TESTIMONY OF JOHN ENGLER, FORMER GOVERNOR OF MICHIGAN, PREPARED FOR THE SUBCOMMITTEE ON THE INTERIOR,ENERGY AND ENVIRONMENT AND THE SUBCOMMITTEEE ON INTERGOVERNMENTAL AFFAIRS---TUESDAY, JULY 25, 2017

Chairman Palmer, Chairman Farenthold, Ranking Members and Subcommittee members of the Committee on Oversight and Government Reform-----

Thank you for inviting me to appear here this morning as you continue your examination of "Sue and Settle" agreements. I appreciate all the work by the members of the two Subcommittees on this important topic. Also, I am grateful to your excellent staff in helping to make the logistics work smoothly.

I want to begin this morning by quoting from a foreword to a publication written for the Alabama Policy Institute located in Birmingham, Alabama. In fact, I have brought a copy of that document entitled: **Consent Decrees in Institutional Reform Litigation: Strategies for State Legislatures**. I would like to leave one with staff so that it might be added to the committee records.

The foreword was written in 2008 by then-Senator, now-**Attorney General Jeff Sessions**.
He wrote: "One of the most dangerous, and rarely discussed, exercises of raw power is the issuance of expansive court decrees. Consent decrees have a profound effect on our legal system as they constitute an end run around the democratic process. Such decrees are particularly offensive when certain governmental agencies secretly delight in being sued because they hope a settlement will be reached resulting in the agency receiving more money than what the legislative branch or other funding source would otherwise have deemed justified. Thus, the taxpayers ultimately fund the settlement enacted through this undemocratic process.

A consent decree is the equivalent of a legislative enactment created at the hands of the courts, and often less subject to modification. By entering into these decrees,

current state executives, such as Governors or Attorneys General, can bind the hands of future state executives and legislatures. A predecessor's consent decree is difficult to alter or end; in practice, a decree can last for many years – longer than the remedy that was needed."

Sessions then described one remarkable and somewhat unimaginable example he personally had to confront. His predecessor as Alabama Attorney General had somehow agreed to a consent decree that mandated an increase in the number of justices on the state supreme court by two seats. Sessions viewed this as essentially amending the Alabama constitution. As the new Attorney General, he objected to the agreement, filed an appeal and was eventually successful in having the Eleventh Circuit Court of Appeals reject it.

While the Alabama example was highly creative, it merely represents hundreds of consent decrees, decrees covering an array of subjects and decrees for the most part which remain in force today. The cost of compliance and the usurping of state and local decision-making will be truly stunning when the true scope of this abuse is made known by the work you are doing. That is why I am so pleased to join you as you attempt to examine these practices, make known the costs and put the spotlight on the end run around accountability that this litigation often represents.

I am happy to discuss the judicial battles we fought when I was Governor in Michigan as we sought to end costly consent decrees and restore public policymaking to those who were elected to Legislative and Executive positions.

Winning reform will not be easy. Activists insist that "**institutional reform litigation**" represents merely their effort to impose broad and long-term reform of government programs and laws on "backward" or "recalcitrant" state or local governments.

Often the reality is a bit different. These same activists have made their case and lost in elections or legislative forums. The last remaining hope for achieving their policy objectives is litigation. A lawsuit

designed and brought to convince state and local governments to settle the case through a consent decree. The seductive argument is: “avoid a long and expensive trial that could last for years and which you will likely lose. Settle and we can work this out”.

This is where the problems with consent decrees really become clear. I realize one person’s problem is sometimes another person’s preferred outcome so it matters greatly who is involved in the litigation. Plaintiffs can look for an opportunity to enact reforms well beyond what the law would require. 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.
Further, once a consent decree has been entered into, they are much easier to enforce than other judgments and they are very difficult to terminate.

Given the possibility of such burdensome outcomes, you might ask why would any Governor or Mayor or Attorney General ever negotiate a consent decree? As I stated, it depends on who the parties are and what their agendas might be at the time of negotiation.
For example, I seem to recall as a state legislator, a situation where the head of the prison system was frustrated by a lack of budgetary support in the legislature. Next thing we know, litigation is brought by prisoner rights activists against the state corrections agency. The lawsuit makes many demands so the agency agrees to a consent decree. Then the agency is right back in the appropriations process stating they are “under court order” and the money must be appropriated by the legislature.

Solving this conundrum will not be easy, but getting the facts made public will build support. Some years ago, Congress considered what was known as the **Federal Consent Decree Fairness Act (FCDFA).**

The purpose of the FCDFA was 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 fails to rule on the motion to modify or vacate within ninety days.

These provisions were designed to get at two pervasive and profoundly problematic institutional practices: "institutional reform litigation," and the private enforcement of federal programs against state and local governments.

[The scholar, ***Dr. Michael S. Greve (John G. Searle Resident Scholar and Director of the AEI Federalism Project****) has written extensively about the private enforcement of federal programs against state and local governments. He points out that "…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.*

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".

Greve also hits on the accountability issue which is central to much of the political discord in America today. He says that "…private enforcement greatly exacerbates the most troublesome feature of intergovernmental programs--the erosion of political responsibility and accountability at all levels."

He described "… 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. 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 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."]

I think the "bottom line" for federal policymakers is that the states and local governments that you represent are asking for help. They seek restoration of their right to exercise the powers reserved to them under the constitution. They want to be held accountable for their own decisions and they seek to

have those decisions made by men and women who were elected. They want to make policy choices according to the wishes of their constituents and set spending priorities based on those choices. They want to be freed from having decisions imposed on them by unelected judges and reporting for years to court-appointed monitors who have no accountability to the public.

I look forward to discussing these issues with the committee today and pledge my support for the overdue reform of consent decrees.

Thank you.