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A Welcome Retreat from Government by Consent Decree

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REVIEW & OUTLOOK

A Welcome Retreat From Government by Consent Decree

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Federal judges now commonly play a major role in the management of public institutions. In school-desegregation and prison-reform cases, judges have appointed expert special masters to advise them on policy details and then proceeded to act like chief administrators, issuing detailed directives on their own authority—or the advice of their own chosen experts. A federal judge in Boston thus became involved in allocating basketballs in different city schools while a judge in Alabama issued detailed directives on the placement of prison air conditioners

Last month, Attorney General Edwin Meese issued new guidelines directing Justice Department lawyers to resist excessive judicial reliance on outside special masters in cases involving the federal government. Of more significance, however, is a different set of guidelines, issued the same day, which seeks to curb a far more common policy partner in the imposition of intrusive judicial controls—the Justice Department itself. These new guidelines are designed to prevent Justice Department lawyers from signing away broad policymaking responsibilities of the federal government in the course of settling lawsuits.

Restraints of this kind are long overdue. The cases where judges intervene with their own administrative directives are actually rather exceptional. Far more often, judges are simply involved in enforcing consent decrees or settlements negotiated by government officials themselves in the course of litigation. But the consequences can be equally vexing.

In the past several years, the Reagan administration has repeatedly found itself in court fighting over legal commitments left by its predecessors. The cases have covered such diverse fields as nondiscrimination standards in education and housing, environmental regulation and FBI investigative practices. And the consent agreements in these cases often have cut deeply into the traditional province of executive discretion, seemingly requiring the Reagan administration to introduce particular legislative measures, to seek and expend particular appropriations, to adopt new regulations and maintain particular agency management policies.

The attorney general's new guidelines on consent agreements should leave subsequent administrations with a cleaner slate—which is to say, a freer hand in reshaping policy to accord with their own judgments and priorities. Even liberal Democrats, then, ought to applaud the new guidelines. The officials who inherit this freer hand in subsequent administrations, after all, may be Democratic appointees. In the meantime, the guidelines reassert an important principle—that public policy should not be mortgaged to bargains with private litigants

Consent agreements do often serve useful ends. They can save the time, expense and awkwardness of direct judicial decision-making by allowing the parties to resolve their differences in direct negotiation. The defendant, by agreeing to cooperate, can often negotiate easier terms with the plaintiff than he might have received from an exasperated judge at the end of a long legal battle. But the agreement would have no value to the plaintiff if it were not binding, and the courts therefore have been called upon to enter and subsequently to enforce such agreements in the manner of binding contracts.

This sort of court-sponsored bargaining is quite routine in disputes between private parties, as well as in suits involving the government. The system assumes that lawyers on each side will strive to win the best deal they can for their clients and that the clients themselves can be trusted to judge what is, from their perspective, a good deal The problem is that the government has a rather special relationship with its "client"—the public.

Government assessments of the public's interest are often quite disputable. That is why we have elections. But the binding character of consent agreements means that one administration may bind its successors on a particular point of policy, even after the outlook behind that policy has been repudiated at the polls. The scale and reach of contemporary government litigation, moreover, means that rather broad policy decisions can be preempted by earlier agreements in individual lawsuits.

This can be a problem even in enforcement actions initiated by the government itself. And it can arise as much from haste and shortsightedness as from partisan strategy. In late 1980, for example, the Justice Department's Civil Rights Division reached an extraordinary agreement with the Chicago school board on a longstanding desegregation suit. Prompted (according to critics) by eagerness to settle this controversial suit before the 1980 elections, Justice accepted a plan for upgrading the attractiveness of Chicago schools and promised to help the local school board "find and provide every available form of financial resources [sic] adequate for the implementation of the desegregation plan."

In 1983 the Chicago school board turned around and successfully sued the federal government for failing to provide adequate funding. A federal district judge ordered a freeze on all new Education Department grants to local schools until Chicago received a downpayment of $14 million. Subsequently the judge determined that $100 million would be necessary and simply ordered the Reagan administration "promptly to undertake some combination of . . . lobbying activities [in Congress] to the extent necessary to assure financing adequate" for this purpose. The Reagan administration tried to resist this direct intrusion into its budgeting and "lobbying" policy, but thus far it has been unable to disentangle itself from judicial demands that some version of its "contract" with Chicago be fully enforced.

Sometimes government consent decrees do look more like deliberate strategies by one set of officials to bind their successors to their own views of good policy. In 1976, for example, outgoing Ford administration officials negotiated an extremely elaborate and ambitious enforcement program in response to a succession of suits by civil-rights groups charging inadequate federal enforcement of anti-discrimination measures in the nation's schools and colleges. Ironically, during the subsequent Carter administration, HEW Secretary Joseph Califano complained that the rigid requirements of the consent decree were inhibiting his department from delivering on its frequent promises to reinvigorate civil-rights enforcement efforts But the federal judge who had entered the initial consent decree insisted that the government must live up to its side of the 1976 agreement. The Reagan administration in turn has been entangled in complex litigation since 1982 over its alleged failures to live up to the demanding terms of the same decree.

The attorney general's guidelines attempt to prevent such abuses in the future by prohibiting federal government settlements that go beyond what a court would have the constitutional power to order on its own authority The guidelines recognize the constitutional principle of separation of powers, which implies definite limits on independent judicial power and definite limits on the extent to which judges can direct the exercise of such basic executive prerogatives

Drawing precise lines may be difficult—all the more so because the issue has rarely been pressed before the courts in the past. But the attorney general is surely right to try to restrain executive agencies from cooperating in the transfer of executive policy responsibilities to private litigants and judges.

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