

**THE COUNCIL OF STATE GOVERNMENTS
RESOLUTION SUPPORTING THE FEDERAL CONSENT DECREE FAIRNESS
ACT**

Resolution Summary

Consent decrees are binding, legal decrees that specify how a particular problem will be remedied. These decrees are used to enforce agreements between state and local governments and the parties suing them. There are federal consent decrees in force in all 50 states.

Unfortunately, consent decrees can burden state and local governments, and have the potential to be a national problem as well. Consent decrees can remain in place for decades. These decisions linger long after the officials who agreed to these decisions have left office. Newly elected officials often find themselves in precarious positions because they cannot effect change as much as they would like because they are bound by the decisions of decades old consent decrees. For example, in Tennessee, hundreds of thousands of residents had their health insurance limited or cut altogether because of a series of consent decrees that prevented the state from implementing Medicaid reforms. These reforms had been approved by the governor and the legislature. In Los Angeles, consent decrees forced the Los Angeles County Metropolitan Transit Authority to spend 47 percent of its budget on buses. In New York City, special education has been governed by a consent decree since 1979, which has prevent efforts by several mayors and school chancellors to implement new reforms under the Individual with Disabilities Education Act.

The Federal Consent Decree Fairness Act (FCDA), sponsored by Senator Lamar Alexander, seeks to provide a three-pronged approach to address the issues surrounding consent decrees. The FCDA seeks to create a four year term limit for consent decrees after the state/local official who provided consent leaves office, a state or local government could ask a federal court to modify or vacate the decree. Second, the FCDA shifts the burden of proof to the plaintiff, who filed the original lawsuit, to demonstrate why continuation of the consent decree in its existing form is necessary to protect a federal right. Third, the FCDA provides guidance for future consent decrees by setting out a series of findings to guide federal courts when drafting decrees to provide that they are narrowly drafted, limited in duration and respectful of state/local policy interests and concerns.

Additional Resource Information

Wall Street Journal, “Democracy by Decree,” April 18, 2006

Legal Times, “Free the People’s Choice,” April 4, 2005

Consent Decrees: http://en.wikipedia.org/wiki/Consent_decree

Management Directives

Management Directive #1: Support state efforts to raise awareness on the effect of consent decrees and to increase support for the Federal Consent Decree Act.

Management Directive #2: CSG staff will post approved resolution on CSG's Web site and make available through its regular communication venues at the state and local level to ensure its distribution to the state government and policy community.

**THE COUNCIL OF STATE GOVERNMENTS
RESOLUTION ON SUPPORTING THE FEDERAL CONSENT DECREE
FAIRNESS ACT**

WHEREAS, consent decrees are important instruments of federalism that place checks on the power of state and local governments; and

WHEREAS, newly elected officials inherit the effect of decades old consent decrees which limit their ability to effectively govern; and

WHEREAS, existing methods discourage state and local elected officials from modifying or terminating a consent decree, even when these decisions are no longer in the best interests of the community; and

WHEREAS, in a recent example, reforms to Tennessee’s Medicaid program were blocked in federal court because they were not in agreement with consent decrees dating back to 1979; and

WHEREAS, in another example, efforts to implement new reforms in special education in New York City were hampered by the effects of a consent decree in 1979; and

WHEREAS, consent decrees forced the Los Angeles Metropolitan Transit Authority to spend 47 percent of its budget on buses, leaving just over half the budget to pay for the county’s remaining transportation needs; and

WHEREAS, in *Frew v. Hawkins*, 540 U.S. 431 (2004), the Supreme Court expressed its concern about consent decrees and stated that consent decrees may “improperly deprive future officials of their designated legislative and executive powers,” which would lead to “federal court oversight of state programs for long periods of time event absent ongoing violation of federal law.”; and

WHEREAS, the Federal Consent Decree Act addresses the inherent weaknesses of the consent decree system while still preserving consent decrees as a mechanism for resolving legal disputes; and

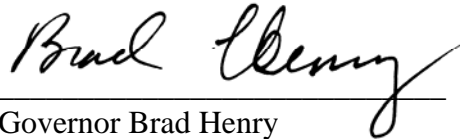
WHEREAS, the Federal Consent Decree Act addresses these issues by (1) allowing a state or local government official to file a motion in federal court to modify or vacate a consent decree after four years or after the state or local official who provided the consent decree leaves office, whichever occurs first; (2) allowing the burden of proof to be shifted to the plaintiffs to show why after a motion to modify or vacate a consent decree has been filed; (3) setting out a series of findings based on the decision in *Frew* to provide guidance to federal courts to ensure that for future consent decrees are

narrowly drafted, limited in duration and maintain state and local interests;
and

BE IT THEREFORE RESOLVED, that The Council of State Governments supports the principles espoused in the Federal Consent Decree Act; and

BE IT FURTHER RESOLVED, that Congress should enact the Federal Consent Decree Fairness Act.

Adopted this 14th Day of November, 2007 at the
CSG Annual State Trends and Leadership Forum
in Oklahoma City, Oklahoma



Governor Brad Henry
2007 CSG President



Representative Deborah Hudson
2007 CSG Chair