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Opinion
Consent Decrees

GOVERNANCE BY **LAWYERS**

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Special to the National Law Journal

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TORT LAW IS not the only aspect of the litigation spectrum that should be on Congress' agenda this term. Congress should also address the phenomenon known as institutional reform litigation. We refer to the process--which has grown exponentially over the last 30 years--in which advocacy groups bring suits resulting in consent decrees; those decrees then effectively--and inflexibly-- run public agencies and institutions, sometimes for decades.

Institutional reform decrees dealing with special education, foster care, mental health, public health and dozens of other state and local programs continue--sometimes for decades after their issuance--without any real regard to whether court control is still needed to protect rights or whether the decree is the best way to achieve statutory goals. Courts base these cases mostly on rights embedded in federal statutes like the Americans With Disabilities Act or the Individuals with Disabilities Education Act.

It is not that the judges by signing these decrees had sought to usurp the prerogatives of governors and mayors, but that is what happened. Judges told the litigants to negotiate decrees with the intention of letting elected officials decide how to comply with statutory rights. The negotiators in practice were the plaintiffs' attorneys, the government's attorneys and lower-echelon government officials. Although formally opponents before the bench, they discovered, around the negotiating table, that they had much in common, including favorite ideas on how to improve the program and a desire to pry more money and authority from governors, mayors and legislators.

Working behind closed doors, the controlling groups negotiated elaborate decrees of 50 or even 500 pages, encrusted with horse trades that often had little to do with the statute or the violations, but a lot to do with long-term agendas such as advancing particular philosophies, insulating budgets, postponing statutory requirements and perpetuating lawyer control of programs. Once signed by a judge, these plans bound not only the current governor or mayor, but also their successors in office. Newly elected officials arrived in office to find that ancient consent decrees controlled current social programs and budgets.

Here are three steps that Congress can take to limit the harm that institutional reform litigation does to local democracy without preventing judges from protecting rights. First, Congress should instruct courts to limit court decrees in institutional reform cases to correcting only actually proven systemic violations of law, even where the defendants consent to further terms.

Second, while public officials should not be allowed to change statutory obligations, we do elect them (not plaintiffs' attorneys) to figure out how to achieve public goals. The controlling group's main trump card in extending its control is its power to prevent modification of the decree. The only escape valve is for public officials to risk chancy litigation under rules that disfavor modification. Old decrees, as a result, are extended and enlarged as public officials offer plums to gain plaintiffs' attorneys' consent to changes. So Congress also should instruct courts to allow modification of consent decrees anytime a public official has a good reason for the change.

Finally, Congress should compel termination of decrees after a fixed time, such as four years, unless plaintiffs show that current violations exist. Decrees now take on a life of their own, governed by the controlling group, and are not subject to appeal or alteration by federal agencies, trial court judges, legislators or the public. The controlling groups just keep controlling public policy and public institutions for decades--through private meetings behind closed doors.

Fortunately, Congress has a model to follow: the Prison Litigation Reform Act of 1995, which halted the worst abuses of prison litigation and did so without stopping courts from stepping in when prisoners' rights are violated.

The act made significant changes in how judges supervise state and local prison officials, including limiting the scope of remedies to violations that are actually proven. As one federal judge has stated, prison cases had started with gross brutality and ended up in disputes over ice cream in the commissary. Congress also put term limits on prison decrees; they could last no longer than two years unless still needed to correct current or future violations. And the burden of proving that a decree was still needed was shifted to the plaintiffs. Despite fears, the law has worked well. Across the country, many 20- and 25-year-old prison decrees have been terminated or modified with no obvious falloff in the capacity of judges to protect prisoners.

General reform of all consent decrees will mean less power for the lawyers of the controlling groups, but not less respect for rights. Judges will remain the protectors of rights, including our collective right to democratic decision-making.

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