decrees than the stringent, quasi-contractual standard that applies to consent decrees that obligate only private parties (for example, in antitrust law). In *Frew v. Hawkins*, the Court reiterated those concerns (albeit in *dicta*) and again exhorted lower courts to pay heed to the legitimate concerns of state and local governments.[22]

It has long been recognized, however, that Supreme Court standards and appellate judicial oversight provide no adequate means of policing consent decrees.[23] In the most extensively studied context, school desegregation, the Supreme Court has repeatedly admonished lower courts to terminate decrees once a school district has achieved unitary status, and it has supplied lower courts with guidance on the legal standards that should delimit the scope and duration of desegregation decrees. These directions are far more stringent and detailed than the generalized exhortations of *Rufo* and *Frew*. Even so, the Court's interventions have had essentially no effect on school desegregation decrees.[24]

The futility of the Court's exhortations is readily explained. While the term "consent decree" suggests a discrete, easily reviewable order, the reality is a process of interest group haggling and bureaucratic management over which even the nominally presiding district judge, let alone a reviewing appellate court, typically has very little effective on-going oversight and control. Appellate courts are placed in a position of absentee landlord, and even that is an excessively charitable description: whereas an absentee

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[21] 502 U.S. 367 (1992).

[22] 540 U.S. 431, 440 (2004).

[23] See, e.g., David Zaring, "National Rulemaking Through Trial Courts: The Big Case and Institutional Reform," 51 UCLA L. Rev. 1015, 1026 n 54 (2004) (citing legal cases and Colin S. Diver, "The Judge as Political Power-Broker: Superintending Structural Change in Public Institutions," 65 Va. L. R. 43, 91 (1971)).

[24] Wendy Parker, "The Future of School Desegregation," 94 Nw. U. L. Rev. 1157 (1999-2000).

landlord can conduct *sua sponte* inspections, appellate review requires a motion by one of the parties. The review, moreover, will typically turn on the district court's factual findings with respect to a remedial record spanning many years—in other words, on matters where the appellate courts' competence and standard of review are at their nadir.

To state the point directly: The Supreme Court has fully recognized the inherent problems of the private enforcement of federal statutes, and it has consistently worked to minimize them. Those problems are most acute in the context of consent decrees. Precisely here, however, the Court has found no way to apply the logic of its federalism decisions in an effective manner. The FCDFA would provide a targeted, salutary remedy for that defect, fully consistent with the consistent jurisprudence of the past two decades.

(c) The "Federal Right" Standard of the FCDFA is Crucial to its Effectiveness. Defendant-governments' inclination to request a modification or termination of a consent decree is a matter of incentives. The FCDFA cannot overcome all the hurdles, from bureaucratic inertia to political unpopularity, that often prevent government officials from requesting the termination of consent decrees. But the proposed reversal of the burden of proof is an important step in the right direction.

Of greater importance is the requirement that plaintiffs opposing the modification or termination of a consent decree must show that the decree is still necessary to uphold *a Federal right*. As mentioned, Supreme Court precedents distinguish between violations of federal *law* and of federal *rights*. The FCDFA standard goes to rights. It would lead to the virtually automatic dismissal of consent decrees that were never predicated on violations of rights to begin with. Put differently, *the "Federal right" standard focuses the modification or termination proceeding precisely on the point that should have been, but often was not, at the center of the entry of the consent decree.* We do not know what percentage of extant consent decrees would flunk the FCDFA standard, but my guess it that the number is substantial. Opponents of the FCDFA appear to agree with that assessment.[25]

The "Federal right" standard has further salutary implications. Opponents have charged that the ninety-day period provided for in the bill in insufficient to conduct a full trial on what is bound to be a convoluted factual record. That might be so if the defendants' compliance record over many years were the focus of the proceeding. The question of a Federal right and its violation, however, is much more focused. It is typically a legal rather than a factual inquiry, and it can usually be resolved by means of pre-trial summary judgment. That judgment, in turn, is readily reviewable by appellate courts.

(d) The FCDFA Embodies a Sensible Balance Between Democracy and Judicial Protection of Rights. The FCDFA would provide state and local governments with a means of moving for the modification or termination of consent decrees that, regardless

[25] See, e.g., Timothy Stoltzfus Jost, "Breaking the Deal," Legal Times, April 25, 2005, at 58; and Simon Lazarus, "Sunset for Consent Decrees," letter to the editor in the Washington Post, April 1, 2005, at A26.

of their original merits, appear ill-advised for one reason or another. Those reasons may include overtly political considerations. By predicating the ability to move for modification or termination on a change in administration, the FCDFA explicitly recognizes the legitimacy of "politics" in this context.

The charge that the FCDFA unjustifiable "injects" politics into the legal process is, respectfully, hard to take seriously.[26] First, it ignores the obvious fact that government officials may decide to *enter* consent decrees for political reasons, prominently including a flight from responsibility. It is unclear why politics should be legitimate at the front but not the tail end. Second, the administration of public programs and the allocation of scarce resources—the subjects of the consent decrees here at issue—are inherently political questions. That is why we have elections.

Politics, all agree, must stop at the water's edge of individuals' rights, and that is what the FCDFA provides. If a consent decree remedy is still required to uphold a Federal right, it will continue in operation. If the remedy has redressed an original rights violation, it will terminate upon the government's motion, as it should. If a consent decree never rested on a rights violation to begin with, the plaintiffs obtained several years' worth of relief to which they were not entitled. In that case, it is hard to see how a successful termination motion leaves them worse off.

Summary and Concluding Remarks

The FCDFA's sponsors have stated its purpose with admirable clarity: it is not a "court-stripping" law but rather an effort to restore political responsibility and accountability to a bureaucratic process that currently operates without effective political or, for that matter, effective judicial control. Interminable consent decrees inflict grave costs on the public fisc, on democratic government, and on the political autonomy of state and local governments—and, more than occasionally, on the intended beneficiaries of the federal statutes under which judicial consent decrees are entered.

The probable effects of the FCDFA are difficult to predict. For reasons mentioned, motions for termination are likely to be granted in a large proportion of cases, but it is an open question to what extent state and local governments would utilize the options provided under the enactment. The most closely analogous existing statute, the Prison Litigation Reform Act, appears to have had a measurable effect on the number and scope of judicial decrees.[27] However, the PLRA governs judicial injunctions as well as consent

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[26] Stoltzfus Jost, supra n. 25.

[27] Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, Title I, S 101(a) [Title VIII, S 802(a)], 110 Stat. 1321-66, codified at 18 U.S.C. S 3626. Between 1995 (the last pre-enactment year) and 2000, the number of correctional facilities under court orders dropped from 456 to 357 and, for state facilities, from 364 to 324. These seemingly modest declines mask much more substantial drops in the number of decrees imposing broad-scale, system-wide reforms (which dropped by over 60 percent) and limits on the prison population (cut almost in half). See Bureau of Justice Statistics, "Census of State and Federal Correctional Facilities, 2000" (revised 10/15/03) at 9 (available at www.ojp.usdoj.gov/bjs/pub/pdf/csfcf00.pdf).

decrees, and state and local officials may be more likely to apply for the termination of orders than for the termination of decrees to which their predecessors agreed. For that and other reasons, the consent decree "drop rate" pursuant to the FCDFA should be expected to be more modest.

The FCDFA may well have a greater effect on the number and scope of *future* consent decrees. That is because the opportunities for termination reduce the expected value of an agreement to the litigants. Some have suggested that the reduced value of consent decrees might have the perverse effect of increasing the volume and scope of judicial *injunctions*, as litigants will now feel compelled to take cases that might well settle all the way to a judicial determination of legal liability. Due to the restrictiveness of well-established legal standards to prove up a violation of privately enforceable statutory rights, however, this substitution effect is likely to be very limited and, moreover, amply compensated by the corollary disincentives to bringing suit in the absence of a violation of rights.

The sensible course of action in the face of uncertainty is to enact the FCDFA and to monitor its outcomes. I confidently predict that the evidence will show it to have been an important step in the right direction.

Testimony of Nathaniel R. Jones
Before the
Senate Judiciary Committee
Subcommittee on Administrative Oversight and the Courts
on S. 489 the Review of Federal Court Decrees
July 19, 2005

My name is Nathaniel R. Jones and I appreciate the opportunity extended to me by members of this Subcommittee to offer my views on S. 489, described as the Review of Federal Court Decrees.

The views set out in this testimony are drawn from my 22 years as a federal appellate judge during which time I sat in over 25 cases that dealt with specific aspects of consent decrees; preceded by my over 10 years as a litigator in various federal jurisdictions; and my service as assistant general counsel to the National Advisory Commission on Civil Disorders (Kerner Commission). It is that combination of experiences that draws me to the unavoidable conclusion that S. 489 is nothing less than a wrecking ball being applied to a judicial process that has been invaluable in resolving very knotty and contentious legal problems.

1. There is no problem that needs fixing—the unanimous 2004 Supreme Court decision in *Frew v. Hawkins*, which directed district courts to listen with deference to local and state officials' recommendations for terminating or modifying decrees, but commanded them to enforce these decrees where the case for change is not made, got it right. One-size-fits-all legislation like S. 489 gets it wrong. This is a case of an answer searching for a problem.

2. The *Frew* decision reinforces what courts have been doing in instances in which consent decrees have been challenged. One example is the Wayne County, Michigan case I cite in my testimony. Another is the case of *Waste Management of Ohio, Inc. vs. City of Dayton* in which the Sixth Circuit panel on which I sat reversed a District Court. The takeaway from those cases is that there are provisions already in place for modifying a consent decree when circumstances so warrant. Another significant case that demonstrates the need for flexibility by courts in dealing with consent decrees is State *of Ohio v. U.S. Department of Energy* pending since 1985 in the Southern District of Ohio. It involves a cleanup of the notorious Fernald nuclear waste site. Thus, any one familiar with the rules and procedures for obtaining a consent decree knows that there are built-in safeguards, including a fairness hearing.

3. The fundamental goal of the required fairness hearing, which must precede the approval of a settlement and the entering of a consent decree, is for a court to ascertain facts with respect to the appropriateness of a court extending its judicial power to it. It must be shown to be fair, adequate and reasonable.

4. It makes no sense to deprive courts of the option of using consent decrees, which in many areas are an enormously valuable tool for courts, parties, and for helping Congress provide for efficient implementation of laws it passes.

5. This bill will significantly raise the costs and reduce the effectiveness of all law implementation affecting state and local governments—thereby depriving citizens nationwide of benefits conferred by federal laws protecting the environment, access to health care, guarantees against discrimination based on age, gender, and disabilities, to name a few, as well as many important instances of race discrimination.

6. While the claim is that the bill will simply fix some deficiencies in the process of renewing and modifying their terms, in practice it will end, not simply mend, the use of consent decrees by federal courts in all matters affecting state and local governments. No attorney representing a plaintiff in litigation against a state or local government will advise his client to enter into a consent decree that will have virtually no lasting effect or value.

7. Long-term consent decrees are sometimes necessary to carry out the complex changes contemplated by laws Congress has enacted in areas covered by the bill. The changes are often necessary to rebuild institutions that are depriving citizens of fundamental rights.

8. S. 489 ignores the valuable lessons taught the nation following the civil disturbances of the Sixties which were documented by the Kerner Commission in its 1968 Report. That report pointed out the festering problems in areas of health, the environment, housing, education and law enforcement resulting from a default

by government at all levels in need of remediation. Consent decrees proved to be an effective tool for redressing the resulting grievances.

9. Tampering with the power of courts to oversee consent decrees, as this legislation would do, with its shifting of the burden of proof onto the shoulders of the aggrieved, stands the whole traditional notion of the responsibility for remedy on its head.

Impact on Courts and the Administration of Justice

One of the concerns I have listed is the impact of the bill on the sensible functioning of courts and the administration of justice. My concern here may not be surprising, given the fact that I spent more than 20 years on the federal Bench having been nominated by President Carter to a seat on the Court of Appeals for the 6th Circuit and confirmed by the Senate in 1979 and having served until 1995 when I took senior status and 2002 when I retired. It is not clear to me that enactment of S. 489 will place new burdens on the courts without yielding any productive results for the parties.

By providing the opportunity, indeed an invitation, to governors and officials of local government to relitigate matters that were previously regarded as settled by consent decrees, the bill would lead to many new proceedings which would come inevitably four years after a new decree and might come as soon as one year or two, if new officials were elected to replace the signatories of the previous decree. Indeed I suspect that in any jurisdiction caught in a financial bind, the temptation would be there to reduce costs by

reducing obligations under a consent decree. The monetary cost of such proceedings to the court system would be enormous. Many of the cases settled by consent decree are brought as class actions, which cost the federal district court system an average of $23,000.00 per case. When one multiplies this figure by even just 100—only a fraction of the number of consent decrees estimated to be active—once can see that this legislation would result in an additional $2 million in costs to the federal courts every time another 100 consent decrees are relitigated.

But reopened proceedings would be the least of the burdens placed on the courts. No one I have discussed this matter with believes that plaintiffs' lawyers in the great majority of cases will be willing to enter into consent decrees that can be revisited every few years with the burden left to plaintiffs to defend the decree. Most will feel that allegiance to their clients' interests will require them to go to trial. This will mean not only a burden on the courts but financial burdens on the parties—the major costs of class action litigation including attorneys' fees. In most cases, state and local governments, if they lose will wind up paying the plaintiffs' lawyers fees plus the fees of the large firms that government defendants retain to represent them in court. According to the most recent comprehensive study on the subject to date, the mean cost of attorneys' fees in class actions in 2002, adjusted for 2002 dollars, was approximately eight million dollars. Under the bill, these fees would have to be paid each time a consent decree is relitigated. When these fees are added to the cost of complying with the remedy won by the plaintiffs, it is clear that forcing litigation can only result in higher costs than settlement

by consent decree. For members of Congress who have been distressed by rising legal costs, this is a matter worth pondering long and hard.

It should be added that the workload will further limit access to a court system that has already been forced to cut its services drastically. Just a few weeks ago, representatives of the federal judiciary testified before a House Appropriations subcommittee that the workload of the courts had increased by 18% between FY 2001 and FY 2005, while funded staffing levels over the same period of time decreased by 1%. Moreover, in FY 2004, the judiciary lost more than 6% of its workforce due to funding constraints, resulting in fewer clerks' office hours in many courthouses for the public to file papers and seek information. And as additional testimony before another House subcommittee indicated, the judiciary's current staffing level is 8% lower than it was in FY 2003. Even though the workload is expected to increase even further as a result of the recently enacted Class Action Fairness Act, the judiciary will be operating approximately at only its FY 2001 staffing levels if it receives the FY 2006 staff funding it has requested.

Under such circumstances, defendants who have had their day in court, and who voluntarily settled their case, ought not be permitted to routinely tie up the courts at the expense of other litigants seeking justice. To permit such repetitive reexamination of consent decrees—especially when the violations persist or the remedies agreed upon have not been carried out—is a far more costly version of a playground "do-over" that fails to serve the public interest in the efficient administration of justice and protection of legal and constitutional rights.

Impact on Substantive Rights

Before I was appointed to the bench I served as General Counsel of the NAACP where I often represented children in court in civil rights cases. For many years, civil rights cases were fought to the bitter end in federal court rooms, but about three decades ago partially in response to the recommendations of the Kerner Commission, sensible public officials and private advocates decided that often it would be better to settle than fight. As a result we have had some noteworthy consent decrees that have greatly broadened opportunities for children.

One prime example is a suit filed late in 1980 by the NAACP and a class of plaintiffs against the state of Missouri and 22 suburban school districts. Just before trials was scheduled to begin in 1983 the parties entered into a settlement agreement calling for desegregation of the suburban districts, support for magnet schools in St. Louis and a program of educational improvements in St. Louis. The agreement was approved as a consent decree by the District Court and with minor modifications by the Court of Appeals. Certiorari was denied. In 1996, the State which paid the bulk of the expenses under the decree, filed a motion to terminate the decree on grounds that it had achieved "unitary status" (i.e., satisfied all its desegregation obligations). After a trial, a conciliator was appointed—Dr. William Danforth, then Chancellor of Washington University of St. Louis. The parties negotiated a revised consent decree that was contingent on replacing the court-ordered funds with funds approved by the state legislature. The legislature, working on bipartisan basis, approved the funding in 1999

and a new consent decree was negotiated the following year. Under the new decree plaintiffs may go back to court if there is a violation. That decree is still in effect.

The result has been the largest voluntary interdistrict desegregation program in the nation. Approximately 10,000 African American students from St. Louis attend schools each year in the suburban districts and that has been the case (with some variation in the numbers since 1984). About 3 in every 4 students are eligible for free and reduced price lunch. Yet they graduate high school and go on to college at about 2 to 3 times the rate of students in inner city schools. Additional opportunities have been made available in the city's magnets and as a result of the school improvement program.

None of this would have been possible without giving the consent decree process time to work. Ultimately the process brought public approval and financial and other types of support from public officials that required time to develop.

One major illustration of the importance of consent decrees in these areas is:

A case reported on Friday, June 3, in which the Department of Justice and the Environmental Protection Agency, along with Wayne County and nearby jurisdiction have asked the district court to terminate and 11-year-old consent decree. The decree required the County to upgrade sewer systems that caused untreated sewage to be dumped into drains and eventually the Detroit River to prevent it from backing up into basements. The centerpiece of the improvements is a massive new sewer tunnel costing

$295 million. Communities say they will spend $99 million more and the county is seeking approval to issue $20 million in bonds as part of the plan. The parties told the court that "the objectives of the decree have been met."

This case shows the scope of laws that would be damaged and how badly; why consent decrees sometimes must last much more than one to four years; why the consent decree option makes more sense than making litigated court orders the exclusive option; and that courts and parties to consent decrees know how to end them when it is time.

A second major example is the *Gautreaux* public housing litigation. This was a case begun in the late 60s by residents of public housing who had been subjected to rigid racial segregation. In 1981 the parties including the United States entered into a consent decree that was dismissed 1988. The results, documented in a book by Leonard Rubinowitz and James Rosenbaum, entitled Crossing the Class and Color Lines, have been hard won but impressive.

More than 7,500 public housing families found decent subsidized housing in desegregated areas, the great majority of them in the suburbs. The big winners were children. As experts Margery Turner Austin and Dolores Acevedo–Garcia write in the January/February issue of Poverty and Race, "the Gautreaux research showed that children whose families moved from predominantly black neighborhoods of Chicago to integrated neighborhoods in the suburbs were substantially more likely to succeed in school and go on to college or jobs." They also note that the success of Gautreaux helped

launch efforts beginning in the mid-90s in 33 metropolitan areas to help low income families move from poor and predominantly minority neighborhoods to more affluent and racially integrated communities.

In both the St. Louis and Chicago cases, the costs of providing decent schools and decent housing, covered by the consent decrees have been more than repaid by the taxes paid by these youngsters as productive citizens and by avoiding the costs of incarceration and other manifestations of dysfunctional communities if nothing had been done to provide opportunity.

Now I recognize that under S. 489, some types of racial discrimination cases would be exempted from the possibility of frequent relitigation. But if you look at a list of notable consent decrees over recent years, you will find that several involve the rights of abused or neglected children, or homeless children, or foster children to decent shelter or other opportunities. These would not be exempted from the proposed law. Since I see no material difference between these cases and the rights of children in racial discrimination cases, you will forgive me if I do not feel secure that the exemption would be a lasting one.

Beyond that, many of the important protections that have been achieved of environment rights or of access to health care or of fair treatment in state institutions have been gained through the vehicle of consent decrees.

I must note the civil rights exemption in S. 489 is far from complete. In the race area it has no application to voting rights cases or to the great majority of housing cases. Nor would the bill protect people who are discriminated against because of their age, or gender, or condition of disability or because of their national origin. And, as I have noted, there is no principled reason for allowing some victims of rights denials the ability to negotiate consent decrees while denying it to others. These are not problems that can be fixed.

It should be noted that S. 489 contains a provision that would exempt school desegregation consent decrees from the restrictive provisions of the bill. The provision is narrower than that contained in H.R. 1229 which would add an exemption for consent decrees in suits brought under Titles VI and VII of the Civil Rights Act of 1964.

Neither of these provisions would prevent severe harm from being done to hundreds of thousands of persons who are protected from discrimination under federal civil rights laws. In the race area, even the broader House exemption has no application to voting rights cases or to the great majority of housing cases. Nor would there be protection for victims of employment discrimination whose rights do not arise under Title VII but under other statutes. Nor would either bill protect people who are discriminated because of age or gender or conditions of disability or because of national origin.

It must be understood that in the area of discrimination, barriers to opportunity often have been maintained over many years. They are not effectively eliminated overnight but only through the patient implementation of consent decrees designed to create a level playing field.

The problems I have identified cannot be cured by broadening the exemption. There is no principled reason for allowing some victims of rights denials the ability to negotiate stable consent decrees while denying the right to others. I believe the bill is hopelessly flawed.

Conclusion

Over the years I served on the bench, I have observed an increasing desire among participants in the judicial system as well as among citizens, to find ways to resolve controversies without the need for the hand-to-hand combat of litigation which often inflicts pain and bitterness.

Among the tools of alternative dispute resolution, none has served better than consent decrees, particularly where major laws and public policies and large numbers of people are involved.

The courts have built a great deal of flexibility into the process. The fairness hearings prescribed under the Federal Rules of Civil Procedure allow the public to have its say and the judge to weigh competing interests before approving a settlement. The recent *Frew*

decision provides the necessary flexibility to change a decree where circumstances have changed.

This is case where there is no evidence of a disease and where the cure is much worse than any of the problems it purports to address. I urge Congress to reject this legislation.

TESTIMONY OF TIMOTHY STOLTZFUS JOST

SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

A REVIEW OF FEDERAL CONSENT DECREES

JULY 19, 2005

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My name is Timothy Stoltzfus Jost and I hold the Robert L. Willett Family professorship at the Washington and Lee University College of Law. I have published approximately one hundred scholarly books, articles, and book chapters, primarily concerning health law, policy, and comparative health law and policy. I am one of the authors of Health Law, the leading health law teaching book in the United States for nearly two decades, now in its fifth edition. I also wrote a number of years ago an article on modification of consent decrees published in the Texas Law Review, analyzing the law in this area, which has been cited by the Supreme Court and is still often cited in law review articles analyzing this issue. Most importantly for our purposes today, I have studied the Medicaid program for three of the four decades of its existence and wrote a book published in 2004 by Oxford University Press which offers a comprehensive treatment of rights in federal health care programs, including Medicaid, and the judicial enforcement of those rights. Much of what I have to say is about Medicaid.

We cannot begin to imagine today the far reaching effects that S. 489 would have if enacted. It would vitiate the enforcement of four decades of federal legislation, including the voting rights act, environmental protection laws, the Americans with Disabilities Act, the nursing home reform act of 1986, and many other important laws that this body has enacted. It would not only block private parties from enforcing these laws, but also would tie the hands of the Department of Justice by largely eliminating consent decrees as a means of settling disputes.

S. 489 results from two impetuses. The first is the Sandler and Schoenbrod book, *Democracy by Decree*, which seems to have had a profound effect on Senator Alexander, the principal sponsor of this legislation. The second is the situation in Senator Alexander's home state of Tennessee, where Governor Bredesen is chafing under the constraints imposed by a number of Medicaid consent decrees that he agreed to a couple of years ago. I will address each of these issues, and then turn to the reasons why this piece of legislation is both impractical and bad public policy.

I have read the Sandler and Schoenbrod book, and like many legal academics who have read it, see it as a strong statement of political preference. It is clear that the authors do not have much use for the federal courts, which they portray as incessantly and illegitimately keeping state and local administrators from doing their jobs through the use of consent decrees. The authors do not simply have a problem with the federal courts, however. Even before they get to consent decrees, they begin their book by criticizing Congress for passing laws creating what they derisively dismiss as "soft rights." Within this category they include all of the landmark statutes passed by this body in the past forty years century that call on states and local governments, as well as private institutions, to make the complex and difficult changes necessary to assure to all Americans clean air, safe drinking water, basic medical care, freedom from invidious discrimination on the grounds of race, religion, gender, or individual disabilities. The hobbling of the courts in their critical role in implementing these rights, which Sandler and Schoenbrod seem to call for, would inevitably have the effect of undermining these laws themselves. Regrettably, that is precisely what S. 489 would do, if enacted.

In the end, the fundamental problem that Sandler and Schoenbrod have with consent decrees seems to be twofold. First, consent decrees sometimes don't work out very well. They are messy, expensive, can take a long time to get wrapped up, and don't always achieve their goals. This is, of course, true with any effort to implement a complex government program, and any student of federal, state or local government can tell you. Indeed, as Congressman Blunt, one of the House sponsors of this legislation, admitted at a recent American Enterprise Institute Seminar on this legislation, "I really think this is more about inactive public officials than about overly active judges." The real problem is not with consent decrees, but rather with elected and appointed officials who hide behind consent decrees and dodge their responsibility to comply with federal law, rather than forthrightly trying to carry out the laws those decrees enforce.. The problem of irresponsible government officials, however, will not be solved, however, by getting rid of consent decrees. It will in all likelihood rather get worse.

Second, Schoenbrod and Sandler argue, as already noted, that consent decrees are often used to implement "soft rights." In an earlier book, Professor Schoenbrod also challenged the legitimacy of the federal agencies and their role in implementing federal rights. The fundamental problem of Sandler and Schoenbrod, that is to say, is with our national government, with the laws it has adopted, and with the messiness of implementing those laws. There are many in this country who no doubt believe that we would be better off without a national government, but it seems to me that this is hardly a basis on which the Senate should be making public policy.

The second driving factor behind S. 489 law is the situation that has developed with the Medicaid program in Tennessee. If you read Senator Alexander's article advocating the adoption of S. 489 in the *Legal Times* this becomes crystal clear. This driving concern about Medicaid is ironic in terms of Sandler and Schoenbrod's concerns, because the word Medicaid does not appear in the excellent index of their book, and as

best I can tell they only mention the program once. This makes sense, because the main concern of Sandler and Schoenbrod seems to be with unfunded mandates, and Medicaid is clearly a funded mandate.

This year the federal government will spend around 180 billion dollars of federal tax dollars on Medicaid. In a year or two we will hit the $200 billion level. The federal matching rate for Tennessee this year is 64.81 percent, which is to say that for every state dollar Tennessee spends on Medicaid, the federal government spends about two. In fact, although Tennessee is forty-ninth among the fifty states in the amount of Medicaid money it spends per enrollee on Medicaid, it is ninth among the states in total federal dollars spent on Medicaid. The federal government spent over $5.2 billion in Tennessee in FY 2004.

Though Medicaid gives massive sums of federal money to the states, the program in fact gives the states a great deal of flexibility. No state need participate in Medicaid if it doesn't choose to, and in fact, as Senator Kyl knows, Arizona for many years stayed out of the program.. States that do choose to participate need only cover a short list of services for a modest number of categories of recipients, and have the flexibility to choose to cover many other services or populations. In fact fewer than forty percent of Medicaid dollars are spent for mandatory services for mandatory eligibility groups. The rights at issue in the TennCare consent decrees that provoked this legislation illustrates the minimal nature of the actual rights Medicaid guarantees to its recipients, such as the right to not be terminated from the program without a hearing or the right to provision of screening services for children. Further, the federal government has been very generous in granting waivers to state Medicaid programs in recent years that excuse the states from compliance with certain requirements of federal Medicaid law. Each of the senators on this subcommittee comes from a state which is operating part of its Medicaid program under federal waiver authority. The states, that is to say, are not in fact unduly constrained by the federal Medicaid law, and CMS, which administers the program, has been very open to letting the states experiment with innovative ideas for making the program better.

TennCare is currently bound by four consent decrees. One of these, which enforces the statutory right of Medicaid recipients to appeal adverse decisions on access to service has been in place since 1979. It has been closed several times, but each time was reopened because the state has failed to comply with the terms of the decree and of the statute. The other three decrees are much more recent, from 1998 and 2001, and deal with rights of children to medical care, eligibility appeals, and home health care. In 2003 current governor Bredesen personally renegotiated all of these decrees. In that year he stated at a news conference that the negotiated changes "put the state back in the driver's seat" and that the decree was "a good solid step to sorting out the problems with TennCare." Indeed, the former director of TennCare testified in court earlier this month that Governor Bredesen was heavily involved in renegotiating the consent decrees in 2003, that the state got most of what it wanted in those negotiations, and that the consent

decree is not to blame for TennCare's mushrooming costs. Now Governor Bredesen has decided, however, that it is no longer convenient to comply with the decrees he helped draft, and this legislation has been introduced in part to free him from their constraints.

How should Congress respond to the request of state governors to be freed from the legal constraints that now come with federal Medicaid dollars? One possibility would be to turn the Medicaid program into a complete handout. Just turn the money over to the states and ask for nothing in return. This seems to me to be complete breach of trust with federal taxpayers. Another approach would be tell the states how to use the money and then simply to trust them to do the right thing. This seems in general to be the attitude of the Center for Medicare and Medicaid Services, which has never, to my knowledge, in the forty year history of the program used the power granted to it under 42 U.S.C. § 1396c to terminate funding for a state program that failed to comply with federal recipient's rights requirements. Indeed, within the past month the Government Accountability Office has issued three reports highly critical of the failure of CMS to address state misuse of federal Medicaid funds and to help the states safeguard the program from fraud. Senator Grassley knows of these reports, requested by his Finance Committee and directed to him, and indeed last week Senator Grassley sent a letter to each of the fifty states asking them to report on improper use of federal Medicaid funds. State attempts to maximize access to federal funds can be expected, but if CMS is not even capable of preventing the states from inappropriately claiming billions of federal taxpayer dollars, can we realistically rely on CMS by itself, without court enforcement of the laws, to ensure that states implement specific requirements enacted by Congress to guarantee the rights of individual Medicaid recipients to basic medical care?

If CMS is not going to ensure that the nearly $200 billion of federal money we are spending in fact goes to help recipients, this task is inevitably left to the courts. This is in fact one of the reasons why we have federal courts–to protect the intended beneficiaries of federal law when those laws are violated. The Eleventh Amendment forbids the courts from entering damage awards against the states, so if the courts are to act, they will need to act through injunctive relief, either on the basis of consent or on the basis of fully litigated orders.

It is vital to understand that the proposed legislation only limits the effectiveness of consent decrees, not of litigated decrees. Today in complex litigation courts act most often through consent decrees. Consent decrees save our country vast sums in legal costs, as they cut dramatically the need for discovery, pretrial preparation, and trial time. They save the resources of the courts, but also the time and money of the states and also of the plaintiffs, whose costs are ultimately covered by the states when they prevail. Early settlement further saves the parties from the prolonged uncertainty of litigation, and assures that rights are protected on a timely basis. Congress and the Supreme Court have long encouraged the settlement of disputes because of the efficiency of settlement.

Perhaps even more importantly, consent decrees allow both parties, including the state, to shape the decision of the court. This is illustrated by the joint memorandum signed by Tennessee's Deputy Attorney General two years ago when the Tenncare decrees were renegotiated by Governor Bredesen. In that document, Tennessee stated that the modifications were designed "to enable the state to achieve significant savings" and were "materially advancing the state's ability to stabilize and preserve the Tenncare program."

The Joint Memorandum also recognized that the modifications were the result of "vigorous, arm's length negotiations" and involved "substantial concessions" from the plaintiffs. This is always true of negotiated agreements, which by definition involve give and take by both sides. Congress must be hesitant to modify retrospectively the terms of consent decrees, as any modification of a consent decree is likely to alter the balance struck by the parties; to restore to one party advantages earlier forgone and deprive the other of benefits it may have sacrificed much to gain.

If S. 489 is enacted, no responsible plaintiff's attorney will ever again enter into a consent decree with a state or local government on behalf of his or her client. Most cases now settled through consent decrees would have to be litigated to judgment if the plaintiffs wanted to make sure that the decree was ultimately enforceable. Not only would the issue of liability have to be litigated, so would the question of remedy. Currently when courts find liability they often ask the parties to propose remedies. If this happened under the proposed legislation, any remedies suggested by the state could be treated as consent decrees, from which the state could later walk away. The plaintiff could not take this chance, and would have to insist that the court impose a remedy itself.

The bill limits the duration of consent decrees to four years or until the end of the term of the governor or local official who agreed to the consent decree. At the end of that time, the state or local government can move to modify or terminate the decree without offering any reason whatsoever. The plaintiff would then have to prove that continuation of the consent decree was necessary "to uphold a Federal right," a technical term that could leave out many claims under federal laws. The plaintiff, that is, would have to litigate the case all over again, perhaps under a more onerous standard. If the court failed to act on the motion within ninety days, the consent decree would be terminated until the court decided the motion. No one, including the Judicial Conference, which recently communicated with the Committee on this matter, seriously thinks that ninety days is adequate to essentially reprove the original case

As a practical matter this would mean that no consent decree against a state government could be expected to last longer than four years. The vast majority would be even shorter in duration, as most would be entered at some point after the beginning of the term of office of a sitting official. States would be allowed to walk away from their contractual commitments simply by electing a new governor, cities by electing a new

mayor. One can only imagine what the provision would mean for Counties which are often headed by a Board of Supervisors with staggered terms..

But Consent decrees often address problems and programs that cannot be changed overnight. Many, therefore, last for considerable periods of time. For example, a case New Orleans settled with the Justice Department in 1998 to resolve a Clean Water Act lawsuit by modernizing an antiquated sewage collection system required a long term consent decree, because you can't build a new sewage collection system overnight. The time limits imposed by S. 489 are in many cases impractical and even unworkable.

But equally as important, the time limits would simply signal state and local governments that if they can just resist compliance for the term of the decree, they will be off the hook. However one feels about the war in Iraq, one can understand the President's reluctance to accept a rigid time limit for withdrawal of American troops as it would simply let the insurgents know how long they will have to wait for victory. Similarly a time limit here would simply let defendants know how long they had to stall compliance if they were inclined to do so..

Time limits are also unnecessary. Consent decrees in class action cases currently cannot be entered until a judge holds a "fairness hearing" to assure that they are consistent with the public interest. Any consent decree can be modified or terminated whenever a party shows that "it is no longer equitable" that the decree be enforced as agreed. F.R.C.P. Rule 60(b)(5). Consent decrees are in fact often modified and terminated as conditions change. As the Supreme Court declared unanimously last year in *Frew v. Hawkins*:

> [D]istrict courts should apply a "flexible standard" to the modification of consent decrees when a significant change in facts or law warrants their amendment... If the State establishes reason to modify the decree, the court should make the necessary changes; where it has not done so, however, the decree should be enforced according to its terms.

Tennessee may now believe that it is in compliance with the Medicaid law and with the agreements it has made. If this is true, it simply needs to move to modify or terminate the decrees that bind it, as indeed it has done. It may also believe that particular judicial orders enforcing these consent decrees are incorrect. If so, it can appeal. Indeed, on April 12, the Sixth Circuit reversed one of the court orders mentioned by Senator Alexander in his column that had blocked implementation of changes in the Medicaid program, deciding that the order exceeded the terms of the consent decree. But Tennessee should not simply be allowed to take over five billion federal taxpayer dollars and refuse to comply with the requirements imposed by Title XIX of the Social Security Act, enacted by this body. It should also not be permitted to simply walk away from agreements that it has negotiated with recipients for the implementation of these laws.

S. 489 poses a serious threat to the authority of the courts, to the power of Congress, and to our federal democracy. It would undermine the key role that federal courts play in protecting the public's rights under the Constitution and under federal law. It threatens the enforceability of dozens of programs enacted by Congress. It is bad public policy and should be rejected by the Senate.

Testimony of Alabama Attorney General Troy King
Before the Senate Administrative Oversight
and the Courts Subcommittee
The Federal Consent Decree Fairness Act
July 19, 2005

My name is Troy King and I am the Attorney General for the State of Alabama. Thank you for inviting me to address this subcommittee today and to share my state's experiences with consent decrees and my support of S. 489/H.R. 1229 as a vehicle to address some of the abuses that accompany many consent decrees.

The Federal Consent Decree Fairness Act will provide a much-needed change in the law regarding consent decrees. The Act will make it easier for state governments to end oppressive consent decrees, by taking the policy-making discretion away from federal judges and returning it to those who have been elected or appointed to make those decisions.

An example of one oppressive, out-of-control consent decree in my state stems from *Reynolds v. McInnes*.[1] In *Reynolds,* African American employees and former employees of the Alabama Department of Transportation commenced a racial discrimination class action against the Department of Transportation.[2] Governor Jim Folsom, Jr. entered into a consent decree in March of 1994 that was originally set to expire in December of 2000. To date, over four-dozen appeals and petitions have been filed and the consent decree remains in effect. The Eleventh Circuit Court of Appeals recently addressed the obscene amount of public funds that have been spent on the *Reynolds* consent decree, stating:

[1] Reynolds v. McInnes, 338 F.3d 1201 (2003).
[2] *Id.*

> [T]his unwieldy litigation has been afflicting the judicial system and draining huge amounts of public funds from the State of Alabama for much too long. The amounts are staggering. Fifty million dollars in public funds has been spent on attorney's fees alone in the case . . . bringing the total litigation costs to the State of Alabama to more than $112 million, and that cost is growing at a rate of around *$500,000 each and every month.*[3]

With these funds, every mile of interstate in Alabama could have been resurfaced twice. Instead, under the *Reynolds* consent decree, plaintiffs' counsel was paid for every minute they spent on this case, without regard to whether they were pursuing a legitimate objective or even whether they prevailed. The lead plaintiff in this case, Johnny Reynolds died shortly after receiving long awaited settlement proceeds. His attorneys, on the other hand, have grown rich, and the people of Alabama have grown more disillusioned with the system that could allow this to occur. The court addressed the long-term effect of this agreement stating:

> The promise of fees for time spent without regard to the outcome of a motion or appeal in a case that apparently has endless potential for dispute may be the kerosene that has fueled the litigation fires, which have raged out of control in this case.[4]

Awarding plaintiffs' attorneys legal fees for every minute they spent on this case, regardless of whether their claims were frivolous, is an example of a contract provision that successive administrations have been helpless to alter as its unsoundness became evident to even the most detached and objective observer. The Federal Consent Decree Fairness Act will provide a vehicle for modifying provisions, such as this one, that are later found to be unworkable or unsound after they are approved.

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[3] *Id.* at 1217.
[4] *Id.* at 1220.

Another example of the difficulties that exist in modifying a current provision of a consent decree can be found in the *Reynolds* case. The *Reynolds* consent decree contained a no-overlap provision that governed the measurement of candidates' job qualifications.

Despite a good faith effort by both parties to comply with the provision, Defendants were forced to pay millions in fines as the plaintiffs blocked, litigated, and otherwise frustrated compliance being achieved. After the Defendants had paid over $4.5 million in sanctions for noncompliance, the court agreed that the no-overlap provision was unworkable and removed the provision from the consent decree. There has been no refund of the monies the state was required to expend to achieve this result. This is a sobering example of what can happen when control of state agencies is taken away from elected officials and placed in the hands of an unaccountable Federal Judiciary.

The case of *RC v. Walley* is another example of the self-perpetuating consent decree. In *RC*, the Plaintiff filed a complaint alleging that he received inadequate care from the Department of Human Resources. The consent decree was entered in June of 1991 and is still being litigated today, despite a recommendation from the court monitor that DHR was in "substantial compliance" with the consent decree.

Thus far, the State of Alabama has committed over $5.3 million in litigation and expenses in this case. Today, the judge is continuing to review the performance of counties that have already been found to be in compliance with the decree, but are alleged to be backsliding, though no provision of the consent decree allows him to do so.

Wyatt v. Stickney was another landmark Alabama case that was litigated for over thirty years. The original consent decree was entered into in the mid-1980s and the case

finally ended in December of 2004. As part of the consent decree, both sides agreed that the Alabama Department of Mental Health and Mental Retardation would have its hospitals accredited and certified in order to meet certain court-approved standards. However, because the standards of clinical development continued to evolve, the Defendants were expected to meet a continually evolving standard. Thus the consent decree perpetually evolved along with the standards as proposed by the plaintiffs.

Even the United States Supreme Court has recognized the problem with consent decrees. In *Frew v. Hawkins*[5] the Court stated:

> Enforcement of consent decrees can undermine the sovereign interests and accountability of state governments. Although officials consent to the entry of decrees in the first place, they tie not only their own hands, but those of their successors in office into the indefinite future . . . if not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees . . . may improperly deprive future officials of their designated legislative and executive powers and lead to federal court oversight of state programs for long periods of time even absent an ongoing violation of federal law.[6]

To be sure, consent decrees are an important legal tool for the states as well as those who have been injured. Governments have important duties to those who depend upon them. When they fail to act responsibly, those injured should have recourse.

However, consent decrees too often usurp the power of constitutionally elected officials and place the public policy decision into the hands of an appointed federal judge. Consent decrees become the bureaucracy's avenue to achieve, by court ordered fiat, what they cannot achieve in the legislature. Federal court oversight "should be as narrow and short-lived as fulfilling the duty to eradicate discrimination allows."[7]

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[5] Frew v. Hawkins, 540 U.S. 431 (2004).
[6] *Frew*, 540 U.S. at 441.
[7] *Reynolds*, 338 F.3d at 1219.

Federal courts should not run important functions of state government for decades at a time. In Alabama, Federal courts have been micromanaging for over twenty years. This is a problem that Congress should address. I call on it to do so.

Dear Ms. Fleming:

Please accept the following statement for inclusion in the record of the July 19, 2005 hearing.

At the conclusion of the July 19 hearing, Attorney General King criticized the courts and plaintiffs' attorneys handling two consent decree matters. The following is offered to provide a balanced record with respect to these two cases.

First, Attorney General King made the following statement about what appears to be the case of *RC v. Walley*, 2005 WL 1138739 (M.D.Ala. 2005):

"We have instances in Alabama, for example, in a case involving the delivery of child welfare services, where we agreed to come into compliance with certain standards. There is a court monitor in place whose job it is to make sure that the State of Alabama does that. We have now brought all 67 counties into compliance. We have asked the judge on the recommendation of the monitor he selected to release the State of Alabama from that consent decree. And, in fact, our experience is that now they are revisiting the counties again. They are doing something that falls completely outside the scope of the consent decree that the State of Alabama is a party to. And in many regards, the State of Alabama is helpless to do anything about it."

He then went on to say, "because what we find in this case of which I speak right now, what we find is a judge who holds court, he listens to the legal arguments, then he opens it up to everybody in the room, and he says, "Tell me, do you have enough money to run your department? Do I need to order more money to be spent?"

This appears to be a one-sided account of the *R.C.* case. As appears from the reported decision to which Attorney General King appears to object, the court monitor did indeed conclude that the 67 counties had been converted and that the consent decree ought to be terminated, and the judge rejected the court monitor's recommendation. But the judge made his decision after conducting a careful review of the monitor's report, and taking into account plaintiff's expert's analysis of the report. Moreover, after identifying both specific respects in which the state had come into compliance with the decree and specific respects in which it had fallen short, the court invited the state to file a

performance report *on August 4, 2005*, and at that time, if appropriate, to renew its motion to terminate the decree.

First, the judge identified a number of problems with the monitor's methodologies, including the sample population sizes, and the fact that at the time the monitor issued the report, only a limited number of reviews had been conducted. The court concluded that the data was too unreliable to sustain defendant's burden of substantial compliance. Second, from the monitor's testimony and report, the judge found evidence of regression and inability to maintain levels of substantial compliance after counties had been declared in converted. The monitor concluded that counties had the capacity to substantially comply with the decree, not that the counties were actually complying.

The court was unable to reconcile the monitor's recommendation with the findings in the report. The court found

"that the record is devoid of sufficient evidence which demonstrates that, for any period of time, converted counties are remaining in substantial compliance with the requirements of the consent decree...At best, there remains uncertainty as to whether Defendant will be able to remain in substantial compliance once the court terminates the injunction in this case."

Understandably, Attorney General King was disappointed by the court's rejection of the monitor's findings and recommendation. But the judge appears to have been acting precisely how Professors Schoebrod and Sandler allege judges too rarely do in consent decree cases – carefully and independently supervising the process and reaching his own decisions, rather than abdicating control in favor of a "controlling group" of attorneys, officials, plaintiffs, and special masters. In short, the judge seems to have been doing his job. Furthermore, as noted above, contrary to the impression left by Mr. King's oral statement, the court has given his client encouragement to renew its motion to terminate the decree as early as next week.

Second, Attorney General King was critical of the court and plaintiffs' attorneys in a case involving Alabama's mental health system, which appears to be *Wyatt v. Stickney*, 219 F.R.D. 529 (M.D.Ala. 2004). He testified:

"We have a consent decree to operate the Department of Mental Health in my State. We agreed to meet certain clinical standards--clinical standards that continue to evolve, that continue to change, and the Federal courts continue to require the State of Alabama to alter its ability--its attempts to come into compliance with new and higher standards. We are not being asked to comply with the bargain that we struck. We are being asked to comply with a bargain that continues to be changed by the plaintiffs and by Federal judges and by court monitors and that the State is a helpless victim of."

It is difficult to reconcile Attorney General King's testimony with the most recent

decision in the case. First, as acknowledged by Mr. King's own written statement (pages 3-4), District Judge Myron Thompson *terminated* the consent decree on January 13, 2004. Insofar as the Attorney General's oral testimony complains of "continu[ing] to be charged by the plaintiffs and Federal judges" with onerous requirements, the testimony is at least 1 ½ years out of date.

Second, King's complaint mentions neither the appalling circumstances that led the initial filing of this lawsuit, nor to the evidently great progress made pursuant to the 33 year decree, issued by the acclaimed Judge Frank M. Johnson, Jr. In his 2004 decision terminating the decree, Judge Thompson noted that in one of the mental health facilities involved, to which many residents had been civilly committed involuntarily, without constitutional due process protections, conditions were described by a journalist in the following terms:

"Human feces were caked on the toilets and walls, urine saturated the aging oak floors, many beds lacked linen, some patients slept on floors . . . Most of the patients . . . were highly tranquilized and had not been bathed in days. All appeared tolack any semblance of treatment. The stench was almost unbearable."

Given these circumstances, it seems neither mysterious nor inappropriate that the judges overseeing this case were concerned about the level of Alabama's budgeting to provide minimally humane treatment at its mental health facilities.

Third, Attorney General King does not note – as the record of the case demonstrates – that this case provides compelling evidence of the need for long-term consent decrees, of precisely the sort that S. 489 is intended to and will extinguish. Nor does the Attorney General refer to the historical significance of the decree: According to Judge Thompson's 2004 opinion terminating the decree, Judge Johnson's original order "has come to be known among mental-health professionals as a "bill of rights for patients;" the principles were "echoed" in the Americans with Disabilities Act and the Supreme Court's landmark *Olmstead* decision, and the "nationwide protection and advocacy system is a 'direct decedent' of the Human Rights Committees Judge Johnson appointed in the Wyatt case." Judge Thompson praised the governor of Alabama and state officials for their reform efforts that enabled him to end the decree.

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Statement of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
July 19, 2005

It has been a difficult year for the federal judiciary. In my 30 years in the Senate I have yet to see a more hostile Congress when it comes to the topic of the Third Branch. When I first arrived in Washington I petitioned to be a part of this committee because of my time as a county prosecutor and my belief in the vital role a strong, independent judiciary plays in our democracy. Yet, in the last year, we have seen attack after attack meant to weaken the judiciary as an institution or to threaten individual judges for their official actions. Whether it is legislation that strips all federal jurisdiction from cases involving certain constitutional questions, the baseless calls for judicial impeachment, or verbal attacks on individual judges and justices, unfortunately it seems the hits just keep on coming. The latest example arrives in the form of this bill.

Consent decrees have done a lot of good in this country, providing much needed compromise and help in resolving several injustices that have plagued our society. These controversies include voting rights, environmental protection, the right to an equal education or medical assistance to the poor – all of which have been remedied by consent decrees. This mechanism for settlement tool has been used responsibly to strike a difficult but entirely appropriate balance. This bill seeks to change that, to undermine that, by essentially stripping the courts of a crucial means to ensure justice.

Currently, consent decrees are entered into willingly by two parties approved by the presiding federal judge and then monitored by that judge. A safety valve in the form of special fairness hearings and the right to appeal is preserved by federal law and serves to address any unforeseen complications that arise because of the decree.

Despite this effective mechanism for the resolution of claims, my colleagues on the other side of the aisle deem it necessary to unravel these agreements by placing an artificial timeline on all consent decrees, regardless of their purpose, scope or size. This timeline consists of either a four-year expiration date or when the public official that signed the consent decree leaves office, whichever occurs first. What troubles me most about this provision is its short-sightedness. If this bill becomes law it is certain to create a morass of costly litigation that will bog down the judiciary and state and local governments for years, if not indefinitely.

Why would any competent attorney advise his or her client to accept a consent decree? Why would victims settle, if four years later the issue will rise again? The answer is they will not settle if this bill was in effect. Thus, every time a consent decree could be entered to solve a problem, it will be impractical. Every time costly litigation could be avoided, the courts will be effectively drained of precious time, money and efficiency because consent decrees will be rendered virtually meaningless.

Beyond the explosion of litigation costs this bill will create there is a 90-day expedited ruling period. That is, if judges do not respond to a motion to void a consent decree within 90 days the consent decree will automatically become void until a ruling is entered.

The Judicial Conference of the United States wrote me a letter protesting this timeline because of its ignorance of reality in the federal court system. The longstanding position of the Judicial Conference, the Third Branch's administrative body, opposes statutory imposition of litigation priorities, expediting requirements, or time limitation rules in specified cases. I think this is an entirely reasonable position given the important

work the judiciary performs. Their letter points out that: "Briefing and evidentiary proceedings alone, without regard to the time needed by the court to decide the motion, would exceed the time frame specified in the legislation."

Therefore, not only does this bill burden the courts with increased litigation, it then seeks to impose rush decisions on complex issues; issues that have far reaching implications for all Americans. That is no way for the courts to operate.

I urge my colleagues to look at this issue carefully and recognize that this bill strips the courts of much needed effectiveness, in a "go for broke" style that subverts not only the independent role of the judiciary but the stately role of the Senate.

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Breaking the Deal

Proposed limits on federal consent decrees would let states abandon commitments.

BY TIMOTHY STOLTZFUS JOST

Bashing judges as petty anti-democratic tyrants is a hardy perennial of American politics. It bloomed once again this spring in the political and media brouhaha surrounding the Terry Schiavo litigation.

But it paints a false picture of America's courtrooms. The truth is that our judges are thoughtful, honorable, and prudent men and women who do their best to interpret laws adopted by our democratically elected Congress and state legislatures and apply them to messy factual situations. So it is unfortunate to see Sen. Lamar Alexander (R-Tenn.) joining the chorus of those unfairly attacking these public servants.

Alexander's April 4 commentary urged passage of his proposed Federal Consent Decree Fairness Act ("Free the People's Choice," Page 58). The senator's immediate concern is several consent decrees that are undemocratically (he contends) binding the Tennessee Medicaid program. Let's get the facts straight.

PLAYING BY THE LAW

Medicaid is our nation's largest health insurance program. In fiscal 2006, the federal government will spend almost $200 billion on the program. The federal government pays 64 cents of every dollar spent in Tennessee on Medicaid. Since Tennessee does not have to take this money, it is not unreasonable to expect the state to comply with federal law when it does. The consent decrees that Sen. Alexander's proposed legislation would help abrogate require nothing more than that.

In each of the three consent decrees described by Alexander, Tennessee was sued for not complying with federal Medicaid law. The Supreme Court has long recognized that federal law gives Medicaid recipients enforceable rights. Some of these—such as the right of poor children to early and periodic screening, diagnosis, and treatment of illness—are quite sweeping.

In each of the three cases, Tennessee's democratically elected governor agreed to take specific steps to comply with a law adopted by Congress. In each case, the plaintiffs agreed to give up substantial rights to achieve a more rapid settlement of the dispute. In each case, the plaintiffs and the state came to an agreement that they presumably felt they could live with and committed themselves to it. In not one of these cases did a judge tell the parties what to put in their agreement.

Tennessee may now believe that it is in compliance with Medicaid law. If this is true, it simply needs to move to modify or terminate the decrees that bind it.

It may also believe that particular judicial orders enforcing these consent decrees are incorrect. If it believes that, it can appeal. Indeed, on April 12 the U.S. Court of Appeals for the 6th Circuit reversed one of the court orders mentioned by Sen. Alexander that had blocked certain changes in the state's program, concluding that the order exceeded the terms of the consent decree.

But as the Supreme Court held unanimously last year in *Frew v. Hawkins*, another case involving a Medicaid consent decree, a state that has entered into a consent decree cannot simply walk away from the order because it no longer feels like complying.

The proposed Federal Consent Decree Fairness Act would allow a state to do just that, and not only in Medicaid disputes. This legislation applies to virtually all cases brought against state and local gov-

emments to enforce federal law. The legislation would apply not just to litigation brought by individuals seeking the protection of federal law, but also to most litigation brought by the Justice Department against state and local governments. Although Sen. Alexander's bill would exempt school desegregation cases, it would cover cases involving race discrimination in employment; housing; and hospitals or other institutions receiving federal funding. It would also undermine consent decrees entered to enforce the Voting Rights Act. It would weaken consent decrees in cases under the Americans With Disabilities Act, cases enforcing federal environmental statutes, and cases brought to defend property and economic rights, religious liberty, or access to guns under the Second Amendment.

It is no wonder that a broad coalition of 86 national, state, and local groups—including the AARP, the National Urban League, and the Southern Poverty Law Center—submitted a letter to Congress on April 12 opposing this legislation.

DISCOURAGING ACT

The Federal Consent Decree Fairness Act would dramatically change the terms of consent decrees both existing and future. It would limit the certain duration of such decrees to four years or until the end of the term of the governor or highest-ranking official who agreed to the decree. At that time, the state or local government could move to modify or terminate the decree without offering any reason whatsoever.

The burden would shift to the plaintiff to prove that continuation of the consent decree was necessary "to uphold a Federal right," a technical phrase that could leave out many claims under federal laws. The plaintiff, in other words, would have to litigate the case all over again. If the court failed to act on the state's motion to overturn within 90 days (and the federal courts are fairly busy places), the consent decree would be terminated until the court decided the motion.

As a practical matter, the Federal Consent Decree Fairness Act would mean that no consent decree against a state government could be expected to last longer than four years. The vast majority would be even shorter in duration, as most would be entered at some point after the beginning of the term of office of the relevant official. States would be allowed to walk away from their commitments simply by electing a new governor, cities by electing a new mayor.

Because the legislation limits the effectiveness of only consent decrees, not litigated decisions, the immediate effect would be to discourage future consent decrees. If future plaintiffs wanted to make sure that a final decree remained enforceable, most cases now settled through consent decrees would have to be litigated to judgment. Yet the Supreme Court has long articulated a policy encouraging settlement of cases, as has Congress.

WHY WE CONSENT

Settlement of cases is vital for conserving the limited resources of the federal courts and for preventing intolerable judicial backlogs. It allows parties to avoid the prolonged uncertainty of complex litigation. It also saves them tens of thousands of dollars in attorney and expert witness fees, discovery costs, and other expenses. Those saddled with more litigation costs would include the Justice Department and other federal agencies, the federal courts, the intended beneficiaries of federal rights, and even state and local governments (the intended beneficiaries of Sen. Alexander's legislation).

Though a consent decree is enforceable as a judgment of the court, it is also a contract between the parties—and comes with many of the benefits of private agreements. Consent decrees allow the parties to determine the scope and terms of a judgment through the give-and-take of negotiation rather than to have terms judicially imposed that neither side may favor.

The kinds of cases addressed by the Alexander legislation commonly involve federal rights in complex federal programs and legislative schemes. Plaintiffs and defendants both accept certain losses in settling these cases in reliance on the decree's promise of corresponding gains. Plaintiffs settle for less-expansive interpretations of their rights than they may be entitled to; defendants agree to more specific obligations than they might have otherwise assumed.

Like other contracts, consent decrees are efficient—they represent terms that both sides believe they can work with. Courts ought to be particularly hesitant to modify these terms as any modification is likely to alter the balance struck by the parties—to restore to one party advantages earlier forgone and deprive the other of benefits it may have sacrificed much to gain.

FAIR AND FLEXIBLE

Litigants often use consent decrees to address problems that cannot be fixed overnight. For example, the city of New Orleans settled a Clean Water Act lawsuit with the Justice Department in 1998 by agreeing to modernize an antiquated sewage collection system. Many consent decrees, therefore, last for considerable periods of time. The time limits that would, for all practical purposes, be imposed by Alexander's legislation would be impractical and even unworkable in many cases.

Time limits are also unnecessary. Consent decrees in class actions currently cannot be entered until a judge holds a "fairness hearing" to ensure that the agreement is consistent with the public interest. Under Federal Rule of Civil Procedure 60(b)(5), any consent decree can be modified or terminated whenever either party shows that "it is no longer equitable" that the decree be enforced as agreed. And, indeed, consent decrees are often modified or terminated as conditions change.

But as the Supreme Court declared unanimously last year in *Frew*: "[D]istrict courts should apply a 'flexible standard' to the modification of consent decrees when a significant change in facts or law warrants their amendment. . . . If the State establishes reason to modify the decree, the court should make the necessary changes; where it has not done so, however, the decree should be enforced according to its terms."

By tying the life of consent decrees to the election process, the Federal Consent Decree Fairness Act would also inject the disruption of state politics into the federal judicial process. "Elect me," politicians might promise, "and I'll end that consent decree." Outgoing governors could enter into consent decrees to politically embarrass their successors by forcing them to move for modification of decrees in popular programs. The bill would thus drag the federal judiciary into state and local political bickering, threatening the very respect for judicial impartiality upon which the rule of law depends.

The Federal Consent Decree Fairness Act poses a serious threat to the authority of the courts, to the power of Congress, and to our federal democracy. It would undermine the key role that federal courts play in protecting the public's rights under the Constitution and under federal law. It is simply bad public policy and should be rejected.

Timothy Stoltzfus Jost is the Robert L. Willett Family Professor of Law at the Washington and Lee University School of Law. He wrote an opinion opposing the Federal Consent Decree Fairness Act for Sen. Max Baucus (D-Mont.).

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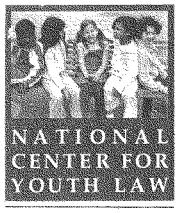

July 14, 2005

Honorable Jeff Sessions, Chairman
Subcommittee on Administrative Oversight and the Courts
U.S. Senate Committee on the Judiciary
335 Russell Senate Office Building
Washington, D.C. 20510-0104

RE: S.489—"Federal Consent Decree Fairness Act"

Dear Chairman Sessions:

On July 19, 2005, the Subcommittee is holding a hearing on "A Review of Federal Consent Decrees", and S.489, legislation sponsored by Senator Alexander that would create the Federal Consent Decree Fairness Act. The National Center for Youth Law is opposed to this legislation and urges its defeat for the reasons stated below. Please include this letter in the record of the July 19, 2005 hearing.

NCYL is a nonprofit organization that uses the law to improve the lives of poor children, working to ensure they have the resources, support and opportunities they need for a healthy and productive future. Often our work includes litigating against governmental agencies who fail to meet their legal obligations to protect or provide benefits and services to disadvantaged and vulnerable children. Some of this litigation has resulted in the entry of federal consent decrees between plaintiffs represented by NCYL and state officials who are defendants in those actions.

NCYL is currently lead counsel in David C. v. Leavitt, No. 93-C-206W (D. Ut.), a case that has been repeatedly cited by the proponents of S.489 as an example of the need for the legislation. Indeed, Senator Alexander has mentioned David C. in his comments on S.489 and Representative Blunt mentioned the case in his oral testimony at the June 21, 2005, hearing before the Subcommittee on Courts, the Internet, and Intellectual Property as an example of a case where judicial oversight is no longer needed. Let me give you the background of the need for the David. C. litigation, how the parties reached a Settlement Agreement, the state defendant's performance on meeting the terms of the Settlement Agreement, the improvements the litigation and Settlement Agreement have brought about in protecting neglected and vulnerable children in Utah's foster care system, and the need for continued adherence to the Settlement Agreement.

The David C. litigation was filed by NCYL in 1993 on behalf of abused and neglected children in Utah, many of whom had experienced more severe harm while in foster care than prior to their placements. The Utah foster care system's

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horrendous treatment of David C., the named plaintiff, and his two brothers is exemplary of the systemic failures leading up to the lawsuit. David C. was three years old when he was taken into DCFS custody, along with his two brothers, due to severe physical and sexual abuse by their biological parents. Nine months later, David's older brother died in a foster home due to blunt force injuries of the abdomen and complications. The autopsy report also found "evidence of multiple blunt injuries . . . of varying ages on all body surfaces." David, who was then removed from the home along with his younger brother, was found to have "multiple incidence of trauma" covering most surfaces of his body. Upon arrival at his new foster home, David had a black eye, a severely swollen nose, bruises on his swollen penis, a handprint across his chest, and parches of hair missing from his head. Subsequently, David's diagnosed mental health problems stemming from these abusive acts were left untreated by DCFS and, at age seven, when the case was filed, he was displaying severe behavioral problems. Unfortunately, David C. was not alone in experiencing these sorts of traumatizing events while in the State's care. At least a half-dozen studies of the state's child welfare system had reported on the system's inadequacies, including a couple of internal audits by the Department of Human Services itself and a couple by the advocacy group, Utah Children.

Partly in response to the David C. litigation, a year later, the Utah legislature appropriated an additional $16 million for child welfare services, enacted a 180-page child welfare reform bill, increased the budget of the guardian ad litem's office threefold, and established new standards for guardian ad litems. In August 1994, the U.S. District Court in Salt Lake City approved a settlement requiring reforms in virtually every facet of the state's protective services and foster care systems. The settlement was reached after many months of negotiations between the parties, with the assistance of a respected neutral mediator. The settlement was signed by then Governor Leavitt at a public ceremony during which he thanked NCYL for its "commitment to children's issues and cooperative work to improve the state's services to children." The Settlement Agreement addressed virtually all aspects of the child welfare system, including child protective services, family services, shelter care, kinship care, foster care, health, education, and mental health services for abused and neglected children.

As part of the Settlement Agreement, the parties agreed to establish a three-member monitoring panel, which was responsible for overseeing the reforms. The panel consisted of a member who was agreed to by both parties, and one person chosen by each party. The panel was provided with staff and a budget to analyze data and to prepare quarterly reports on compliance. Unfortunately, report after report issued by the panel demonstrated that the State was not fulfilling its promises under the Settlement Agreement. In the panel's fourth report issued on April 20, 1998, the panel concluded that the State was in compliance with only 20% of the Settlement Agreement's terms, and that it would be unable to correct this substantial noncompliance before the 48-month term of the agreement had ended. In light of the defendants' ongoing failure to comply with the Settlement Agreement over the course of four years, NCYL filed a motion asking the district court to extend the Settlement Agreement. Utah vigorously opposed the motion to extend, claiming the agreement's termination clause should be given full force and effect even though Utah was out of compliance with the vast majority of the

other provisions of the Settlement Agreement. Plaintiffs relied on the Supreme Court case, Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992), which holds that modification of a consent decree is proper if there has been a significant change in circumstances warranting revision and the proposed modification is suitably tailored to the changed circumstances. The Court found that it had the authority to extend the Settlement Agreement and that Utah was seriously out of compliance with the reforms they had agreed to four years earlier, but it thought that it would be futile to extend an agreement with which compliance had been so poor. Instead, the Court ordered Utah to modify and comply with a new plan that it created for comprehensive reform, which ultimately became known as the Milestone Plan. Governor Leavitt publicly stated that Utah would implement the Milestone Plan whether or not the Court ordered them to do so. The Court retained jurisdiction to monitor implementation of the Milestone Plan so long as the compliance provisions developed by the State had not been met, and ordered an independent child welfare policy organization to serve as its Monitor.

Rather than channeling their full energy into reforming the child welfare system, Utah instead then spent a considerable amount of time and resources filing appeals and motions seeking to prevent enforcement of the Milestone Plan. Utah withdrew its last motion in 2002 after its repeated efforts were unsuccessful. Fortunately, for the past few years, Utah has moved beyond its past litigation strategy and instead focused its efforts on complying with the Milestone Plan. The Monitor's reports in 2003, 2004, and 2005 demonstrate progress in many areas, but indicate that there is substantial work left to be done in order to comply with the terms of the Milestone Plan. The Court has made clear that its doors are open to Utah's requests for modifications of the Milestone Plan, and plaintiffs have demonstrated a willingness to make adjustments in response to Utah's concerns that some provisions are burdensome. The parties have entered into two stipulations that have had the effect of "trimming" the Milestone Plan in response to Utah's request for adjustments and streamlining of some of the provisions. Utah is on the right track, and, although it is not yet in compliance with all provisions of the Milestone Plan, its progress in some regions demonstrates an ability to do so in the future. The assistance of the Monitor and the oversight of the Court have been critical to Utah's ability to develop a child welfare system with the resources and internal capacity to meet the substantial challenges involved in ensuring children's safety and well-being.

With that background let me state what we believe are the major problems presented by S.489 and the impact it would have on the David C. case and other cases that we may bring to protect children who have been victims in not only their own homes but in the custody of the state. However, by no means are the threats of S.489 limited to the types of cases filed by NCYL, it also poses a threat to federal civil rights law, the authority of federal courts and the rights of parties to negotiate their own settlements and remedies to terminate litigation. The major problems with the Consent Decree Fairness Act include:

- It will deter, if not completely preclude, plaintiffs from agreeing to settlements that have no lasting value beyond the limited terms specified in this act, i.e. four years or an intervening election. Even though a defendant may be willing to enter into a mutual, negotiated compromise and cut short the litigation to focus on the remedy, plaintiffs would have little incentive to enter into an agreement that forces them to relitigate the issues upon the artificial statutory expiration of the agreement anyway

and particularly when the decision may be based on future political whims. The result is that plaintiffs and defendants will be forced to litigate cases to judgment that will extend the course of the litigation over several years and significantly increase the costs.

- Existing law protects defendants where they can make a showing that conditions have changed supporting the termination or modification of a consent decree. As the United States Supreme Court just recently unanimously held in Frew v. Hawkins, 540 U.S. 431, 441-442 (2004) district courts should apply a "flexible standard" to the modification of consent decrees when a change in the facts or law warrant the change and after giving state officials "latitude and substantial discretion."[1] Where the state establishes a reason to modify the decree the court should make the necessary changes. This bill turns that obligation on its head by shifting the burden to the aggrieved plaintiffs to show that after an arbitrary time period or an election the agreed upon decree should continue.
- The definition of a consent decree in the bill is extraordinarily broad and leaves open the possibility that any order entered into by the court that had the parties' participation and whole or partial consent or acquiescence of the parties is a consent decree. For example, if the court ordered each side to make recommended findings and took some recommendations from each side to craft the order, that order could be construed as a consent order. As such it would be subject to time the limits in this bill and allow relitigation of final orders never intended to be consensual.
- The 90-day limitation in which the court must rule on the defendant's motion to modify or vacate the consent decree is often unrealistic. Most importantly, invalidating the order if the motion has not been decided within 90 days again presumes that circumstances have changed in a case where nothing more than four years has expired or there has been an election. Plaintiffs are denied the relief which was found reasonable by the court and agreed upon by the parties simply because of judicial inaction on what may be an extremely complex case or an otherwise crowded docket. Again, the effect of this provision is to deprive aggrieved plaintiffs of their established remedies with an illogical and probably inaccurate presumption.
- The retroactive application of the bill would unfairly place on plaintiffs a condition certainly never contemplated while entering into the consent decree which, if known, would have resulted in a significantly different consent decree, if one would have been entered into at all. I can say that NCYL would have not been inclined to enter into the Settlement Agreement that it did in David C. if it would have been forced to make a new affirmative showing of the State's failures upon a mere political change in administrations.
- The limitation on compensation of special masters supervising consent decrees, when appropriate, would make it nearly impossible to obtain competent and respected individuals to take on the tasks required of supervising consent decrees. By their definition, special masters are necessary when there is an "exceptional condition" and where their matters cannot be addressed effectively and timely by a judge or

[1] The Supreme Court in Frew noted Utah's "legitimate concerns" asserted as *amici curiae* that consent decrees can undermine the sovereign interests and accountability of state governments but did not retreat from its Ruffo holding. The Court continued to recognize that "[i]f the State establishes reason to modify the decree, the court should make the necessary changes: where it has not done so, however, the decree should be enforced according to its terms." 540 U.S. at 442.

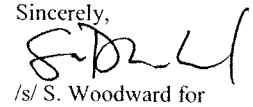
magistrate. In other words, the compensation restriction in this bill would preclude obtaining a qualified master in cases found where special qualifications are needed.

If S.489 were passed and signed, the defendant Governor of Utah could immediately move to vacate or modify the consent decree and shift the burden to the plaintiff children to establish the Settlement Agreement continues to be necessary to uphold their federal rights despite the fact that Utah is not yet in compliance with its own reform plan. Essentially plaintiffs would be required to relitigate the case they first brought seeking reforms in a foster care system that was, by agreement, failing abused and vulnerable children. To this day compliance has improved but there is much that needs to be done. However, plaintiffs have continually worked with the state on developing agreements to modify the original consent decree and subsequent orders to achieve outcomes recommended by a monitoring panel and expert consultants. The district court has actively overseen the Settlement Agreement and has directed the parties to enter into stipulations regarding future compliance where circumstances have changed. The Settlement Agreement has worked as it should: it has brought the state closer to compliance with the federal rights of the foster children plaintiffs balanced with changing circumstances asserted by the defendant state. The result is children who are safer and better cared for while in the state's custody. But more needs to be done. Meanwhile the state is free at any time to show that under current law the Settlement Agreement should be modified or vacated based on *its* showing that it is in compliance with the Milestone Plan it developed in order to meet the needs of Utah's abused and neglected children.

S.489 is essentially a "get out of jail free card" for state and local governments who have failed and continue to fail to meet their obligations under federal law to the most vulnerable of citizens. The proponents of this bill, under the guise of political accountability, seek to leave abused children, vulnerable adults, discriminated against minorities and women, neglected seniors, and disabled persons to a political structure that through its own prior agreements has recognized the need for systemic reform. These agreements should be protected not weakened.

We urge you to reject S.489. If you have any questions or if we can provide any additional information please feel free to contact us.

Sincerely,



/s/ S. Woodward for
CURTIS L. CHILD
Senior Attorney

cc: Members of the U.S. Senate Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts

Testimony of Ross Sandler and David Schoenbrod

before the

Subcommittee on Administrative Oversight and the Courts

of the

Senate Committee on the Judiciary

on

S.491

"Federal Consent Decree Fairness Act"

July 19, 2005

Professor Ross Sandler
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My name is Ross Sandler. I am a professor of law at New York Law School. Joining me in this written testimony is, David Schoenbrod, also a professor of law at New York Law School.

Professor Schoenbrod teaches the law of remedies and is a co-author of a casebook that deals extensively with decrees against state and local government: Schoenbrod, Macbeth, Levine & Jung, *Remedies: Public and Private* (West Publishing, 3d ed. 2002). Earlier in his career, Professor Schoenbrod worked for Senator and Vice President Hubert Humphrey, clerked for Judge Spottswood W. Robinson III of the Court of Appeals for the District of Columbia Circuit, and assisted John Doar and Franklin Thomas at the Bedford-Stuyvesant community development organization.

I teach state and local government law and direct the Center for New York City Law. In that capacity I edit three newsletters on New York City issues: *CityLaw*, *CityLand*, and *CityRegs*. The Center also maintains a Web site providing the public with free access to 25,000 New York City administrative decisions: www.citylaw.org. From 1986 to 1990, I served as Commissioner of Transportation of the City of New York under Mayor Edward I. Koch.

The sponsors of the Federal Consent Decree Fairness Act have stated that they based their bill on a proposal made in a book written by Professor Schoenbrod and myself, *Democracy by Decree: What Happens When Courts Run Government* (Yale University Press, 2003). The book grew out of our experience at the Natural Resources Defense Council where, from 1975 through 1980, we were a litigation team. Among the cases we litigated was a Clean Air Act case against

state and local officials in which we sought to enforce New York City's transportation control plan and reduce air pollution in New York City. *Friends of the Earth v. Carey*, 535 F.2d 165, (2d Cir. 1976) and 552 F.2d 25 (2d Cir. 1977), stay denied, 434 U.S. 1310 (1977) (Mr. Justice Marshall), *cert. denied*, 434 U.S. 902 (1977). Our courtroom victories resulted in the judge asking the parties to negotiate a consent decree. The decree ultimately controlled important aspects of how New York City operated its roads, ran the transit system, deployed police and traffic agents, regulated pollution, and much more. In time, we came to be surprised by the scope and duration of the power that we had over city officials who, unlike us, were politically accountable. When I later became Commissioner of Transportation, I became a defendant in our own case and, as such, was subjected to the decree we had negotiated.

Professor Schoenbrod and I have not lost our firm conviction that the doors of federal court houses should be open to those whose rights are violated. But, we have gained the understanding that, as federal judges now operate, consent decrees during the remedy phase of institutional reform litigation are often more intrusive and last longer than needed to vindicate federal law.

Our analysis does not support the usual complaint about judicial activism: that judges are too active in finding rights in the constitution or statutes. Rather our analysis found that after liability has been established and rights acknowledged, judges, during the remedy stage, allow the parties to negotiate decrees that go beyond correcting the violation that was the plaintiffs' actionable claim. These broad consent decrees last longer than necessary to remedy violations of

federal law, and they hobble the capacity of elected officials to manage complex and costly social programs. Subsequently elected officials find their authority restricted when they seek to modify previously adopted long term plans, adjust policies and balance budgets.

The obvious question is why are the decrees broader than necessary to protect the rights?

Institutional reform cases begin with plaintiffs' attorneys seeking to change how a government program operates – be it foster care, special education, mental health services, accessibility, or any of the dozens of types of state and local programs subject to institutional reform litigation. Plaintiffs' attorneys easily find a legal hook that they can use to draft a complaint because Congress and federal agencies have created so many standards applicable to state and local programs that most programs are in violation.

With the plaintiffs' attorneys having an open and shut case, the judge tells the parties to negotiate a decree. Those sitting around the negotiating table include the plaintiffs' attorneys, defendant officials, and government attorneys. We call these negotiators the controlling group. All of the members of the controlling group have ideas about how to improve the program. Through a process of horse trading, they construct a plan to change it. The plans are usually quite detailed. Many go on for dozens of pages. The obligations written into the plans are not tethered to the violations that gave rise to the suit, but rather reflect the controlling group's collective ideas about how to make the program run better. For example, a federal statutory requirement that state health officials provide health care assistance to children eligible for

federal assistance, might be expanded in a consent decree to also require repeated and costly additional efforts to locate potentially eligible children by telephone, direct mail, visits and other methods.

The signature of a judge turns this plan into a federal court order that must be obeyed by the defendants and their successors in office. Many decrees last for decades.

Governors and mayors have their own reasons to go along with a consent decree. Contested litigation makes them a target of criticism, while the consent decree lets them take credit for a solution. The consent decree might be constructed so that the more onerous requirements fall due after the next election. For the appointed officials who run the programs under reform, the decree gives them a way to broaden their power and grow their budgets by court order rather than through the usual processes for securing the approval of governors, mayors, or legislatures. This latter point was noted by Justice Sandra Day O'Connor in *Blessing v. Freestone*, 520 U.S. 329 (1997), a case where private plaintiffs faulted Arizona state officials over the way the officials had managed the child support services program required under the Social Security Act. Justice O'Connor, in describing the questionable tactics of the state officials, wrote that "attributing the deficiencies in the State's program primarily to staff shortages and other structural defects, [the state officials] essentially invited the District Court to oversee every aspect of Arizona's Title IV-D program." *Id.* at 1360.

Plaintiffs prefer to negotiate the decree for the obvious reason that they get to determine

its terms and avoid a trial, but there are other powerful reasons why plaintiffs seek to negotiate a decree. A decree entered over the defendants' objection can be appealed, which delays implementation, often for years. Even more importantly, while the law is very forgiving about what the parties may agree to in a negotiated decree, the law is very unforgiving about what a judge may order over the objection of the defendant. *Lewis v. Casey*, 518 U.S. 343 (1996). When a judge drafts a decree he or she is strictly limited to a remedy measured by the violations proved, but when the parties draft their own decree the strict limitation goes out the window.

Judges sign overly broad negotiated decrees because no one objects and otherwise they will have to write the decree themselves, which would mean conducting a hearing, mastering the management of the governmental agency, and taking responsibility for the policy choices.

Once the decree is signed, it must be obeyed unless and until the decree is modified or vacated. Obeying a consent decree that is five, ten or fifteen years old often makes no sense. Initiatives don't work as hoped. Budget priorities or circumstances change. Experts advocate new solutions. In our book, *Democracy by Decree* at pp. 128-29, we described how it took eighteen months of litigation before the New York City Housing Authority could gain approval to modify a twenty-two-year-old decree in order to evict promptly criminal tenants who used their apartments as drug emporiums. *Escalera v. New York City Housing Authority*, 924 F.Supp. 1323 (S.D.N.Y. 1996). In the litigation over the proposed modification, the parties battled over whether the advent of crack cocaine was sufficiently new and unexpected to warrant revising the old decree, whether living next door to a drug dealer actually increased risk of criminal violence,

and whether hiring more housing police might be a better solution, i.e., "more suitable" than evicting drug dealers. After three days of testimony Judge Loretta A. Preska issued a fifty-five-page opinion deciding that on balance it was permissible for the Housing Authority to use the lawful, speedy eviction procedures more speedy than the consent decree. While this litigation continued, the tenants, the purported beneficiaries of the old decree, lived with the danger and intimidation of drug dealers next door. The snarl of litigation so incensed the tenant organization that it hired other lawyers to fight on the side of the Housing Authority and against its old lawyers.

Under the Supreme Court case of *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367 (1992), it is difficult for states and localities to get out from under decretal requirements that make no sense and are unnecessary to protect rights. The *Rufo* test is demanding and time consuming. And, to have any chance at success, the leaders of the defendant agency must divert their attention from other managerial problems to litigation. So, the leaders typically decide not to litigate and instead beseech plaintiffs' attorneys to consent to a modification. The plaintiffs may give the state or city some leeway, but in return demand that new obligations be added to the decree. In this way, the decree grows from dozens of pages to hundreds or even thousands of pages. With all the modifications on consent, side deals, and letters of understanding, it is often only members of the controlling group who understand what the consent decree requires.

The Supreme Court, in its unanimous opinion in *Frew v. Hawkins*, 124 S.Ct. 899 (2004), forcefully recognized the problem presented by consent decrees that unnecessarily constrain the

policy making discretion of state and local officials. The Court made clear that the proper measure of injunctive relief should be plaintiffs' rights rather than a bargain struck in a consent decree. For our analysis of *Frew*, see Sandler & Schoenbrod, "The Supreme Court, Democracy and Institutional Reform Litigation,"49 *New York Law School Law Review* 915 (2005).

While the Supreme Court has recognized the problem, it has not fully fixed it. In institutional reform litigation, there has been a persistent gap between the Supreme Court's calls for lower courts to respect the policy making prerogatives of state and local officials and actual practice in the lower courts, as we have shown. See *Democracy by Decree* at ch. 6. One reason is that it is difficult for successor officials to complain effectively about overly broad decrees entered into by their predecessors. *Frew* itself does not fix the problem because the Supreme Court is, after all, a court rather than a legislature and so typically works incrementally rather than by comprehensively reversing and revising previously announced litigation ground rules. But, the Court has in a similar context recognized that Congress can change these ground rules and make new ground rules applicable to old as well as new decrees. *French v. Miller,* 530 U.S. 327 (2000). In *French*, none of the Justices expressed a contrary view on this point.

The Federal Consent Decree Fairness Act articulates ground rules for modifying and vacating consent decrees entered against states and localities. These ground rules are in accord with the view expressed by the Supreme Court's opinion in *Frew* that the proper measure of injunctive relief should be plaintiffs' rights rather than a bargain struck in a consent decree. Section 2 of the Act articulates principles that the Supreme Court recognizes, but that controlling

groups often get away with ignoring. Section 3 begins by defining the consent decrees to which this section applies. It then goes on to allow state and local officials to move to modify or vacate the decree, but instructs the court to deny the motion if plaintiffs show the decree is needed to protect their rights.

The Act allows courts to protect rights, but otherwise lets state and local officials run state and local government. The Federal Consent Decree Fairness Act strikes this balance by making clear that the bargains written into consent decrees are not contracts, but are judicial remedies ultimately to be measured against federal law, not the preferences written into consent decrees in prior times or by prior officials. This is precisely the kind of balance suggested by Justice Brennan in a case where a prior agreement in the form of a past bond covenant prevented subsequently elected officials from acting to confront new air pollution challenges. Justice Brennan wrote:

> One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days. . . . [N]othing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to "clean out the rascals" than the possibility that those same rascals might perpetuate their policies by locking them into binding contracts. *United States Trust Co. v. State of New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., in dissent)

July 25, 2005

The Honorable Jeff Sessions
United States Senate
Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts
335 Russell Senate Office Building
Washington, D.C. 20510-0104

Dear Chairman Sessions:

Thank you for the opportunity to testify at the hearing on the Federal Consent Decree Fairness Act. We now request permission to amplify our testimony by responding to three questions about the bill.

First, is the Act really needed given that judges must, under rule 23 of the federal rules of civil procedure, hold hearings on consent decrees in class actions? Yes, the bill is needed. Although some institutional reform consent decrees are class actions, many are not. Even in rule 23 cases, judicial vetting of consent decrees tends to be modest because the parties consenting are unified in support of the decree, the judge has only limited fact finding capacity, and those who may be most directly hurt by the decree, such as successor officials yet to be elected, get no notice of the hearing. In any event, even Professor Owen Fiss, a stalwart supporter of institutional reform litigation, acknowledged that "[t]o say that a trial judge must do 'nothing' before entering a consent decree would be a bit of an exaggeration, but not much." Owen Fiss, "Justice Chicago Style," 1987 *University of Chicago Legal Forum* 1, 12.

Of equal importance, decrees that made sense when entered, frequently, over time, come to make no sense, as we show repeatedly in our book. *Democracy by Decree: What Happens When Courts Run Government* (Yale University Press, 2003).

Second, would the Act stop the use of consent decrees? No, consent decrees will still be used for compelling legal and practical reasons.

Forcing the judge to draft his or her own decree without the parties' consent is a decidedly unattractive option since, without consent, the rules tightly restrict the remedies that may be included in the decree. Judge-made remedies are limited to correcting proven violations. Judges may not stray from that standard. If, for example, plaintiffs prove that

special education students have been deprived of adequate transportation, the judge could only order a remedy to correct the transportation violation. By contrast, with consent, the parties might expand the decree to include such items as school accessibility and class room activities. This opportunity to define the remedy is a powerful incentive for both plaintiffs as well as defendants because it allows more give and take, expands the potential for compromise, and offers greater opportunity to achieve long-term goals.

There are practical reasons also why consent decrees will continue to be used. Negotiating a consent decree avoids the expense and uncertainty of trial; it accelerates the time when the officials become subject to contempt proceedings; it speeds the implementation of changes to the governmental program; it allows the plaintiffs to begin collecting fees; and it prevents defendants from appealing.

Opponents of the bill argue that plaintiffs won't consent because the decree will be voidable after four year or on a change of administrations. That is a misreading of the statute because the decree can be neither modified nor terminated so long as the plaintiffs can show that the decree is needed to protect federal rights. What would be voidable is a bargain in excess of federal rights. Voiding such bargains is the *raison d'etre* for the Act. The Act will focus institutional reform litigation on its legitimate purpose: to enforce federal rights, and not to enforce private bargains.

Opponents also claim that the Act would require the plaintiffs to reprove their case. That too is a misreading of the statute. Judicial orders certifying the class, establishing the right to fees, and finding liability are all final decisions. The burden of proof that the plaintiffs would have to shoulder is that the decree continues to be needed to prevent violations of federal rights. This, after all, is the only justification for the federal court's involvement. It is fair that the party benefiting from such an extraordinary assertion of federal power over state and local officials prove that it is necessary.

Opponents overstate the difficulty they face in meeting this burden. In our experience, plaintiffs' counsel in institutional reform cases keep current on the institutions over which they have obtained court orders, often with better information sources than the defendants themselves. With the foreknowledge that they may have to prove a continuing violation at a later date, consent decrees may be structured to require defendants to share information regularly with plaintiffs. This is usual in any event; consent decrees almost always include reporting provisions. Lastly, there is the availability of discovery procedures to round out the plaintiffs' knowledge.

Third, is the Act necessary after of the Supreme Court's decision in *Frew v. Hawkins*? Yes, the Act remains necessary. In *Frew*, the Supreme Court forcefully recognized the problem of consent decrees that unnecessarily constrain policy making discretion of state and local officials, but the Court did not fix the problem. The reason is that the

Supreme Court is a court rather than a legislature and so typically works incrementally rather than by comprehensively reversing and revising previously announced litigation ground rules. *Frew* is written as if it restates the ground rules for modification previously set down in *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367 (1992), whereas *Frew* in fact may be read to have changed the ground rules. Sandler & Schoenbrod, "The Supreme Court, Democracy and Institutional Reform Litigation," 49 *New York Law School Law Review* 915 (2005).

The ambiguity in *Frew* has already led one court of appeals to read *Frew* as blessing overbroad decrees. *Jeff D. v. Kempthorne*, 365 F.3d 844 (9th Cir. 2004). This opinion illustrates a point we have previously made: in institutional reform litigation, there has been a persistent gap between the Supreme Court's calls to respect the policy making prerogatives of state and local officials, and the actual practice in the lower courts. *Democracy by Decree: What Happens When Courts Run Government* (Yale University Press, 2003), at ch. 6.

Frew, moreover, does not address the standard for vacating old consent decrees that are no longer needed, a standard which is different and in some ways tougher than the standard for modification set out in *Rufo*. The current standard for termination leaves the burden on defendants, which means they must prove a negative, while the Act wisely puts the burden on the plaintiffs.

Congress can and should codify the spirit of *Frew* into comprehensive ground rules; the proper measure of injunctive relief should be plaintiffs' rights rather than a bargain struck in a consent decree. The Supreme Court has recognized that Congress can change these ground rules and make new ground rules applicable to old as well as new decrees. *French v. Miller*, 530 U.S. 327 (2000).

In passing the Act Congress will insure that courts continue to protect rights, but otherwise permit state and local officials run state and local government. That is how it should be.

Sincerely,

Ross Sandler and David Schoenbrod

Testimony of Lois J. Schiffer

Before Senate Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts
July 19, 2005
"A Review of Federal Consent Decrees"
On S. 489, the Federal Consent Decree Fairness Act

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My name is Lois Schiffer and I appreciate the opportunity extended to me by members of this Subcommittee to offer my views on S. 489, described as the Federal Consent Decree Fairness Act.

I am currently a lawyer in private practice at the Washington, D.C. law firm of Baach Robinson & Lewis PLLC. From 1994-2001, I was the Assistant Attorney General in charge of the Environment and Natural Resources Division in the United States Department of Justice. There, I was responsible for federal litigation related to pollution, public lands and natural resources, wildlife, condemnation and inverse condemnation, and certain Indian cases. With the United States Attorneys Offices, this Division handles all federal litigation related to enforcement of laws protecting against pollution. Formerly, I worked in the Division from 1978-1984. I have also taught environmental law for 20 years as an adjunct professor at Georgetown University Law Center, and for a semester as a Lecturer at Harvard Law School.

I have had extensive experience with consent decrees to fix environmental problems. Indeed I have approved and signed hundreds of environmental consent decrees, and have personally negotiated many of them. That experience came primarily from my work at the U.S. Justice Department where, as Assistant Attorney General, I was responsible for supervising 700 people (400 lawyers) with cases in every federal court in the country, and some state courts as well. With the United States Attorneys, we were responsible for all environmental enforcement and defense litigation—both civil and criminal—on behalf of the Environmental Protection Agency, the Department of the Interior, the Department of Defense, and every other federal agency. The docket of the Division was over 10,000 cases at a time. We handled cases arising under over 100 federal statutes. The consent decrees I have approved obligate companies to undertake Superfund cleanups costing hundreds of millions of dollars; obligate local sewer authorities to put in new sewage treatment and collection systems to the tune of many millions of dollars and many years of work to protect public health; obligate companies to develop new diesel engines to comply with the Clean Air Act; and require cleanup of major river systems. I have approved many consent decrees that would be stabbed in the heart by S. 489.

The consent decree is one of the most important tools for getting state and local governments to comply with the environmental laws Congress enacts. The federal Department of Justice uses them daily, and a model Superfund consent decree is on the Division's website. Also, in environmental enforcement cases we often worked with states on enforcement cases, including actions to get local governments to comply. I testify today to inform this Subcommittee that S. 489, if enacted, would be a giant step backward in implementing our nation's environmental laws to give all Americans clean air, clean water, and clean land.

The gist of my testimony is that, from the perspective of environmental protection, S. 489 is fatally flawed. It stabs in the heart one of the most important tools for protecting our environment, and would be a giant step backward for clean air, water, and land in this country. The bill will effectively eliminate altogether the use of consent decrees for environmental problems, and disable an essential component of enforcing and implementing all our environmental laws.

- First, this bill would mean that the Justice Department and citizens groups would stop entering into consent decrees to resolve environmental cases brought against state and local governments. Since complying with laws passed by Congress can take time, a law that means consent decrees may be terminated after a short time eliminates them as a useful tool.

- Second, this bill would increase, not reduce, the amount and scope of litigation in our courts, with greatly added expense and grave burden on resources of the Justice Department and U.S. Attorneys; state governments that both bring enforcement cases and defend them; local governments that would face trials not settlements; and federal courts. This also is completely contrary to efforts in every federal court to encourage cases to settle.

- Third, the bill will seriously set back the enforcement of environmental laws passed by this Congress and give us all dirtier air, water, and land.

- Finally, the bill is completely unnecessary because, particularly under the recent Supreme Court decision in Frew v. Hawkins, 540 U.S. 431 (2004), state and local governments and courts already have good tools to address the concerns it seeks to remedy.

To make these points, this testimony details the problems S. 489 would create for use of consent decrees to resolve environmental cases; provides ten examples of cases that illustrate how important consent decrees are in protecting the environment; and also provides some background about just what consent decrees are and how they are used to resolve environmental cases. This information is important to understanding just how fatal S. 489 would be to a clean environment.

I. S. 489 would stab in the heart an important tool for fixing environmental problems and getting state and local governments to comply with Congress' environmental laws.

The provisions of S. 489 erect major obstacles in the way of settling, rather than trying, environmental cases.

First, S. 489 would effectively eliminate consent decrees as tools to enforce our nation's laws against state or local government to assure that they meet their environmental protection obligations. Consent decrees are excellent tools to enforce Congress' laws, because they get the parties focused on fixing the problems rather than, as litigation does, on fighting over the problems themselves. If S. 489 becomes law, however, almost no one seeking to carry out Congress' goals—to enforce the law—would use consent decrees in the future, because essentially that person, including the United States, would be negotiating with a state or local government that may well not keep its word a few years down the road, and if the state or local government did decide to change its mind, the 90 day provision, which is totally unworkable, means there is little likelihood the agreement continues.

The problem is made greater because, in the area of environmental law, fixing problems often takes a long time. For example, municipalities with aging sewage treatment plants or sewage collection systems may take years to secure adequate funding and to upgrade their systems to assure that public health and the environment are protected from raw or improperly treated sewage. Cleaning up major Superfund sites may take a number of years, first to evaluate and determine an effective remedy, and then to implement the remedy. Disputes between states as to boundaries or water allocation may take years to resolve, and once they are resolved the parties would want to assure that the resolution stays in place well into the future. If enforcers—the federal government, state governments, or citizens—know that the resolution of the matter—the consent decree—would likely have to be reopened in under, even well under, four years, the tool becomes unavailable for practical purposes. In many, or most, of the cases we litigated at the Department of Justice to enforce the environmental laws, if we had known that a consent decree in a case against a state or local government could be reopened for no reason well before the work required was completed, we would have taken the cases to trial to get a finding of liability and a court-decided injunction as to remedy to assure that the public health, welfare, and the environment would be adequately protected. Any other course would not have met our public trust to protect the American public.

Second, vast amounts of resources will have to be dedicated to litigation over the problem, rather than turning attention to the fix. These resources devoted to litigation—taking discovery, writing briefs, putting on witnesses, making arguments to judges—will be resources not only of the United States or the citizens groups, but also those of the state and local governments that will be required to spend money defending cases rather than resolving them and resolving the environmental problem. States also bring enforcement actions against local governments, so the states will be burdened as enforcers as well. All of this means that, in addition to being expensive for everyone including state and local governments, less enforcement will be accomplished. Less enforcement means less environmental protection all around, because violators won't be required to fix problems, and others deciding whether to comply with the laws will not be deterred from not meeting their obligations.

S. 489 would have a serious impact not only on resources of state and local lawyers, but also on federal courts, and on the justice system generally. With courts under heavy burdens and pressures to expedite a wide range of cases, including criminal cases subject to speedy trial requirements of the Constitution and U.S. law, seriously reducing or effectively eliminating an important settlement tool will interfere with the administration of justice in this country. It is certainly an approach at odds with the federal Alternative Dispute Resolution Act of 1998, 28 U.S.C. §651 et seq. Under that law, every federal court in the country now has an alternative dispute resolution program geared to encourage parties to settle. Every federal circuit court has an alternative dispute resolution program too, and those programs are key to reducing court caseloads. As Judge Jones' testimony so eloquently notes, most federal judges would be extremely dismayed by the bill.

Third, settling environmental cases with consent decrees provides far more flexibility to the parties in establishing what the state or local government must do to come into compliance with the environmental law. The parties, rather than the court, set the schedule. Each party compromises to come up with a more workable solution than a judge-decided ruling may provide. Moreover, a component of consent decree flexibility is that consent decrees can be modified. While both court-established remedies and consent decrees may be modified, courts may well be more willing to change an order not crafted by the judge. With consent decrees, there are effective tools for dealing with changed circumstances, including changed financial circumstances, in a state or local government. Frew v. Hawkins, 540 U.S. 431 (2004), decided by the U.S. Supreme Court in 2004, underscores those tools. The Court specifically states that courts must understand that state officials must be given flexibility in carrying out their responsibilities. For example, in the case of a consent decree to provide for restoring the Everglades in Florida with work covering many years, the parties agreed to seek a modification as circumstances changed. In the consent decree that requires the City of New York to build a drinking water filtration plant to comply with the Safe Drinking Water Act so that New Yorkers will have safe water to drink for years to come, the decree has been modified several times to extend the schedule. In the case requiring Wayne County (Detroit) to upgrade its sewer system, after the County completed fixing the system the consent decree was recently terminated. Each of these cases is described more fully below.

Fourth, in many environmental laws, Congress has explicitly provided that enforcement actions may be brought by private parties. These "citizen suits" are a critically important component of assuring effective enforcement of our nation's environmental laws, and of securing for the American public clean water, clean air, and clean land. Most of the sewage treatment cases described below were initiated by community groups as citizen suits, then the United States intervened and became actively involved. Many of these citizen groups have extensive experience with these laws, and of working with state and local governments, and a sound understanding of what Congress intended in enacting the laws and what ways work to get state or local governments to meet their obligations under the laws. Yet citizens often have limited resources. The provisions of S. 489, which that effectively eliminate use of consent decrees to solve problems, would gravely impair the important role that Congress has recognized for citizen suits in the enforcement of environmental laws.

A particular provision of the Clean Water Act is also noteworthy here. One of the big concepts in the law when it was first passed in 1972 was that sewage waste was a major polluter of our rivers and streams, and municipal sewage systems, if properly built and funded, could take a big step to improving water quality. Thus, under that federal law, municipalities have a special and important obligation to construct and maintain "publicly owned treatment works" (called POTWs), sewage systems that must properly collect and treat sewage that historically has been a significant component of water pollution. When it was passed in 1972, the Clean Water Act provided substantial federal funding so that municipalities would build or upgrade these systems. Under 33 USC §1319(e), a part of the enforcement provisions of the Clean Water Act, whenever the United States sues a municipality to enforce against it, it must join the state as a party, and the state is liable for payment of any judgment or any expenses incurred as a result of complying with any judgment entered against the municipality to the extent that the laws of the state prevent the municipality from raising revenues needed to comply. Under S. 489, both the state so joined and the local government that is seen as the source of the problem could each seek to set aside any consent decree as to which it had been a party.

Fifth, S. 489 would provide that if a state or local government moved to set aside a consent decree, the United States or citizen group, or state for that matter, that had brought the original case would have to show an ongoing violation of federal rights and a continuing need for the remedy and the court would have to act all within 90 days. This could be used after the ink was barely dry on a consent decree, and certainly in many cases in a year or two after the consent decree had been agreed to. The provision creates two overwhelming problems. For future consent decrees, meeting the requirements to continue the consent decree is such an impossible burden that, all by itself, the provision would stop enforcers from entering into consent decrees. If a law enforcer knows that a remedy takes ten years to implement, and s/he will face setting an agreement aside in only a few years, s/he would instead try the case and get the court to make findings and rulings about liability and remedy in order not to face the virtually insurmountable obstacle of putting the case together all over again a few years down the road. Protecting the public would demand no less. Also, the burden on judges—who already face docket demands including speedy trial requirements—of getting the parties to prepare, giving them trial and hearing time, and deciding the matter so quickly, is great.

For existing consent decrees, if S. 489 becomes law, federal judges all over the country will face the immediate problem of considering and deciding motions to set aside consent decrees that they will have to find a way to handle in 90 days or less, or know that important remedies may stop in their tracks. At a minimum, environmental enforcers as well as the many other affected plaintiffs in a wide range of cases would face reopened consent decrees and new negotiations. This would be a period of great turmoil in the administration of justice throughout the country.

In sum, if enacted, S. 489 will stab consent decrees, a key tool for securing compliance with our environmental laws, in the heart. It will result in increased litigation; less enforcement; reduced flexibility; great burdens on governments, citizen groups, and courts; and less environmental protection for all of us. Federal enforcers could not use consent decrees responsibly to resolve cases that require major fixes, and there would be a giant step backward in meeting the requirements and goals of the laws Congress has passed to protect and clean up the nation's air and water and land. S. 489 is a fatally flawed bill.

II. Examples of consent decrees entered in environmental cases illustrate the fatal flaws in S. 489.

Examples help in understanding the effect that S. 489, if enacted, could have on environmental cases, and in seeing how under present law the system is working for cases involving state and local governments. I have selected ten that arise under at least four environmental laws. There are many other consent decrees in environmental cases brought against state or local governments, but these show clearly how S. 489 would undermine the laws that Congress has passed since the 1970s to protect and clean up our environment. The examples underscore that fixing problems often takes longer than four years, and certainly more than one or two or three years. They also show that state or local governments can get consent decrees modified and terminated. They illustrate consent decrees where parties have negotiated and specified provisions important to each of them, including timing requirements. They certainly make clear that a focus on fixing these problems is far more productive than litigation about who caused the problem that would result if S. 489 made such consent decrees unlikely or indeed, was a basis for seeking modification of the decrees here that are continuing. Many of these consent decrees are complicated because they solve complicated problems to protect public health and the environment—the idea that the United States or citizen groups would have to prove the underlying case in less than 90 days to keep them going after S. 489 is chilling. Certainly these ten examples underscore how useful and important consent decrees are to fix problems that the environment faces when states or local governments fail to comply with environmental laws. The ten examples are as follows:

1. New Orleans sewage in the streets. In United States v. Sewerage and Water Board of New Orleans, No. 93-3212 (E.D. La., case filed Oct. 30, 1993), the League of Women Voters of New Orleans and other community groups brought an enforcement action against the New Orleans sewer authority because it maintained an old sewage collection system that allowed raw human sewage to run in the streets of the city when it rained. Eventually, because of the importance of the problem, the Environmental Protection Agency and the U.S. Justice Department determined that the United States should join the suit. The parties actively negotiated a consent decree, which was signed in June 1998. The Consent Decree requires New Orleans to renovate its over 50-year-old sewage collection system over a time frame of eleven years. That the case was settled rather than litigated also allowed the flexibility of permitting the Board to restore Lincoln Beach, an historically African-American beach from the days of segregation, rather than pay a higher money penalty.

2. Sewage overflows in Knoxville, Tennessee. In February 2005, the court entered a consent decree in United States et al. v. Knoxville Utilities Board, No. 3:03-CV-497 (E.D. Tenn. case filed Dec. 1, 2004). In the case, the U.S. Department of Justice, the Environmental Protection Agency, the Tennessee Department of Environment and Conservation, a citizen group, and the City of Knoxville—as plaintiffs—entered into a consent decree with the Knoxville Utilities Board, an independent agency of the City of Knoxville. The consent decree requires the Board to take a number of specified steps to analyze and fix sewage overflows. The work is expected to cost $530 million, to eliminate 3.5 million gallons of sewage overflows annually, and will be implemented over the next 12 years (through 2016). It is noteworthy that the state agency of Tennessee—the state that is asking this Congress to overturn such decrees—and a local government in that state teamed up with the federal government to bring the case, and that under S. 489, the Knoxville Utilities Board, as an independent agency of the City of Knoxville, could seek to set aside the decree and oblige all parties to reprove their case to restore the consent decree.

3. Sewage overflows in Wayne County (Detroit) Michigan—now fixed. A final sewage treatment case is important in illustrating that current tools for terminating decrees are effective. In United States v. Wayne County (Detroit), the United States sued Wayne County, 13 downriver communities, and two drainage districts for violating provisions of their wastewater discharge permits. In 1994, the parties entered into a consent decree to implement the plan they had developed to upgrade the sewage treatment system so that the untreated sewage dumped into drains and eventually into the Detroit River would not back up into basements. The project has cost $295 million so far, and clearly required more than four years to complete. Last month, the parties asked the court to approve termination of the consent decree because "the objectives of the decree have been met." The court terminated the decree. United States v. Wayne County, C.A. No. 87-70992 (E.D. Mich., May 2, 2005). The case illustrates the need for consent decrees long enough to achieve environmental protection goals, and the capacity of present law to provide for changes to reflect new circumstances like completion of projects. When a consent decree has been completed, parties know how to terminate them, and do not require the provisions of S. 489 to accomplish that result.

4. Wastewater collection and treatment in Birmingham, Alabama. In United States v. Jefferson County, Alabama, Jefferson County Commissioners, and the State of Alabama, No. 93-G-2492-S (N. D. Ala. case filed Nov. 29, 1993), a consent decree provides for extensive rehabilitation to the entire Jefferson County wastewater collection system and the County's ten wastewater treatment facilities. The decree also requires, as a Supplemental Environmental Project, that the County acquire riparian properties or greenways to reduce or eliminate runoff pollution into the Cahaba and Black Warrior River systems in Jefferson County to generally enhance the water quality of those rivers. The consent decree requires these actions over a number of years.

5. Sewage-laden stormwater in Washington, D.C. Another citizen group, the Anacostia Watershed Society, brought a suit, later joined by the United States, against the District of Columbia Water and Sewer Authority (WASA). The consent decree, signed by the parties in late 2004, requires WASA to address Washington, D.C.'s sewage-laden storm water runoff by capturing it in three tunnels to be built under the agreement, then later treating it at Blue Plains sewage treatment plant. The estimated cost of the sewage control project is $1.4 billion and will take 20 years to build completely, with significant sections of the new system placed in operation along the way. United States v. District of Columbia Water and Sewer Authority, No. 00-183 (D.D.C., case filed Feb. 2, 2000).

6. Sewage spills in Los Angeles. In United States v. City of Los Angeles, No. 98-9039 (C.D.Cal., case filed Nov. 9, 1998), the state of California and community groups sued the City of Los Angeles to stop frequent sewage spills from deteriorated pipes in the city's sewage system in violation of the Clean Water Act. The consent decree requires the city to rebuild sewer lines, increase the system's capacity, enhance its spill control programs, and plan for future expansion. The state regional water board will use its portion of the civil penalties on environmental projects, and the city will perform over $7 million on environmental projects in addition to its work on the sewer system. The schedule for repairs and other projects runs through June 30, 2012.

7. Safe drinking water in New York City. A case related to water filtration is also instructive. The United States sued, then entered into a consent decree with, the City of New York to require that the City build a water filtration plant for water from the Croton watershed that becomes drinking water for New Yorkers. The consent decree was amended several times to accommodate the City's difficulties with siting issues. Assuring that New York City complies with the Safe Drinking Water Act is an essential public health matter. Identifying a site and building a water filtration plant is a major undertaking that requires more than four years. United States v. City of New York, 30 F. Supp. 2d 325 (E.D. N.Y. 1998). The Notice of the Second modification to extend time is at 69 Fed. Reg. 60188 (Oct. 7, 2004).

8. Restoring the Everglades. Our national crown jewel Everglades National Park has significantly benefited from a consent decree. Pursuant to a consent decree resolving a lawsuit brought by the United States against the State of Florida and the South Florida Water Management District, and entered by the federal court in 1991, the parties committed to extensive and long-term work to restore the Everglades to the River of Grass it was before the Corps of Engineers undertook extensive engineering work in the 1940's and on. The 1991 consent decree has been modified, and by a recent order, enforced. Indeed, after the consent decree was in place, Senator Bob Smith of New Hampshire played a significant role in assuring that Congress appropriated funding for the process. The replumbing of the Everglades is supported by Governor Bush. It takes many years to restore the ecosystem of this precious National Park. The case is United States v. South Florida Water Management District et. al. , No. 88-1886-Civ-Moreno (S.D.Fla.). Recently the Miccosukee Tribe and a number of environmental groups sought an order, granted by the court, enforcing the decree as to water quality in the Loxahatchee National Wildlife Refuge (order with opinion entered on June 1, 2005).

9. Superfund cleanups everywhere, including in Oyster Bay New York. Under authority of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or the Superfund law), consent decrees are an important tool for securing cleanups at Superfund sites. Indeed, a "model" Superfund consent decree is provided on the U.S. Department of Justice website. At a number of Superfund sites, local governments have been contributors of some of the hazardous substances. Cleanups are carried out often under consent decrees that cover a number of years. Especially given continuing interest in reducing transaction costs for Superfund, it would be perverse to encumber consent decrees and effectively require litigation to get Superfund cleanups. An example of a Superfund consent decree involving local governments is State of New York v. The Town of Oyster Bay, 696 F. Supp. 841 (E.D.N.Y. 1988), where a consent decree to clean up the Old Bethpage Landfill, a seriously contaminated site on the Superfund National Priority List, was entered in 1988. The Town undertook the remediation. Construction was completed at the site in 1993, and groundwater pumping continues. From April 1992 through March 2000, approximately 3.4 billion gallons of contaminated groundwater was treated on site. If S.489 had been in effect at the time of this consent decree, it could have been reopened before the cleanup was complete.

10. Original jurisdiction cases in the United States Supreme Court. Arizona v. California is an example of disputes between states as to water allocations or boundaries. It was brought in the Supreme Court as an "original jurisdiction" matter. That means that, as a dispute between two states, the Supreme Court hears the case directly. For original jurisdiction cases, the Supreme Court appoints special masters to gather the facts, encourage the parties to resolve the dispute, or recommend a legal decision. In this case, in 1952 Arizona sued California in the U.S. Supreme Court to adjudicate rights to water from the Colorado River. The United States intervened

seeking water rights on behalf of 5 Indian reservations. In 1964, the Court entered a decree based on a consent agreement of the parties allocating much of the water but held that the amount for the Indian reservations could be adjusted when a boundary issue was resolved. 376 U.S. 340. After various proceedings, including an argument in the Supreme Court to determine whether certain issues were res judicata, in 2000 the Supreme Court determined that the United States' claim for more water for the Quechen Tribe (Ft. Yuma reservation) was not precluded and could go forward. 530 U.S. 392 (2000). All parties have now reached a further settlement agreement that the Special Master has recommended to the whole court as a supplemental decree that would meet the definition of a consent decree under S. 489. The Tribe will get a portion of the water it claimed, and water it cannot use now can be used by California until the tribe can use it. Under S. 489, it would appear that California, after an election, could seek to upset this agreement. Further, the Supreme Court's effective use of Special Masters to address these original jurisdiction cases would be seriously impaired by the provision of S. 489 limiting the role and compensation for Special Masters.

Other original jurisdiction cases with decrees on agreement of the parties that allocate water are: Kansas v. Colorado; Kansas v. Nebraska; Nebraska v. Wyoming; and Wisconsin v. Illinois.

These ten examples effectively illustrate the serious problems to effective implementation of our nation's environmental laws, passed with bipartisan support of Congress, if S. 489 becomes law. They also underscore problems in carrying out the important goals of alternative dispute resolution set forth in the Alternative Dispute Resolution Act of 1998. Specifically:

- Use of consent decrees would be virtually eliminated because there is often a need for remedies to environmental problems that last longer than the less than four years for which any certainty in a consent decree would be provided under S. 489. The legislation would effectively eliminate the use of consent decrees by the federal government and citizens groups to ensure that state and local governments comply with environmental protection laws. This problem is especially acute under sewage treatment cases, because the Clean Water Act is designed to have municipal governments undertake key responsibility to build and maintain sewage treatment facilities to clean up our nation's waters.

- Immediately after enactment great confusion would occur. As to consent decrees in place in existing cases that provide for cleanup of Superfund sites, construction of improved sewage collection and treatment systems, restoration of the Everglades, allocation of water among states, and many other environmental actions, shortly after enactment of S. 489 many disputes that have been resolved and plans undertaken could be thrown into confusion. Courts would be burdened with revisiting old matters. State and local governments would be called on to reassess matters long settled. The burden—in terms of both money and work—would be imposed on federal courts, state and local governments, the United States government, and many citizens and citizens groups.

- In the future, the amount of litigation would be increased, not decreased, in our federal courts, as the United States, states, and citizens and citizen groups seeking compliance with federal law and the U.S. Constitution would find themselves compelled to litigate rather than settle cases. Disputes would focus on "what is the problem" rather than how to fix the problem. Burdens on the court system, and on the resources of each involved entity, would be great.

- Overall enforcement of environmental laws would fall. Because resources of federal, state, and local governments and citizen groups are finite, more would be expended on each case, and overall enforcement of environmental laws, and thus overall compliance with those laws, would go down. Moreover, because an important part of enforcement is the deterrent effect on others, less enforcement means even less compliance as cities and states see that if they fail to comply with the environmental laws they are not so likely to face enforcement actions. Our nation's citizens will have less environmental protection, and less clean air, clean water, and clean land. Public health could be affected adversely.

- The ten case examples make clear that the current system works. Consent decrees resolve disputes and achieve compliance. Courts have authority to modify decrees. Under Frew v. Hawkins, courts and thus parties before the courts are instructed to take into account the importance of providing flexibility for state and local officials.

In sum, these cases make clear that consent decrees that run more than four years are critically important tools to get our nation's water and air and land cleaned up and protected. By imposing serious obstacles in the way of effective use of those decrees, S. 489 will result in more litigation and less environmental protection.

III. Background information about consent decrees is useful to understanding how S. 489 stabs environmental consent decrees in the heart.

In a wide range of substantive areas, Congress passes laws setting forth goals, rules and standards that it requires to be implemented and enforced. These laws include environmental laws, public land laws, civil rights laws, antitrust laws, Medicare, Medicaid, and the Sarbanes-Oxley law to improve quality and transparency of financial disclosures and independent audits. In addition, of course, the United States Constitution protects all of us through its important provisions, including equal protection and due process. Surely when Congress enacts laws it does so with the expectation that those laws will be complied with and enforced.

Often, those who are the subjects of the legislation comply with the laws and regulations that implement them. But sometimes, the will of Congress in passing such laws as the Clean Water Act or the Medicaid Act are not carried out, and enforcement, including through lawsuits, must occur. Under environmental laws, enforcement tools include administrative actions, civil suits, and criminal actions. Lawsuits to enforce are brought by the United States through the U.S. Department of Justice and United States Attorneys offices, by states, and by private parties, including in the environmental area citizen suits expressly provided for in many of the environmental laws. Indeed, the possibility of enforcement encourages compliance even before enforcement suits are brought, and that deterrence component of an effective enforcement program is important too.

Although it is not the subject of S. 489, it is worth noting that the United States is obligated to comply with these environmental laws as well, and is commonly sued by states and citizens seeking orders for compliance. Congress has passed laws such as the Federal Facilities Compliance Act, 42 U.S.C. §6961 et. seq., making clear that federal agencies must meet the same pollution control standards as state and local governments and private parties when it comes to the environmental laws. Getting the federal government to meet obligations to use water and air pollution controls is certainly the essence of democracy.

Enforcement lawsuits to obtain compliance with the laws that Congress passes and with the U.S. Constitution may be resolved in a number of ways: through summary judgment if the court finds there are no disputed facts; through a full-blown trial; through a settlement agreement; or through a consent decree. A consent decree is an agreement among the parties, approved and entered as an order by the Court. It bears repeating that if the state or local government does not agree, there will be no consent decree. If the case is not resolved through settlement or consent decree, the court may conduct a trial on both the question of whether the defendant is liable, and after liability is determined, on what an appropriate remedy for the liability would be. The court may resolve the case with an injunction and/or with other remedies, including money penalties.

Often when a state or local government is sued because plaintiffs—including the United States or a citizen group--allege that it has failed to comply with a federal law or with the U.S. Constitution, the state or local government makes an evaluation that it is likely to lose the case, and would rather not spend its lawyer, investigator, and other resources defending against claims it is likely to lose. Often, the parties to the lawsuit can decide whether to fight over whether there were violations of the law in the first place, or can focus attention and resources on how to fix the problem. A focus on fixing the problem generally turns to a discussion of a consent decree. The parties work out the terms of that decree, usually with each side making some compromises to get an agreement.

Congress has underscored the importance of settling cases. Under a law enacted by Congress in 1998, the Alternative Dispute Resolution Act, 28 USC §651 et seq., federal courts are strongly urged to encourage resolution of cases through means of "alternative dispute resolution", and, partly as a result of this law, every federal district court in the country has an alternative dispute resolution program to help parties obtain settlement short of trial. Indeed, every federal circuit court in the country has an ADR program as well. In the Sixth Circuit, for example, which covers Senator Alexander's state of Tennessee, the Court's website reports that its mediation office mediates approximately 1000 appeals per year, about 44% of which are resolved with no judicial involvement. My own home United States Court of Appeals for the District of Columbia Circuit has an outstanding alternative dispute resolution office that trains leaders of the bar and encourages them to mediate cases; that program has exposed many lawyers to ADR and they in turn have informed their clients of its value.

Because by negotiating consent decrees the plaintiffs—including the United States or states or citizen groups—and defendants, including state or local governments, turn resources and attention to fixing the problem, to assure compliance with the laws and constitution, rather than focusing on whether there is a problem, all participants achieve more and more effective enforcement. In addition, consent decrees often permit the parties—the state or local government and any other entity—to get to know each other better and work together more effectively over the long run.

The public has a role in many consent decrees. After the parties reach agreement, to become a consent decree the agreement must be approved by the Court where the case was filed. Under a number of environmental laws, before the Court determines whether to approve the consent decree, there is a requirement or a practice of public notice and an opportunity for public comment. This occurs, for example, under the Superfund law, under the Clean Air and Clean Water Acts, and under the hazardous waste law known as "RCRA" (the Resource Conservation and Recovery Act). The Court then takes into account any public comments and determines whether the agreement is reasonable, fair, and consistent with the purposes of the statute. See, e.g., United States v. Charles George Trucking, Inc., 34 F. 3d 1081 (1st Cir. 1994).

Other cases seeking to assure that state and local governments comply with the law or constitution are brought as class actions. In those cases, under provisions of the Federal Rules of Civil Procedure, Rule 23(e), the Court must hold a fairness hearing and evaluate the agreement to assure that it "fair, reasonable, and adequate." Rule 23(e)(1)(C).

Finally, the parties are not locked in to the specific terms of a consent decree. It has long been the law that parties can seek, first from each other and then from the court, modifications in light of changed circumstances or termination because the terms of the agreement have been fully met. Last year the Supreme Court reiterated that standard, and indeed expanded it, by unanimously approving a standard for seeking modifications in or relief from consent decrees that recognizes the important need for flexibility by state and local governments, especially when a new administration of the state or local government comes into office. Frew v. Hawkins, 540 U.S. 431 at 442 (2004).

The federal government extensively uses consent decrees to resolve enforcement actions under the full range of federal environmental laws. Indeed, under the federal Superfund program a model consent decree is posted on the website for the Environment and Natural Resources Division of the U.S. Department of Justice. Superfund cases, that may well include state or local government contributors to hazardous substances at a site, involve complicated settlement negotiations, often among numerous parties, and result in consent decrees that may take years to implement when the cleanup requires study or is large or time-consuming to implement. Another area in which the United States uses consent decrees is to resolve Clean Water Act enforcement actions brought against local sewage treatment systems to assure that they put into place effective sewage treatment systems. Such systems take many years to fund and build. A number of specific examples are described in Section II above. These are examples only—the United States seeks to settle environmental cases, and has used consent decrees, in a wide range of circumstances and under a wide range of statutes.

* * * * *

In summary, consent decrees are critically important tools to protect our nation's environment. Enacting S. 489 would cause great confusion under existing environmental consent decrees, and eliminate use of consent decrees for long-term state and local government fixes to environmental problems under the environmental laws. The result would be more litigation and less environmental protection. S. 489 should not be passed.

Testimony of Roger Snoble

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Los Angeles County
Metropolitan Transportation Authority

Before the

U.S. Senate Judiciary Committee

Subcommittee on Administrative Oversight and the Courts

"The Federal Consent Decree Fairness Act", S. 489

July 19, 2005

Mr. Chairman, my name is Roger Snoble, and I am the Chief Executive Officer of the Los Angeles County Metropolitan Transportation Authority ("Metro"). I would like to thank the Subcommittee for allowing me this opportunity to share Metro's experience under a federal consent decree that controls the bus service my agency provides.

By way of background, Metro was formed in 1993 by California legislation which merged two then-existing agencies: the Southern California Rapid Transit District (1964-1993), which provided bus and rail transit services in a portion of Los Angeles County, and the Los Angeles County Transportation Commission (1976-1993), which served as the planning and programming agency for all transportation services within Los Angeles County. With these merged responsibilities, Metro operates the public transit system for a large portion of the County of Los Angeles, manages the construction of major transit projects and provides for the equitable allocation of transit funds, not only for its own transit operations, but for all other transit operators in the County. In addition, Metro is responsible for the countywide funding for street, highway, and other transportation improvements.

In 1994, a class action lawsuit was brought which alleged that Metro had neglected its bus service while building a rail system, and that this constituted discrimination against its bus passengers who were more heavily minority than its rail passengers. Metro strongly disputed all of the plaintiffs' claims and showed that there has never been any significant difference between the racial and ethnic makeup of its bus and rail passengers.

After two years of expensive and intense litigation, but before the matter had yet proceeded to trial, the parties reached a settlement which is embodied in a consent decree approved by the United States District Court. The consent decree began in November 1996 and runs for ten years. It contains four major elements. The first two, a restriction on fares and an immediate expansion of bus service by 102 buses, are clearly described and were fully implemented without controversy. However, the other two elements are not as well defined. One calls for an unspecified amount of additional bus service to provide enhanced access to centers of employment, education and medical services. The other element seeks to reduce bus crowding by setting bus passenger limit goals. The Special Master assigned to oversee the consent decree has interpreted these latter two consent decree elements in a very expansive manner.

Even though Metro has added new bus service to employment, education and medical centers, including the implementation and continuing expansion of its innovative "Rapid Bus" program that has become a model for the transit industry, the Special Master has ordered further service. Even though random point checks have shown that Metro continues to meet the consent decree's bus crowding goals about 98% of the time, the Special Master has ordered millions of dollars of additional bus service to remedy mostly minor and often isolated instances where these goals have not been fully met. Moreover, even though nothing in the consent decree prohibits Metro from reducing or eliminating unproductive bus service, as is routinely done in the industry, the Special Master has placed severe restrictions on any service reductions, thus eliminating the use of this

operational efficiency as a way to fund any significant portion of the new service he has ordered.

The many mandates of the Special Master have placed a serious strain on the Metro budget. In the 1996-97 fiscal year, the year in which the consent decree was approved, the Metro budget included $719.4 million for Metro operated bus service. This was 25.4% of the Metro budget that year. In contrast, Metro's budget for 2004-05 contained almost $1.2 billion for Metro bus service, which was over 40% of that year's budget. This huge increase in bus funding is even more significant than the raw numbers would suggest, since during this period Metro opened two major segments of its Red Line subway and the Gold Line light rail, greatly reducing the need for bus service in the corridors served by these rail lines.

This massive increase in funding for the bus system has not only reduced our ability to fund other critical transportation projects, including improvements to our streets and highways which are among the most congested in the nation, but has left the agency in critical condition financially. With the use of one-time funding and reserves, Metro has been able to adopt a balanced budget for 2005-06. However, the agency is facing a projected deficit next fiscal year of over $150 million. Among the solutions the MTA Board is likely to consider to address this shortfall is a fare increase for our customers. If a fare increase is approved, its impact will most burden the transit dependent -- the very persons the consent decree was designed to help.

I want to make it clear that Metro agreed to a ten-year consent decree, recognizes its obligations under that decree and has worked diligently and in good faith to fulfill those obligations. When the Special Master or the Court has determined that new service is required by the consent decree, Metro has implemented it, no matter how much we disputed the need for it. The consent decree, as agreed to by the parties, will expire at the end of October 2006. However, the plaintiffs are seeking to have the Special Master impose an involuntary extension. The Special Master has denied this request, but the denial was without prejudice, and it is anticipated that the plaintiffs will try again. Because federal law does not clearly prohibit the courts from imposing involuntary extensions of voluntary consent decrees, Metro faces the real possibility of an unlimited continuation of having little control over the bus service it will provide, but full responsibility for funding that service level.

Mr. Chairman, thank you for holding this hearing and granting me the opportunity to offer Metro's perspective on this important issue.