



U.S. Department of Justice

Office of Legal Policy

F-6

Washington, D.C. 20530

MEMORANDUM

October 27, 1986

TO: Samuel A. Alito
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FROM: Donald B. Ayer
Deputy Solicitor General

Lowell V. Sturgill, Jr.
Attorney-Advisor

SUBJECT: Litigation Strategy Working Group

The Litigation Strategy Working Group will meet this Thursday, October 30, 1986 from 11:00 - 12:00 a.m. in the Antitrust Division's Conference Room, Room 3101. At that time, we will discuss the following subjects:

1. Alternative Sentencing Guidelines.
2. The role of intervenors in suits settled by consent decrees in the wake of Local 93, International Association of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (July 2, 1986). A revised copy of a memorandum prepared by Roger Marzulla and Ray Ludwiszewski on this subject is attached, along with a copy of the Consent Decree Guidelines signed by the Attorney General this spring.
3. Federal agencies funding private litigation against the federal government.

4. The press disclosure policies of the federal government relating to plea agreements.

As time permits, we will, as usual, discuss other matters of interest to the Group.

We look forward to seeing you on Thursday.

Attachments

cc: All Assistant Attorneys General (Litigating Divisions)



U.S. Department of Justice
Land and Natural Resources Division

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

OCT 24 1986

MEMORANDUM

TO: Litigation Strategy Working Group

FROM: Roger J. Marzulla
Deputy Assistant Attorney General

Raymond B. Ludwiszewski
Special Counsel
Land & Natural Resources Division

SUBJECT: Role of Intervenors in Suits Settled by Consent
Decrees in the Wake of Local 93, International
Association of Firefighters v. City of Cleveland,
106 S. Ct. 3063 (July 2, 1986)

Last term the Supreme Court decided Local 93, International Association of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (July 2, 1986) in which Justice Brennan made two interesting rulings with respect to consent decrees: (1) since they are essentially agreements between the parties, they may provide for remedies which the court would not have jurisdiction to order if the case had been tried; and (2) likewise because they are private agreements, the consent of other parties to the action (to wit, intervenors as-of-right) need not be obtained. These rulings were contrary to the position taken by the United States. I think it would be worthwhile for the LSWG to discuss the impact of this decision on our consent decree practice.

I. Consent Decree as Agreement. The opinion discusses the dual nature of a consent decree as an agreement between the parties that is also a judicial order. The court concludes that the scope of the agreement is not limited by the court's authority to issue orders, so that the parties can agree to remedies (here race-conscience hiring) which the court could not have ordered in the absence of such an agreement. This directly challenges an important premise of the Attorney General's consent decree policy: that a consent decree is an order whose scope may not exceed the court's jurisdictional order authority. The group should discuss, what, if any, effect the Local 93 decision has on the way we analyze proposed consent decrees.

II. Consent of All Parties (Including Intervenors).
Our Firefighters amicus brief suggested that the consent of an intervenor as-of-right is required in Title VII cases before the court may enter a consent decree. The amicus brief properly emphasized the importance of safeguarding the rights of those individuals who may be disadvantaged by a Title VII decree. The brief notes:

It is one thing for consenting parties to enter into consent decrees affecting only their own rights. but a Title VII consent decree awarding preferences in hiring, promotions, seniority, or layoffs to minority employees or prospective employees necessarily disadvantages those individuals who are not preferred. (Brief at 24)

Although this position makes sense in the Title VII arena where a limited number of jobs or promotions is being divided up, is problematic in environmental cases where virtually anyone has standing to challenge actions taken by the federal government. Citizen suit provisions allow almost anyone to challenge EPA's failure to perform "nondiscretionary" duties, while the APA gives any aggrieved party standing to challenge new regulations. In environmental enforcement cases such as those brought under the Clean Air Act, Clean Water Act or Superfund, the United States frequently enters into proposed consent decrees with polluters only to have them challenged by intervenors as inadequate remedies. We have consistently taken the position that the court may approve such consent decrees over the objection of intervenors. U.S. v. Hooker Chemical Plastics (Hyde Park case), 540 F.Supp. 1067, 1083 (W.D.N.Y. 1982).

Perhaps a valid distinction can be drawn between those who suffer injury differentiated from that of the public in a Title VII case and those who suffer no more than anyone else in an environmental case. However, this sounds very much like the test for standing, and may appear that we concede that significant injury in fact is not required to bring suit but only to challenge consent decrees. Perhaps a preferable approach is to attempt to limit (as Justice Brennan does) the impact the consent decree itself by arguing that it cannot affect the rights of those not a party to it. This too poses difficulties, however, as it undercuts the finality of our consent decrees.

We would like the LSWG to discuss the appropriate Department position with regard to the need for intervenors' consent to entry of a decree.

Attachment: Local 93 Opinion



Office of the Attorney General
Washington, D. C. 20530

13 March 1986

MEMORANDUM

TO: All Assistant Attorneys General
All United States Attorneys

FROM: EDWIN MEESE III *EM*
Attorney General

SUBJECT: Department Policy Regarding Consent
Decrees and Settlement Agreements

The following policy is adopted to guide government attorneys involved in the negotiating of consent decrees and settlements. Adopted pursuant to the Attorney General's litigation and settlement authority, these guidelines are designed to ensure that litigation is terminated in a manner consistent with the proper roles of the Executive and the courts. They are to be followed in all cases tried by counsel under the direction of the Attorney General.

I. General Policy on Consent
Decrees and Settlement Agreements

Consent decrees are negotiated agreements that are given judicial imprimatur when entered as an order of the court. Because of their unique status as both contract and judicial act, consent decrees serve as a useful device for ending litigation without trial, providing the plaintiff with an enforceable order, and insulating the defendant from the ramifications of an adverse judgement. In the past, however, executive departments and agencies have, on occasion, misused this device and forfeited the prerogatives of the Executive in order to preempt the exercise of those prerogatives by a subsequent Administration. These errors sometimes have resulted in an unwarranted expansion of the powers of judiciary -- often with the consent of government parties -- at the expense of the executive and legislative branches.

The executive branch and the legislative branch may be unduly hindered by at least three types of provisions that have been found in consent decrees:

1. A department or agency that, by consent decree, has agreed to promulgate regulations, may have relinquished its power to amend those regulations or promulgate new ones without the participation of the court.

2. An agreement entered as a consent decree may divest the department or agency of discretion committed to it by the Constitution or by statute. The exercise of discretion, rather than residing in the Secretary or agency administrator, ultimately becomes subject to court approval or disapproval.

3. A department or agency that has made a commitment in a consent decree to use its best efforts to obtain funding from the legislature may have placed the court in a position to order such distinctly political acts in the course of enforcing the decree.

In Section II these guidelines address each of these concerns and limit authority to enter into consent decrees that would require the Secretary or agency administrator to revise, amend or promulgate regulations; that would require the Secretary or agency administrator to expend funds which Congress has not appropriated, or to seek appropriations from Congress; or that would divest the Secretary or the agency administrator of discretion granted by the Constitution or by statute.

These limitations on entry into consent decrees that might include such provisions are required by the executive's position, that it is constitutionally impermissible for the courts to enter consent decrees containing such provisions where the courts would not have had the power to order such relief had the matter been litigated.

The limitations in Section II.A. of the guidelines are not intended to discourage termination of litigation through negotiated settlements. The Attorney General has plenary authority to settle cases tried under his direction, including authority to enter into settlement agreements on terms that a court could not order if the suit were tried to conclusion. Settlement agreements -- similar in form to consent decrees, but not entered as an order of the court -- remain a perfectly permissible device for the parties and should be strongly encouraged. Section II.B., however, places some restrictions on the substantive provisions which may properly be included in settlement agreements. For example, Section II.B.1. allows a department or agency to agree in a settlement document to revise, amend, or promulgate new regulations, but only so long as the department or agency is not precluded from changing those regulations pursuant to the APA. Similarly, under Section II.B.2. the Secretary or agency administrator may agree to exercise his discretion in a particular manner, but may not divest himself entirely of the power to exercise that discretion as necessary in the future. The guidelines further provide that in certain circumstances where the agreement constrains agency discretion, a settlement agreement should specify that the only sanction for the government's failure to comply with a provision of a settlement agreement shall be the revival of the suit. Revival of the suit as the sole remedy removes the danger of a judicial order

awarding damages or providing specific relief for breach of an undertaking in a settlement agreement.

Finally, it must be recognized that the Attorney General has broad flexibility and discretion in the conduct of litigation to respond to the realities of a particular case. Such flexibility can be exercised by the Attorney General in granting exceptions to this policy.

II. Policy Guidelines on Consent Decrees and Settlement Agreements

A. Consent Decrees

A department or agency should not limit its discretion by consent decree where it would assert that a similar limitation imposed by injunction unduly or improperly constrains executive discretion. In particular, the Department of Justice will not authorize any consent decree limiting department or agency authority in the following manner:

1. The department or agency should not enter into a consent decree that converts into a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations.

2. The department or agency should not enter into a consent decree that either commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization.

3. The department or agency should not enter into a consent decree that divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

B. Settlement Agreements

The Department of Justice will not authorize any settlement agreement that limits the discretion of a department or agency in the following manner:

1. The department or agency should not enter into a settlement agreement that interferes with the Secretary or agency administrator's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act.

2. The department or agency should not enter into a settlement agreement that commits the Department or agency to

expend funds that Congress has not appropriated and that have not been budgeted for the action in question.

In any settlement agreement in which the Secretary or agency administrator agrees to exercise his discretion in a particular way, where such discretionary power was committed to him by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties, the sole remedy for the department or agency's failure to comply with those terms of the settlement agreement should be the revival of the suit.

C. Exceptions

The Attorney General does not hereby yield his necessary discretion to deal with the realities of any given case. If special circumstances require any departure from these guidelines, such proposed departure must be submitted for the approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General at least two weeks before the consent decree is to be entered, or the settlement agreement signed, with a concise statement of the case and of reasons why departure from these guidelines will not tend to undermine their force and is consistent with the constitutional prerogatives of the executive or the legislative branches. Written approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General will be required to authorize departure from these guidelines.