Testimony of

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Subcommittee on Administrative Oversight and the Courts
on S. 489 the Review of Federal Court Decrees
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My name is Nathaniel R. Jones and I appreciate the opportunity extended to me by members of this Subcommittee to offer my views on S. 489, described as the Review of Federal Court Decrees.

The views set out in this testimony are drawn from my 22 years as a federal appellate judge during which time I sat in over 25 cases that dealt with specific aspects of consent decrees; preceded by my over 10 years as a litigator in various federal jurisdictions; and my service as assistant general counsel to the National Advisory Commission on Civil Disorders (Kerner Commission). It is that combination of experiences that draws me to the unavoidable conclusion that S. 489 is nothing less than a wrecking ball being applied to a judicial process that has been invaluable in resolving very knotty and contentious legal problems.

1. There is no problem that needs fixing--the unanimous 2004 Supreme Court decision in Frew v. Hawkins, which directed district courts to listen with deference to local and state officials' recommendations for terminating or modifying decrees, but commanded them to enforce these decrees where the case for change is not made, got it right. One-size-fits-all legislation like S. 489 gets it wrong. This is a case of an answer searching for a problem.

2. The Frew decision reinforces what courts have been doing in instances in which consent decrees have been challenged. One example is the Wayne County, Michigan case I cite in my testimony. Another is the case of Waste Management of Ohio, Inc. vs. City of Dayton in which the Sixth Circuit panel on which I sat reversed a District Court. The takeaway from those cases is that there are provisions already in place for modifying a consent decree when circumstances so warrant. Another significant case that demonstrates the need for flexibility by courts in dealing with consent decrees is State of Ohio v. U.S. Department of Energy pending since 1985 in the Southern District of Ohio. It involves a cleanup of the notorious Fernald nuclear waste site. Thus, any one familiar with the rules and procedures for obtaining a consent decree knows that there are built-in safeguards, including a fairness hearing.

3. The fundamental goal of the required fairness hearing, which must precede the approval of a settlement and the entering of a consent decree, is for a court to ascertain facts with respect to the appropriateness of a court extending its judicial power to it. It must be shown to be fair, adequate and reasonable.

4. It makes no sense to deprive courts of the option of using consent decrees, which in many areas are an enormously valuable tool for courts, parties, and for helping Congress provide for efficient implementation of laws it passes.

5. This bill will significantly raise the costs and reduce the effectiveness of all law implementation affecting state and local governments--thereby depriving citizens nationwide of benefits conferred by federal laws protecting the environment, access to health care, guarantees against discrimination based on age, gender, and disabilities, to name a few, as well as many important instances of race discrimination.

6. While the claim is that the bill will simply fix some deficiencies in the process of renewing and modifying their terms, in practice it will end, not simply mend, the use of consent decrees by federal courts in all matters affecting state and local governments. No attorney representing a plaintiff in litigation against a state or local government will advise his client to enter into a consent decree that will have virtually no lasting effect or value.

7. Long-term consent decrees are sometimes necessary to carry out the complex changes contemplated by laws Congress has enacted in areas covered by the bill. The changes are often necessary to rebuild institutions that are depriving citizens of fundamental rights.

8. S. 489 ignores the valuable lessons taught the nation following the civil disturbances of the Sixties which were documented by the Kerner Commission in its 1968 Report. That report pointed out the festering problems in areas of health, the environment, housing, education and law enforcement resulting from a default by government at all levels in need of remediation. Consent decrees proved to be an effective tool for redressing the resulting grievances.

9. Tampering with the power of courts to oversee consent decrees, as this legislation would do, with its shifting of the burden of proof onto the shoulders of the aggrieved, stands the whole traditional notion of the responsibility for remedy on its head.

Impact on Courts and the Administration of Justice
One of the concerns I have listed is the impact of the bill on the sensible functioning of courts and the administration of justice. My concern here may not be surprising, given the fact that I spent more than 20 years on the federal Bench having been nominated by President Carter to a seat on the Court of Appeals for the 6th Circuit and confirmed by the Senate in 1979 and having served until 1995 when I took senior status and 2002 when I retired. It is not clear to me that enactment of S. 489 will place new burdens on the courts without yielding any productive results for the parties.

By providing the opportunity, indeed an invitation, to governors and officials of local government to relitigate matters that were previously regarded as settled by consent decrees, the bill would lead to many new proceedings which would come inevitably four years after a new decree and might come as soon as one year or two, if new officials were elected to replace the signatories of the previous decree. Indeed I suspect that in any jurisdiction caught in a financial bind, the temptation would be there to reduce costs by reducing obligations under a consent decree. The monetary cost of such proceedings to the court system would be enormous. Many of the cases settled by consent decree are brought as class actions, which cost the federal district court system an average of $23,000.00 per case. When one multiplies this figure by even just 100--only a fraction of the number of consent decrees estimated to be active--once can see that this legislation would result in an additional $2 million in costs to the federal courts every time another 100 consent decrees are relitigated.

But reopened proceedings would be the least of the burdens placed on the courts. No one I have discussed this matter with believes that plaintiffs' lawyers in the great majority of cases will be willing to enter into consent decrees that can be revisited every few years with the burden left to plaintiffs to defend the decree. Most will feel that allegiance to their clients' interests will require them to go to trial. This will mean not only a burden on the courts but financial burdens on the parties--the major costs of class action litigation including attorneys' fees. In most cases, state and local governments, if they lose will wind up paying the plaintiffs' lawyers fees plus the fees of the large firms that government defendants retain to represent them in court. According to the most recent comprehensive study on the subject to date, the mean cost of attorneys' fees in class actions in 2002, adjusted for 2002 dollars, was approximately eight million dollars. Under the bill, these fees would have to be paid each time a consent decree is relitigated. When these fees are added to the cost of complying with the remedy won by the

plaintiffs, it is clear that forcing litigation can only result in higher costs than settlement by consent decree. For members of Congress who have been distressed by rising legal costs, this is a matter worth pondering long and hard.

It should be added that the workload will further limit access to a court system that has already been forced to cut its services drastically. Just a few weeks ago, representatives of the federal judiciary testified before a House Appropriations subcommittee that the workload of the courts had increased by 18% between FY 2001 and FY 2005, while funded staffing levels over the same period of time decreased by 1%. Moreover, in FY 2004, the judiciary lost more than 6% of its workforce due to funding constraints, resulting in fewer clerks' office hours in many courthouses for the public to file papers and seek information. And as additional testimony before another House subcommittee indicated, the judiciary's current staffing level is 8% lower than it was in FY 2003. Even though the workload is expected to increase even further as a result of the recently enacted Class Action Fairness Act, the judiciary will be operating approximately at only its FY 2001 staffing levels if it receives the FY 2006 staff funding it has requested.

Under such circumstances, defendants who have had their day in court, and who voluntarily settled their case, ought not be permitted to routinely tie up the courts at the expense of other litigants seeking justice. To permit such repetitive reexamination of consent decrees--especially when the violations persist or the remedies agreed upon have not been carried out--is a far more costly version of a playground "do-over" that fails to serve the public interest in the efficient administration of justice and protection of legal and constitutional rights.

Impact on Substantive Rights
Before I was appointed to the bench I served as General Counsel of the NAACP where I often represented children in court in civil rights cases. For many years, civil rights cases were fought to the bitter end in federal court rooms, but about three decades ago partially in response to the recommendations of the Kerner Commission, sensible public officials and private advocates decided that often it would be better to settle than fight. As a result we have had some noteworthy consent decrees that have greatly broadened opportunities for children.

One prime example is a suit filed late in 1980 by the NAACP and a class of plaintiffs against the state of Missouri and 22 suburban school districts. Just before trials was scheduled to begin in 1983 the parties entered into a settlement agreement calling for desegregation of the suburban districts, support for magnet schools in St. Louis and a program of educational improvements in St. Louis. The agreement was approved as a consent decree by the District Court and with minor modifications by the Court of Appeals. Certiorari was denied. In 1996, the State which paid the bulk of the expenses under the decree, filed a motion to terminate the decree on grounds that it had achieved "unitary status" (i.e., satisfied all its desegregation obligations). After a trial, a conciliator was appointed--Dr. William Danforth, then Chancellor of Washington University of St. Louis. The parties negotiated a revised consent decree that was contingent on replacing the court-ordered funds with funds approved by the state legislature. The legislature, working on bipartisan basis, approved the funding in 1999 and a new consent decree was negotiated the following year. Under the new decree plaintiffs may go back to court if there is a violation. That decree is still in effect.

The result has been the largest voluntary interdistrict desegregation program in the nation. Approximately 10,000 African American students from St. Louis attend schools each year in the suburban districts and that has been the case (with some variation in the numbers since 1984). About 3 in every 4 students are eligible for free and reduced price lunch. Yet they graduate high school and go on to college at about 2 to 3 times the rate of students in inner city schools. Additional opportunities have been made available in the city's magnets and as a result of the school improvement program.

None of this would have been possible without giving the consent decree process time to work. Ultimately the process brought public approval and financial and other types of support from public officials that required time to develop.

One major illustration of the importance of consent decrees in these areas is:

A case reported on Friday, June 3, in which the Department of Justice and the Environmental Protection Agency, along with Wayne County and nearby jurisdiction have asked the district court to terminate and 11-year-old consent decree. The decree required the County to upgrade sewer systems that caused untreated sewage to be dumped into drains and eventually the Detroit River to prevent it from backing up into basements. The centerpiece of the improvements is a massive new sewer tunnel costing $295 million. Communities say they will spend $99 million more and the county is seeking approval to issue $20 million in bonds as part of the plan. The parties told the court that "the objectives of the decree have been met."

This case shows the scope of laws that would be damaged and how badly; why consent decrees sometimes must last much more than one to four years; why the consent decree option makes more sense than making litigated court orders the exclusive option; and that courts and parties to consent decrees know how to end them when it is time.

A second major example is the Gautreaux public housing litigation. This was a case begun in the late 60s by residents of public housing who had been subjected to rigid racial segregation. In 1981 the parties including the United States entered into a consent decree that was dismissed 1988. The results, documented in a book by Leonard Rubinowitz and James Rosenbaum, entitled Crossing the Class and Color Lines, have been hard won but impressive.

More than 7,500 public housing families found decent subsidized housing in desegregated areas, the great majority of them in the suburbs. The big winners were children. As experts Margery Turner Austin and Dolores Acevedo-Garcia write in the January/February issue of Poverty and Race, "the Gautreaux research showed that children whose families moved from predominantly black neighborhoods of Chicago to integrated neighborhoods in the suburbs were substantially more likely to succeed in school and go on to college or jobs." They also note that the success of Gautreaux helped launch efforts beginning in the mid-90s in 33 metropolitan areas to help low income families move from poor and predominantly minority neighborhoods to more affluent and racially integrated communities.

In both the St. Louis and Chicago cases, the costs of providing decent schools and decent housing, covered by the consent decrees have been more than repaid by the taxes paid by these youngsters as productive citizens and by avoiding the costs of incarceration and other manifestations of dysfunctional communities if nothing had been done to provide opportunity.

Now I recognize that under S. 489, some types of racial discrimination cases would be exempted from the possibility of frequent relitigation. But if you look at a list of notable consent decrees over recent years, you will find that several involve the rights of abused or neglected children, or homeless children, or foster children to decent shelter or other opportunities. These would not be exempted from the proposed law. Since I see no material difference between these cases and the rights of children in racial discrimination cases, you will forgive me if I do not feel secure that the exemption would be a lasting one.

Beyond that, many of the important protections that have been achieved of environment rights or of access to health care or of fair treatment in state institutions have been gained through the vehicle of consent decrees.

I must note the civil rights exemption in S. 489 is far from complete. In the race area it has no application to voting rights cases or to the great majority of housing cases. Nor would the bill protect people who are discriminated against because of their age, or gender, or condition of disability or because of their national origin. And, as I have noted, there is no principled reason for allowing some victims of rights denials the ability to negotiate consent decrees while denying it to others. These are not problems that can be fixed.

It should be noted that S. 489 contains a provision that would exempt school desegregation consent decrees from the restrictive provisions of the bill. The provision is narrower than that contained in H.R. 1229 which would add an exemption for consent decrees in suits brought under Titles VI and VII of the Civil

Rights Act of 1964.

Neither of these provisions would prevent severe harm from being done to hundreds of thousands of persons who are protected from discrimination under federal civil rights laws. In the race area, even the broader House exemption has no application to voting rights cases or to the great majority of housing cases. Nor would there be protection for victims of employment discrimination whose rights do not arise under Title VII but under other statutes. Nor would either bill protect people who are discriminated because of age or gender or conditions of disability or because of national origin.

It must be understood that in the area of discrimination, barriers to opportunity often have been maintained over many years. They are not effectively eliminated overnight but only through the patient implementation of consent decrees designed to create a level playing field.

The problems I have identified cannot be cured by broadening the exemption. There is no principled reason for allowing some victims of rights denials the ability to negotiate stable consent decrees while denying the right to others. I believe the bill is hopelessly flawed.

Conclusion
Over the years I served on the bench, I have observed an increasing desire among participants in the judicial system as well as among citizens, to find ways to resolve controversies without the need for the hand-to-hand combat of litigation which often inflicts pain and bitterness.

Among the tools of alternative dispute resolution, none has served better than consent decrees, particularly where major laws and public policies and large numbers of people are involved.

The courts have built a great deal of flexibility into the process. The fairness hearings prescribed under the Federal Rules of Civil Procedure allow the public to have its say and the judge to weigh competing interests before approving a settlement. The recent Frew decision provides the necessary flexibility to change a decree where circumstances have changed.

This is case where there is no evidence of a disease and where the cure is much worse than any of the problems it purports to address. I urge Congress to reject this legislation.