Congressional Testimony

A Time To Reform: Oversight of the Activities of the Justice Department's Civil, Tax, and Environment and Natural Resources Divisions and the U.S. Trustee Program

Testimony Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary, United States House of Representatives

June 8, 2017

Andrew M. Grossman
Adjunct Scholar, Cato Institute
Partner, Baker & Hostetler LLP

My name is Andrew Grossman. I am 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 Cato Institute, my law firm, or its clients.

My testimony today focuses on two related issues concerning the use of settlements in government litigation that have previously been of interest to this Subcommittee and that, I believe, warrant further consideration and oversight.

The first is 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 set agency regulatory priorities and (in some instances) actually influences the content of those regulations. Since the House Judiciary Committee first directed its attention to the problem of collusive settlements in 2012,[1] there have been a myriad of hearings and reports focusing on this problem, as well as the introduction of legislation to constructively address it. There are three questions for the Subcommittee today: what is the Trump Administration doing to avoid the errors of the Obama Administration regarding collusive settlements? What should it be doing? And is there still a need for legislation in this area?

The second issue I will address in this testimony is the use of settlements to circumvent the appropriation of funds by Congress. As the Subcommittee is well aware, the Obama Administration, on several occasions, entered into settlements with third parties that directed them to make payments to activist organizations and other groups favored by officials. A recent settlement approved by the U.S. Court of Appeals for the District of Columbia, over the dissent of Judge Janice Rogers Brown, employs the same technique to distribute hundreds of millions of dollars to various nonprofit groups directly from the United States Treasury in the absence of any appropriation.

---

[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"].

Again, the Subcommittee should seek to understand what the Trump Administration is doing to prevent this kind of bootleg appropriations and whether legislation is required.

I. Ending the "Sue and Settle" Phenomenon

A. Understanding the Phenomenon

Typically, 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 is not new, dating back to the broad "public interest" legislation of the 1960s and 1970s, what is new is the frequency with which generally applicable regulations, particularly in the environmental sphere, are 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] We are still tallying the costs of the "sue and settle" binge through the end of President Obama's second term, 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. This happens in all manner of litigation, and is not confined to a particular subject matter. Settlements binding federal actors have been considered in cases concerning environmental policy, 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.

---

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

B. The Trump Administration

To date, I have not identified any abusive settlements during the Trump Administration. Of course, the day is still young, and not all of the ingredients for collusion, including appointed officials, are yet in place. One encouraging sign is EPA Administrator Scott Pruitt's decision 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….
>
> 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 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.[3]

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."[4] And I have no doubt that Administrator Pruitt will keep his word.

But the EPA is just one agency of the many that have employed "sue and settle" tactics to advance their agendas, and no other agency heads are as outspoken on this issue as Administrator Pruitt. The Trump Administration has not issued any kind of comprehensive policy statement regarding the use of settlements, and so there is still the risk of abuse—even if not so acute, for a variety of reasons, as under the Obama Administration.

---

[3] *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/.

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

C. The Department of Justice Should Readopt the Meese Policy

So there is still a need for reform on this issue, including actions by the Executive Branch and by Congress. Collusive settlements can be used to evade accountability within the Executive Branch. They can be 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. These are serious things, especially for an administration led by a President who ran on a deregulatory agenda and now is seeking to carry it out through the instruments of the federal government.

In these circumstances, the interests of Congress and the President overlap, and both should favor reintroduction of the "Meese Policy."[5] 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.

---

[5] 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.

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 [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.

In short, if the Trump Administration is serious about promoting accountability and pursuing its policy goals, it should formally adopt the Meese Policy. The fact that it has not done so yet is cause for concern and for oversight by this Subcommittee.

D. Congress Should Enact Reform Legislation

There is also a need for action by Congress. As we have seen, the use of collusive settlements is a recurring problem. Addressing it therefore requires actions that endure beyond the tenure of a single administration. That means legislation. Congress can and should adopt certain common-sense policies that provide for transparency and accountability in settlements and consent decrees that compel 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.[6] Those principles are reflected in the Sunshine for Regulatory Decrees and Settlements Act, H.R. 469 and S. 119. 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. Most substantially, it requires the court, before approving a pro-

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

posed consent decree or settlement, to find that any deadlines contained in it allow for the agency to carry out standard rulemaking procedures. 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.

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

Finally, 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 has observed, "Difficult and fundamental questions are raised" by citizen-suit provisions that give private litigants control over actions and decisions (including the setting of agency priorities) "committed to the Executive by Article II of the Constitution of the United States."[7] 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 William Yeatman of the Competitive Enterprise Institute, "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."[8] Furthermore, "65 percent of the EPA's statutorily defined responsibilities (212 of 322 possible) are past due by an average of 2,147 days."[9] 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 non-

---

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

[8] 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.

[9] *Id*.

discretionary 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 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 deadlines that agencies regularly fail to observe.[10]

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 abusive litigation.

II. Time To Act on "Slush Fund" Settlements and Judgment Fund Abuse

The Subcommittee and Committee are well aware of the phenomenon of "slush fund" settlements, having conducted an extensive investigation finding that the Obama Administration's Department of Justice "subverted Congress' spending power by requiring settling defendants to donate money to non-victim third-parties."[11] A related phenomenon is the use of settlements that direct funds from the federal government's Judgment Fund to third parties who have not been injured by the government for non-compensatory and non-restitution purposes. I do not intend, in this testimony, to recapitulate the factual background of this problem or the constitutional issues it raises—on

[10] 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).

[11] H.R. Rep. No. 115-72 (2017).

the legal issues, I would direct you to the testimony and publications of the Heritage Foundation's Paul Larkin.[12] But I do wish to discuss a recent decision by the D.C. Circuit addressing this phenomenon and to reiterate the need for reform.

The decision comes in a case known as *Keepseagle* and involves a settlement of a class action brought by Native American farmers and ranchers who alleged the Department of Agriculture had discriminated against them in farm credit and benefit programs.[13] In 2001, the district court certified the class for equitable relief only, declining to address monetary relief. In 2010, the class counsel and government announced a settlement including monetary relief: fully $680 million from the Judgment Fund would be placed in a compensation fund for claimants. This was, as Prof. Paul Figley has described, "remarkably generous," given that it represented about 98 percent of what the plaintiff class could possibly have won at trial had everything gone its way.[14] Reporting by the *New York Times* indicated that, as is almost always the case, the proceeds of actual litigation would likely have been far less than the class's projections, due to weaknesses in many class members' cases and the fact that Native American farmers had, in general, fared well economically.[15] Indeed, through the Clinton and George W. Bush Administrations, the Executive Branch had contested the very existence of money damages, reversing course only after the Obama Administration took power.[16]

Contemplating that claims on the compensation fund would not exhaust it, the settlement provided that remaining funds would be directed to so-called "*cy pres*" beneficiaries. "[A]ny non-profit organization, other than a law firm, legal services entity, or educational institution" that served Native

---

[12] *See Settling the Question: Did the Bank Agreements Subvert Congresstional Appropriations Power?, Testimony Before the H. Subcomm. on Oversight and Investigations, H. Comm. on Fin. Servs., H. Subcomm. on Oversight and Investigations*, 113th Cong. (May 19, 2016) (written testimony of Paul J. Larkin, Jr.), available at https://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-plarkin-20160519.pdf.

[13] Slip Op., *Keepseagle v. Perdue*, No. 16-5189 (D.C. Cir. May 16, 2017).

[14] *Oversight of the Judgment Fund, Testimony before the H. Subcomm. on the Constitution and Civil Justice, H. Comm. on the Judiciary*, 114th Cong. (Mar. 2, 2017) (written testimony of Paul F. Figley), at 12, available at http://docs.house.gov/meetings/JU/JU10/20170302/105620/HMTG-115-JU10-Wstate-FigleyP-20170302.pdf.

[15] *Id*. at 11–12.

[16] *Keepseagle*, at 9 (Brown, J., dissenting) (citing district court proceedings).

American farmers was eligible for funding. With no one challenging the *cy pres* provision, the district court approved the settlement.

Ultimately, despite a low bar to seeking compensation under the settlement, only about 3,600 farmers made eligible claims—far fewer than the 19,000 or more predicted by the complaint. Less than half of the compensation fund was distributed to class members, leaving $380 million for payment to third-party organizations to advance various programmatic activities.[17] Ultimately, the settlement was modified, at the request of class counsel, the government, and an objector to provide claimants with an additional $18,500 (plus taxes) each, irrespective of their individual circumstances; to promptly distribute $38 million to *cy pres* organizations proposed by class counsel; and to place the remainder—fully $265 million—in a trust to distribute to *cy pres* organizations over the next 20 years. Unsurprisingly, again no one challenged the *cy pres* provision—after all, it wasn't anybody's money.

On appeal to the D.C. Circuit, an objector argued that the settlement's *cy pres* provision violates the Appropriations Clause, because it proposes to expend Treasury funds without a specific appropriation by Congress, and violates the Judgment Fund Act, because *cy pres* beneficiaries have no right to recover against the United States.[18] These arguments, the majority held, were forfeited.

Judge Janice Rogers Brown disagreed, and her dissent merits serious consideration, beginning with her pithy analysis of the political economy of settlements that draw on the Judgment Fund for purposes other than compensation:

> *Cy Pres* gives the Executive Branch a win-win: By agreeing to a settlement amount that vastly overstated the claimants' monetary damages, the Executive can use a large dollar amount to reap the political benefits of photo-op compassion towards a discriminated minority group. At the same time, the Executive's agreement to an overstated damages sum ensures enough money is left in the fund to pay favored third parties after the claimants are compensated. Class counsel gets a piece of the action too: By agreeing to *cy pres* distributions, the size of the settlement fund is inflated. The larger the settlement's size, the larger class counsel's fee award—regardless of how much of the settlement actually pays injured parties (better known as class counsel's clients). Even Appellant's protest of the *cy pres* scheme

[17] *Keepseagle*, at 7–8.

[18] *Id*. at 23.

> is not entirely altruistic. He wants the remaining money distributed to already-compensated class members, not returned to the U.S. Treasury. In short, everyone apparently presumed a blood-ied-shirt party could be thrown at the taxpayer's expense. Why risk Congress being a killjoy?[19]

The answer, Judge Brown explained, is the constitutional separation of powers: "If the Government wishes to achieve certain purposes by expending taxpayer money to people with no monetary claims against the United States, a legislative appropriation is required."[20]

But, she asked, who is to enforce that requirement? Certainly not the Executive Branch, which was driven by "political calculations" concerning favored constituencies and could take credit for its beneficence in paying compensation to class members and throwing financial support to favored organizations.[21] Class counsel, meanwhile, sought a fee award larger than the actual monetary claims of the class could possibly support, making *cy pres* a convenient means to drive up the total dollar-value of the settlement and thereby the fee award.[22] And, as for class members, they had no particular claim on funds in excess of those they had already been awarded under the settlement.

Despite these circumstances, Judge Brown continued, the district court and the majority "treat[ed] the parties' consent as a means to circumvent constitutional limitations on judicial power."[23] She would not, it being clear that the settlement relies on the Executive Branch's arrogation of Congress's appropriation power and exceeds the Judgment Fund Act's narrow authority to settle claims, pay for an agency's programs.[24] The money that remains in the compensation fund, she concluded, should revert to the U.S. Treasury.[25]

Unfortunately, Judge Brown's analysis comes to us in dissent. But we may still profit from her wise counsel. Congress, she suggests, "should consider amending the Judgment Fund Act to explicitly bar *cy pres* distribution schemes in class action settlements with the United States."[26] And it "should

---

[19] *Id*. at 3 (Brown, J., dissenting).

[20] *Id*. at 4 (Brown, J, dissenting).

[21] *Id*. at 13 (Brown, J, dissenting).

[22] *Id*. at 3, 7 n.1, 10, 21–22 (Brown, J, dissenting).

[23] *Id*. at 15 (Brown, J, dissenting).

[24] *Id*. at 30–31 (Brown, J, dissenting).

[25] *Id*. at 37 (Brown, J, dissenting).

[26] *Id*. at 40 (Brown, J, dissenting).

also consider authorizing the Comptroller General to review and report to Congress on any class action settlement in excess of $100 million."[27] Absent reforms such as these, it is all too easy to imagine how the Executive Branch could use the Judgment Fund and sham settlements to circumvent just about any congressional restriction on programmatic activities or fund recipients. Judge Brown's proposals would make fitting additions to the Stop Settlement Slush Funds Act of 2017, H.R. 732 and S. 333, which addresses the closely related problem of settlements of government claims that require defendants, as opposed to the government itself, to make payments other than compensation or restitution to third parties

So far as this Subcommittee's oversight duties are concerned, you deserve an answer to the question of why the Trump Administration is allowing this settlement to proceed. It need not, as Judge Brown correctly explained:

> Before the *cy pres* process begins, the Justice Department should consider a motion under Federal Rule of Civil Procedure 60(b)(4) to strike the *cy pres* provisions within the settlement agreement as void. No party has raised a Rule 60(b)(4) challenge in this case, and it is not subject to the finite time constraints restricting other Rule 60(b) motions. *See* FED. R. CIV. P. 60(c)(1). This course could remove the *cy pres* provisions before recipients are approved and distributions begin.[28]

More generally, the Subcommittee should ask whether the Department of Justice believes that settlements directing Judgment Fund monies to *cy pres* organizations comport with the Appropriations Clause and the Judgment Fund Act and, if so, why. If the Department does not believe it is barred from undertaking such settlements, it should explain to Congress when they are appropriate, how it evaluates such settlements, and why such settlements are in the interest of the federal government and taxpayers. The Subcommittee should also obtain a commitment from the Department that the Department will notify it at least a month in advance of proposing to a court a settlement involving *cy pres* relief.

III. Conclusion

Collusive settlements that govern the federal government's future actions or contain *cy pres* awards 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

---

[27] *Id*.

[28] *Id*. at 38–39 (Brown, J., dissenting).

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.