Testimony of

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Before the Senate Administrative Oversight
and the Courts Subcommittee
The Federal Consent Decree Fairness Act
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My name is Troy King and I am the Attorney General for the State of Alabama. Thank you for inviting me to address this subcommittee today and to share my state's experiences with consent decrees and my support of S. 489/H.R. 1229 as a vehicle to address some of the abuses that accompany many consent decrees.
The Federal Consent Decree Fairness Act will provide a much-needed change in the law regarding consent decrees. The Act will make it easier for state governments to end oppressive consent decrees, by taking the policy-making discretion away from federal judges and returning it to those who have been elected or appointed to make those decisions.
An example of one oppressive, out-of-control consent decree in my state stems from Reynolds v. McInnes. In Reynolds, African American employees and former employees of the Alabama Department of Transportation commenced a racial discrimination class action against the Department of Transportation. Governor Jim Folsom, Jr. entered into a consent decree in March of 1994 that was originally set to expire in December of 2000. To date, over four-dozen appeals and petitions have been filed and the consent decree remains in effect. The Eleventh Circuit Court of Appeals recently addressed the obscene amount of public funds that have been spent on the Reynolds consent decree, stating:
[T]his unwieldy litigation has been afflicting the judicial system and draining huge amounts of public funds from the State of Alabama for much too long. The amounts are staggering. Fifty million dollars in public funds has been spent on attorney's fees alone in the case . . . bringing the total litigation costs to the State of Alabama to more than $112 million, and that cost is growing at a rate of around $500,000 each and every month.

With these funds, every mile of interstate in Alabama could have been resurfaced twice. Instead, under the Reynolds consent decree, plaintiffs' counsel was paid for every minute they spent on this case, without regard to whether they were pursuing a legitimate objective or even whether they prevailed. The lead plaintiff in this case, Johnny Reynolds died shortly after receiving long awaited settlement proceeds. His attorneys, on the other hand, have grown rich, and the people of Alabama have grown more disillusioned with the system that could allow this to occur. The court addressed the long-term effect of this agreement stating:
The promise of fees for time spent without regard to the outcome of a motion or appeal in a case that apparently has endless potential for dispute may be the kerosene that has fueled the litigation fires, which have raged out of control in this case.

Awarding plaintiffs' attorneys legal fees for every minute they spent on this case, regardless of whether their claims were frivolous, is an example of a contract provision that successive administrations have been helpless to alter as its unsoundness became evident to even the most detached and objective observer. The Federal Consent Decree Fairness Act will provide a vehicle for modifying provisions, such as this one, that are later found to be unworkable or unsound after they are approved.
Another example of the difficulties that exist in modifying a current provision of a consent decree can be found in the Reynolds case. The Reynolds consent decree contained a no-overlap provision that governed the measurement of candidates' job qualifications.
Despite a good faith effort by both parties to comply with the provision, Defendants were forced to pay millions in fines as the plaintiffs blocked, litigated, and otherwise frustrated compliance being achieved. After the Defendants had paid over $4.5 million in sanctions for noncompliance, the court agreed that the no-overlap provision was unworkable and removed the provision from the consent decree. There has been no refund of the monies the state was required to expend to achieve this result. This is a sobering example of what can happen when control of state agencies is taken away from elected officials and placed in the hands of an unaccountable Federal Judiciary.
The case of RC v. Walley is another example of the self-perpetuating consent decree. In RC, the Plaintiff filed a complaint alleging that he received inadequate care from the Department of Human Resources. The consent decree was entered in June of 1991 and is still being litigated today, despite a recommendation from the court monitor that DHR was in "substantial compliance" with the consent decree.
Thus far, the State of Alabama has committed over $5.3 million in litigation and expenses in this case. Today, the judge is continuing to review the performance of counties that have already been found to be in compliance with the decree, but are alleged to be backsliding, though no provision of the consent decree allows him to do so.
Wyatt v. Stickney was another landmark Alabama case that was litigated for over thirty years. The original consent decree was entered into in the mid-1980s and the case finally ended in December of 2004. As part of the consent decree, both sides agreed that the Alabama Department of Mental Health and Mental Retardation would have its hospitals accredited and certified in order to meet certain court-approved standards.
However, because the standards of clinical development continued to evolve, the Defendants were expected to meet a continually evolving standard. Thus the consent decree perpetually evolved along with the standards as proposed by the plaintiffs.
Even the United States Supreme Court has recognized the problem with consent decrees. In Frew v. Hawkins the Court stated:
Enforcement of consent decrees can undermine the sovereign interests and accountability of state governments. Although officials consent to the entry of decrees in the first place, they tie not only their own hands, but those of their successors in office into the indefinite future . . . if not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees . . . may improperly deprive future officials of their designated legislative and executive powers and lead to federal court oversight of state programs for long periods of time even absent an ongoing violation of federal law.

To be sure, consent decrees are an important legal tool for the states as well as those who have been injured. Governments have important duties to those who depend upon them. When they fail to act responsibly, those injured should have recourse.
However, consent decrees too often usurp the power of constitutionally elected officials and place the public policy decision into the hands of an appointed federal judge. Consent decrees become the bureaucracy's avenue to achieve, by court ordered fiat, what they cannot achieve in the legislature. Federal court oversight "should be as narrow and short-lived as fulfilling the duty to eradicate discrimination allows."
Federal courts should not run important functions of state government for decades at a time. In Alabama, Federal courts have been micromanaging for over twenty years. This is a problem that Congress should address. I call on it to do so.