Congressional Testimony

Government Litigation and the Need for Reform

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Andrew M. Grossman
Senior Legal Fellow, Buckeye Institute
Adjunct Scholar, Cato Institute
Partner, Baker & Hostetler LLP

My name is Andrew Grossman. I am a Senior Legal Fellow at the Buckeye Institute, an Adjunct Scholar at the Cato Institute, and a partner in the Washington, D.C., office of Baker & Hostetler LLP. The views I express in this testimony are my own and should not be construed as representing those of the Buckeye Institute, the Cato Institute, my law firm, or its clients.

My testimony today focuses on the use and abuse of "sue and settle" tactics in litigation against the government. "Sue and settle" refers to collusion in litigation between government regulators and outside groups bringing suit against those regulators to compel them to take official actions that the regulators themselves support. It raises serious concerns about the conduct and resolution of litigation that seeks to compel agency action, set agency priorities, and (in some instances) influence the content of regulations or other agency actions. Since the House Judiciary Committee first directed its attention to the problem of collusive settlements in 2012,[1] there have been a series of hearings and reports focusing on this problem, as well as the introduction of legislation. There are three questions for the Subcommittee today: Was the Trump Administration successful in avoiding the errors of the Obama Administration regarding collusive settlements? What is the Biden Administration doing today? And is there a role for legislation in this area? Let's not hide the ball: the answers are, respectively, yes, the same old shenanigans, and emphatically yes.

I. Understanding the "Sue and Settle" Phenomenon

Usually, the federal government vigorously defends itself against lawsuits challenging its actions. But not always. Sometimes regulators are only too happy to face collusive lawsuits by friendly "foes" aimed at compelling government action that would otherwise be difficult or impossible to achieve.

In a number of cases brought by activist groups, the Obama Administration chose instead to enter into settlements that committed it to taking action, often promulgating new regulations, on a set schedule. While the "sue and settle" phenomenon was not new, dating back to the broad "public interest" legislation of the 1960s and 1970s, the Obama Administration accelerated the frequency with which agency actions and generally applicable regulations,

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[1] *See generally The Use and Abuse of Consent Decrees in Federal Rulemaking: Hearing Before the H. Subcomm. on the Courts, Commercial and Administrative Law, H. Comm. on the Judiciary*, 112th Cong. (Feb. 3, 2012) (written testimony of Andrew M. Grossman, Visiting Legal Fellow, The Heritage Foundation), available at http://judiciary.house.gov/_files/hearings/Hearings%202012/Grossman%2002032012.pdf [hereinafter "2012 Testimony"].

particularly in the environmental sphere, were being promulgated according to judicially enforceable consent decrees struck in settlement. The EPA alone entered into more than sixty such settlements between 2009 and 2012, committing it to publish more than one hundred new regulations, at a cost to the economy of tens of billions of dollars.[2] And that was only the first term of the Obama Administration. The second term witnessed a further "sue and settle" binge, including such regulations as the Clean Power Plan.

In the abstract, settlements serve a useful, beneficial purpose by allowing parties to settle claims without the expense and burden of litigation. But litigation seeking to compel the government to undertake future action is not the usual case, and the federal government is not the usual litigant. Consent decrees and settlements that bind the federal government present special challenges that do not arise in private litigation. They also raise what the authors of a Congressional Research Service report correctly described as "fundamental questions" about the separation of powers and exercise of policymaking direction, including:

> To what extent can an administration bind itself and its successors to particular policies or actions that would otherwise remain discretionary? How can long-term judicial oversight of federal policy be consistent with the executive branch's duty to faithfully execute the law? Do policymaking settlements unduly transfer federal power to private plaintiffs, who can "collude" with friendly administrations to enshrine favorable approaches to huge swaths of policy entrusted to the executive branch?[3]

As Professor Michael McConnell observed in an unfortunately prescient article from the 1980s, litigation settlements involving the federal government have "created a new species of lawmaking," one by which "one Administration can set policy today *and* bind their successors to comply with it tomorrow, by settling a law- suit on those terms."[4] Such settlement, he argues, "violate the structural provisions of the Constitution by denying future executive officials the policy-making authority vested in them by the Constitution and laws."[5]

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[2] U.S. Chamber of Commerce, Sue and Settle: Regulating Behind Closed Doors (2013), at 14.

[3] Sarah Herman Peck & Ben Harrington, Cong. Research Serv., The "Flores Settlement" and Alien Families Apprehended at the U.S. Border, CRS Report No. R45297 (2018), available at https://www.yalelawjournal.org/pdf/130Brewer_b4jdxryv.pdf.

[4] Michael W. McConnell, Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change, 1987 U. Chi. Legal F. 295, 297.

[5] *Id*. at 298.

That is, however, only one part of the problem. In some cases, settlements may serve, within the context of a single presidential administration, to support departure from the priority schemes prescribed by Congress, to cut short ordinary rulemaking timelines, to limit public participation in rulemaking, to evade accountability, and to exclude interested parties from the policymaking process. As a result, sound administration of the law suffers. For example, agency settlements have "la[id] the foundation for rushed, sloppy rulemaking, resulting in further time and resources required to be spent on technical corrections, subsequent reconsiderations, or court-ordered remands to the agency."[6]

The "sue and settle" phenomenon is not confined to a particular policy area or agency. Settlements binding federal actors have been considered in cases concerning immigration law, civil rights, federal mortgage subsidies, national security, and many others. Basically, settlements may become an issue in any area of the law where federal policymaking is routinely driven by litigation. But they are especially prevalent in environmental law, due to the breadth of the governing statutes, their provisions authorizing citizen suits, and the great number of duties those statutes arguably impose on the relevant agencies.

II. The Trump Administration

There is a reason that public interest in the "sue and settle" phenomenon peaked during the Obama Administration and that relatively little ink has been spilled on it since until quite recently. That reason is that, right out of the gate, the Trump Administration resolved to put an end to the phenomenon through executive action. For example, the Administration's first EPA Administrator, Scott Pruitt, quickly decided to bar collusive settlements involving the EPA. He explained the action in a radio interview:

> In fact, one of the things we've done internally…is send a memo out to our regions and also to headquarters to say that the days of sue and settle, the days of consent decrees governing this agency where the EPA gets sued by an NGO, a third party, and that third party sets the agenda, sets the timelines on how we do rulemaking, and bypassing rulemaking entirely have ended. And we've sent that out across the agency….
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> When you use the courts, you know, when someone sues, a third party, and NGO, Sierra Club or otherwise, sues the EPA and then the EPA outside of the regulatory process enters into

[6] Travis Voyles, Clearing Up Perceived Problems with the Sue-and-Settle Issue in Environmental Litigation, 31 Land Use and Env'tl L.J. 287, 294 (2016).

> something called a judgment consent decree and then changes statute, changes timelines, changes obligations under a statute. That's regulation through litigation. That's an abuse of the process. And whether it's for conservative causes or liberal causes, that's still a breach of the process and should not be done.[7]

Administrator Pruitt could not have been more clear than when he told the *Wall Street Journal*, "Regulation through litigation is simply wrong" and stated that agencies should not "use the judicial process to bypass accountability."[8]

Administrator Pruitt kept his word. In October 2017, he issued a memorandum entitled "Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements."[9] The memorandum provided that EPA "shall avoid inappropriately limiting the discretion that Congress authorized the Agency, abide by the procedural safeguards enumerated in the law, and resist the temptation to reduce the amount of time necessary for careful Agency action." It also provided that, when considering a litigation settlement, EPA should "should welcome the participation of the affected states and tribes, regulated communities, and other interested stakeholders," so that their rights and interests are given appropriate account.

Upon issuing this directive, Administrator Pruitt declared, "The days of regulation through litigation are over." Administrator Pruitt, as well as his successor, Andrew Wheeler, followed through on that promise, adhering to the letter and spirit of the directive while in office.

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[7] *EPA Administrator Scott Pruitt: The Days of "Sue And Settle" Have Ended*, Hugh Hewitt Show (Mar. 29, 2017), available at http://www.hughhewitt.com/epa-adminstrator-scott-pruitt-days-sue-settle-ended/.

[8] Kimberley A. Strassel, *A Back-to-Basics Agenda for the EPA*, Wall St. J. (Feb. 18, 2017).

[9] Memorandum from E. Scott Pruitt, EPA Administrator, to EPA Assistant Administrators, et al., Re: Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements (Oct. 16, 2017), available at https://www.epa.gov/sites/default/files/2017-10/text_of_memo_from_epa_administrator_scott_pruitt_to_epa_managers_adhering_to_the_fundamental_principles_of_due_process_rule_of_law_and_cooperative_federalism_in_consent_decrees_and_settlement_agreements_october_16_2.txt.

III. The Biden Administration

President Biden's appointee as EPA Administrator, Michael Regan, revoked the 2017 directive.[10] His memorandum effectuating that decision explained that "settlement of environmental claims against the EPA preserves agency resources to focus on the vital work the agency carries out under the environmental statutes."[11] Of course, the Pruitt directive did not bar settlements of meritorious claims the litigation of which would only distract the agency and needlessly consume resources.

The Biden Administration's most prominent settlements to date have focused on energy production. A series of litigation settlements entered in March 2022 binds the Bureau of Land Management to undertake extensive environmental review for oil and gas leases on thousands of parcels of public lands, covering nearly 4 million acres in Colorado, Montana, New Mexico, Utah, and Wyoming.[12] In a press release, the plaintiffs—environmental-activist organizations that oppose energy production—crowed that the settlements "entirely recast the federal government's obligation to consider the cumulative climate impacts of oil and gas leasing on public" and thereby provide an "opportunity for the Biden administration to chart a new path toward clean energy and independence from fossil fuels" by restricting energy production.[13] The American Energy Alliance, however, warned that the settlements set a new "precedent [that] can now be cited to require future lease sales to include a more thorough study and further delay."[14]

In a separate settlement entered in September 2022, BLM agreed to halt drilling permits on 113 oil and gas leases across 58,617 acres of land in

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[10] Memorandum from Michael S. Regan, EPA Administrator, to EPA Deputy Administrator, et al., Re: Consent Decrees and Settlement Agreements to Resolve Environmental Claims Against the Agency (Mar. 18, 2022), available at https://www.epa.gov/system/files/documents/2022-03/ogc-22-000-2698_0.pdf.

[11] *Id*.

[12] Press Release, WildEarth Guardians, Biden administration will address oil and gas leasing climate impacts, reconsider sales to oil and gas industry, June 2, 2022, https://wildearthguardians.org/press-releases/biden-administration-will-address-oil-and-gas-leasing-climate-impacts-reconsider-sales-to-oil-and-gas-industry/.

[13] *Id*.

[14] American Energy Alliance, "Sue & Settle" Back Under Biden's Regulatory Regime, June 14, 2022, https://www.americanenergyalliance.org/2022/09/sue-settle-back-under-bidens-regulatory-regime/.

Montana, North Dakota, and South Dakota for the agency to undertake additional environmental review.[15] One of the plaintiffs in the suit hailed the settlement as a repudiation of the Trump Administration's pro-energy-development policies and an important step toward ending energy development on public lands: "Oil and gas leasing is completely at odds with climate action, we applaud the administration for agreeing to do the right thing."[16] One environmental law expert was more critical: "These settlements are an abuse of the system and are being used to advance the policy goals of the Biden administration at the expense of the law."[17]

As of June 3, 2023, the EPA's website lists over twenty proposed consent decrees and draft settlement agreements that the agency has approved over the past year or so, nearly all of them in cases brought by environmental-activist organizations.[18] The settlements address a wide variety of claims under such statutes as the Clean Water Act, Clean Air Act, and Endangered Species Act concerning such things as use of pesticides across the country for mosquito control and other flying insect pest control, weed and algae control, animal pest control, and forest canopy pest control; air regulations affecting industrial activity in numerous states; oil and gas production and transmission; and more. By all indications, "sue and settle" is back with a bang.

IV. Congress Should Enact Reform Legislation

Congress has the power and responsibility to ensure that the Executive Branch is not abusing its settlement power. After all, agency settlements concern the administration of statutory programs enacted by Congress, agencies may exercise only those powers delegated to them by Congress, and agencies have a duty to respect the limitations and priorities set by Congress. As we have seen, the use of collusive settlements is a recurring problem, one that has

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[15] Stipulated Settlement Agreement, WildEarth Guardians v. U.S. Bureau of Land Management, No. 21-4, Doc. No. 48-1 (Sept. 6, 2022), available at https://earthjustice.org/wp-content/uploads/final_settlement_agreement_mt_lease_sale.pdf.

[16] Press Release, Sierra Club, Legal Agreement Blocks Drilling on 58,000 Acres in Montana, Dakotas Pending New Analysis, Sept. 7, 2022, https://www.sierraclub.org/press-releases/2022/09/legal-agreement-blocks-drilling-58000-acres-montana-dakotas-pending-new.

[17] Jack McEvoy, 'Sue And Settle': Biden Admin Agrees To Block Oil And Gas Drilling After Settling With Eco Activists, Sept. 13, 2022 (quoting Paul Seby).

[18] EPA, Proposed Consent Decrees and Draft Settlement Agreements, https://www.epa.gov/ogc/proposed-consent-decrees-and-draft-settlement-agreements.

persisted across administrations. Addressing it therefore requires reform that endure beyond the tenure of a single administration. That means legislation. Congress can and should adopt certain common-sense reforms that provide for transparency and accountability in settlements and consent decrees that compel or constrain future government action.

My previous written testimonies and articles on this issue have detailed at length the consequences and costs of collusive settlements, as well as principles for reform—specifically, transparency, public participation, accountability, and administrative regularity.[19] Those principles are reflected in the Sunshine for Regulatory Decrees and Settlements Act, which was introduced in the previous Congress as H.R. 2708 and S. 1247. That bill represents a leap forward in transparency, requiring agencies to publish proposed settlements before they are filed with a court and to accept and respond to comments on proposed settlements. It also requires agencies to submit annual reports to Congress identifying any settlements that they have entered into. The bill loosens the standard for intervention, so that parties opposed to a "failure to act" lawsuit may intervene in the litigation and participate in any settlement negotiations. It targets collusion by requiring settlement negotiations to be conducted by mediation and to include any intervenors. To advance accountability, it requires the Attorney General or agency head (for agencies with independent litigating authority) to sign off on proposed settlements that affect an agency's exercise of discretionary authority. Finally, it requires a court, before approving a proposed consent decree or settlement, to find that any deadlines contained in it allow for the agency to carry out standard rulemaking procedures and are consistent with the agency's overall statutory priorities. In this way, the federal government could continue to benefit from the appropriate use of settlements and consent decrees to avoid unnecessary litigation, while ensuring that the public interest in transparency and sound rulemaking is not compromised.

V. The Department of Justice Should Readopt the Meese Policy

It is also appropriate for Congress to exercise oversight concerning the Executive Branch's policies and internal procedures for agency settlements. While abuse of settlement power may have short-term benefits for agencies seeking to achieve their immediate policy priorities, "sue and settle" tactics undermine the federal government's long-term interests in sound administration, effective rulemaking, and presidential control. In addition to the consequences described above, collusive settlements can be used to evade accountability within the Executive Branch. Experience has shown that they can be

[19] *See* Andrew M. Grossman, *Regulation Through Sham Litigation: The Sue and Settle Phenomenon*, Heritage Found. Legal Memo. No. 110 (Feb. 25, 2014).

used to advance one agency's agenda at the expense of another's, to undermine centralized oversight of the regulatory system by the Office of Management and Budget and its Office of Information and Regulatory Affairs, and to undermine presidential control.

In these circumstances, the interests of Congress and the President overlap, and both should favor reintroduction of the "Meese Policy."[20] Attorney General Edwin Meese III, serving under President Ronald Reagan, saw that consent decrees have been abused to hinder the Executive Branch and circumvent the Legislative Branch. Turning to constitutional principles, he propounded policy guidelines prohibiting the Department of Justice, whether on its own behalf or on behalf of client agencies and departments, from entering into consent decrees that limited discretionary authority in any of three respects:

1. The department or agency should not enter into a consent decree that converts to 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.

With respect to settlement agreements unsupported by consent decree, the Meese Policy imposed similar limitations buttressed by the following requirement: that the sole remedy for the government's failure to comply with the terms of an agreement requiring it to exercise its discretion in a particular manner would be revival of the suit against it. In all instances, the Attorney General retained the authority to authorize consent decrees and agreements that exceeded these limitations but did not "tend to undermine their force and

[20] Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys, Re: Department Policy Regarding Consent Decrees and Settlement Agreements (Mar. 13, 1986), available at http://www.archives.gov/news/samuel-alito/accession-060-89-1/Acc060-89-1-box9-memoAyer-LSWG-1986.pdf.

[were] consistent with the constitutional prerogatives of the executive or the legislative branches."

The Meese Policy addresses the fundamental problem of sue and settle: It blocks agencies from relinquishing their discretionary authority to outside groups, thereby reinforcing traditional norms of administrative rulemaking. An administration that embraces the Meese Policy will benefit from greater flexibility, improved transparency, and, ultimately, better policy results.

My discussion of the Meese Policy reflects the fact that the exercise of settlement authority inevitably involves the exercise of discretion by the Executive Branch. That means, at the end of the day, that there will always be some room for mischief unless the Executive Branch commits to exercising its discretion wisely. As a practical matter, Congress can enact procedures and create incentives to promote that end and impose some measure of accountability on responsible officials. But a problem involving the exercise of discretion cannot be solved through legislation alone, short of eliminating discretion, which is not possible in this instance. After all, it is proper for the government to settle meritorious actions, and Congress has no means of spelling out, in every instance, when settlement may be warranted. What it does have is oversight authority, to ascertain the Executive Branch's administration of the laws is sound and consistent with legislative policy and, if not, hold the responsible officials to account and press for reform.

Needless to say, the Biden Administration Department of Justice has not adopted the Meese Policy. As part of its oversight activities, Congress should undertake to understand why. While the Meese Policy would restrict settlement discretion somewhat, it does so in the service of values—accountability, the constitutional separation of powers, flexibility in administration of the laws, and sound policymaking—that the current Administration generally espouses. Ultimately, the lack of a persuasive explanation for an Administration's refusal to adopt (and enforce) the Meese Policy or something like it may spell the need for closer oversight and for broader legislative reforms that limit agency power.

VI. Congress Should Consider More Comprehensive Reform To Bolster the Constitutional Separation of Powers

Along those lines, Congress may wish to consider a more comprehensive approach that limits the ability of third parties to compel Executive Branch action. Suing to compel an agency to act on a permit application or the like is different in kind from seeking to compel it to issue generally applicable regulations or take action against third parties. As Justice Anthony Kennedy observed, "Difficult and fundamental questions are raised" by citizen-suit provisions that give private litigants control over actions and deci-

sions (including the setting of agency priorities) "committed to the Executive by Article II of the Constitution of the United States."[21] Constitutional concerns aside, at the very least, the ability to compel agency action through litigation and settlements gives rise to the policy concerns identified above, subordinating the public interest to special interests and sacrificing accountability.

The sue-and-settle phenomenon is facilitated by the combination of broad citizen-suit provisions with unrealistic statutory deadlines that private parties may seek enforced through citizen suits. According to a 2013 analysis by William Yeatman, "98 percent of EPA regulations (196 out of 200) pursuant to [Clean Air Act] programs were promulgated late, by an average of 2,072 days after their respective statutorily defined deadlines."[22] Furthermore, "65 percent of the EPA's statutorily defined responsibilities (212 of 322 possible) are past due by an average of 2,147 days."[23] With so many agency responsibilities past due, citizen-suit authority allows special-interest groups (whether or not in collusion or philosophical agreement with the agency) to use the courts to set agency priorities. Not everything can be a priority, and by assigning so many actions unrealistic and unachievable nondiscretionary deadlines, Congress has inserted the courts into the process of setting agency priorities, but without providing them any standard or guidance on how to do so. It should be little surprise, then, that the most active repeat players in the regulatory process—the agency and environmentalist groups—have learned how to manipulate this situation to advance their own agendas and to avoid, as much as possible, accountability for the consequences of so doing.

Two potential solutions suggest themselves. First, a deadline that Congress does not expect an agency to meet is one that ought not to be on the books. If Congress wants to set priorities, it should do so credibly and hold agencies to those duties through oversight, appropriations, and its other powers. In areas where Congress has no clear preference as to timing, it should leave the matter to the agencies and then hold them accountable for their decisions and performance. What Congress should not do is empower private parties and agencies to manipulate the litigation process to set priorities that

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[21] *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring).

[22] William Yeatman, *EPA's Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, "Sue and Settle"* (July 10, 2013), available at http://cei.org/sites/default/files/William%20Yeatman%20-%20EPA%27s%20Woeful%20Deadline%20Performance%20Raises%20Questions%20About%20Agency%20Competence.pdf.

[23] *Id*.

may not reflect the public interest while avoiding the political consequences of those actions. To that end, Congress should seriously consider abolishing all mandatory deadlines that are obsolete and all recurring rulemaking deadlines that agencies regularly fail to observe.[24]

Second, Congress should consider narrowing citizen-suit provisions to exclude "failure to act" claims that seek to compel the agency to consider generally applicable regulations or to take actions against third parties. As a matter of principle, these kinds of decisions regarding agency priorities should be set by government actors who are accountable for their actions, not by litigants and not through collusive litigation.

VII. Conclusion

Collusive settlements that govern the federal government's future actions raise serious constitutional and policy questions and are too easily abused to circumvent normal political process and evade democratic accountability. Congress can and should address these problems to ensure that settlements are employed only in circumstances where they advance the public interest, as determined by our public institutions, under the requirements of the Constitution.

I thank the Subcommittee for the opportunity to testify on these important issues.

[24] One commentator endorses allowing agencies to set their own non-binding deadlines, subject to congressional oversight. Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 Admin. L. Rev. 171, 200–02 (1987).