

Consent Decrees

Background

A consent decree is a judge's order based on an agreement between parties in a lawsuit, enforceable by contempt charges and modified only by court order. Consent decrees entered into by private parties provide a reasonable and effective tool for settling lawsuits. But with lawsuits involving state and local governments, consent decrees are a weapon in the arsenal of activist plaintiffs and activist judges that they are more than willing to use.

To obtain a consent decree, an advocacy group identifies a program that needs change, constructs a legal theory that some constitutional or statutory requirement has been violated, and files a lawsuit against a state or local government. Instead of gambling on what could be a long and expensive court trial that they could lose, plaintiffs often try to convince state and local governments to settle the case through a consent decree. As Michael DeBow and his associates note in a 2008 report on consent decrees for the Alabama Policy Institute:

If the lawsuit goes to trial and the judge rules in favor of the plaintiff, the judge would be limited to ordering a remedy based on the facts of the case. But a consent decree can go well beyond what could legally be ordered after a trial. This creates a powerful incentive for plaintiffs because it creates an opportunity to enact reforms well beyond what the law would require.... Activists also have a strong incentive for getting state and local governments to enter into a consent decree because they are much easier to enforce than other judgments and very difficult to terminate and because, in effect, whatever the law actually requires is no longer in dispute or

ISSUE SNAPSHOT

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even applied. By expanding beyond the scope of the requirements of the law, a consent decree can enact a public policy agenda that otherwise would have little or no public support.¹

Several problems arise when consent decrees involving state and local governments are involved. For example, they allow judges to order a remedy to a problem that has not been proven in court. Such remedies may not be the best way to solve the problem, if the problem even exists at all. As a result, taxpayers are hurt twice by paying higher taxes to support questionable judicial remedies, as well as by having their voices in policy-making unduly compromised.

Supporters of consent decrees claim that society and our nation's legal institutions would be much worse off without such decrees. This view unfairly assumes that

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the public and its elected representatives cannot be trusted and therefore must be compelled by court order. In essence, the right to representative government guaranteed by the United States Constitution has been compromised by the arbitrary and unchecked use of federal consent decrees.

The Proper Roles of Government: By design, American courts are reactive. They are established to ensure justice under the law in criminal and civil cases and to ensure the legitimate interpretation of the Constitution. However, judges in both state and federal courts have moved beyond intended functions and have become proactive in the use of the law for policymaking. When courts drift from determining whether rights have been violated and begin to enforce social aspirations, constitutional and other likely serious problems arise.

Policy Consideration

In some cases, state and local governments can mount a formidable defense against consent decrees if they force plaintiffs to prove their case in court. If enough cases were decided by a trial instead of settled by a consent decree, the odds are good that fewer cases of this type would be filed. Even if the state or local government lost the case, the cost of trying the case would likely be less expensive than the cost of settling with a consent decree. Moreover, the judge would be limited to ordering a remedy based only on the facts of the case, nothing more.ⁱⁱ

Recommendation

Because consent decrees violate our representative form of government, Alabama's laws regarding them should be modified.

- An existing provision of the Alabama Constitution requires approval of the Legislature for state court orders requiring disbursement of state funds. In a similar fashion, the Alabama Constitution should be amended to require legislative approval for future federal consent decrees that require additional state expenditures or direct existing state funds.

- Alabama's Attorney General should also be required to negotiate a time limit, keyed to the expiration of the current governor's term of office, in every consent decree entered into by either the state government or any local government.
- The Attorney General should also be required to present a report to the State Legislature on every consent decree currently affecting state or local government operations, with budgetary and policy implications clearly addressed for each decree. The report should also note whether the Attorney General will seek to have any decrees dismissed in the coming year, and state reasons for these decisions.
- Finally, the state Attorney General's office should be required to complete an up-to-date list of consent decrees in force against the state government and local governments, to post such a list on the office's Web site, and to provide links on the Web site to publicly available documents describing the decrees and their administration.

Further Reading

- Michael E. DeBow, Gary J. Palmer, and John J. Park, Jr. "Consent Decrees in Institutional Reform Litigation: Strategies for State Legislatures." Alabama Policy Institute, 2008. Available at <http://tinyurl.com/68lnx5p>. Access verified February 12, 2011.

ⁱ Michael E. DeBow, Gary J. Palmer, and John J. Park, Jr. "Consent Decrees in Institutional Reform Litigation: Strategies for State Legislatures." Alabama Policy Institute, 2008, p. 5. Available at <http://tinyurl.com/68lnx5p>. Access verified February 12, 2011

ⁱⁱ *Ibid.*