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The Feds Want to Cement Change at Columbia With a Consent Decree. How Would That Work?

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The Trump administration has already won major concessions from Columbia University as the institution fights to restore hundreds of millions of dollars in federal funding. Now it's contemplating the use of an aggressive legal approach to preserve

those victories, according to reporting published Thursday by *The Wall Street Journal.*

The government is considering the use of a consent decree — a legal and regulatory measure that would put a federal judge in charge of ensuring the university's compliance with its pledges to President Donald Trump, likely beyond the end of his second term.

Reporting from *the Journal* and *The New York Times* did not clarify exactly how long the government might seek to put Columbia under federal oversight, or which commitments it would seek to enforce. For any potential decree to move forward, Columbia would need to consent both to the government's stipulations as well as the use of the decree as a tool toward securing a resolution; university spokespeople did not tell either publication if the institution would consider doing so.

It's not wholly uncommon for the government to use consent decrees to affirm and secure negotiated policy changes on college campuses, said Peter F. Lake, director of the Center for Excellence in Higher Education Law and Policy at Stetson University's College of Law. But deploying such a decree in the context of federal pauses and cuts to research funding represents an unprecedented shift from how the government has previously regulated the sector.

"What happens with Columbia is going to portend what will happen in the future with any number of other institutions," Lake said. "They're all going to be watching this very carefully to see what happens. This is a test of a weapon system in a new way, and the world is watching."

What are federal consent decrees?

You're likely familiar with the role that settlement agreements play in federal civil litigation. A federal consent decree is a settlement agreement reached between two consenting parties that is then approved, and thereafter overseen, by a federal judge.

Under a traditional two-party settlement agreement, a future presidential administration could amend or terminate any agreement reached by the Trump administration and a university like Columbia as long as the university is on the same page as the government. Alternatively, if a university were to violate a settlement agreement's terms and conditions, that future administration could simply decide not to bring a breach-of-contract claim against the university to enforce the terms of the settlement.

But under a consent decree approved by a federal judge, the courts become empowered to monitor and enforce the terms of any agreement reached between a university and the federal government. To do so, the courts rely on the ability to hold the university in contempt of court for failing to comply with those terms. Contempt punishments can include fines, nonmonetary

sanctions, or even detainment.

In essence, the consent decree takes longer-term enforcement of the agreement out of the hands of the executive branch — where a future administration's priorities might be totally at odds with Trump's — and puts it in the hands of federal judges, who have lifetime appointments and a general deference to local and professional rules and standards, legal precedents, and judicial hierarchy.

Should any modifications be sought to a consent decree, the parties would need to seek additional approval from the courts — more than likely from the judge who originally authorized the decree. Unless evidence of fraud, error, or unconstitutionality surfaces, consent decrees generally can't be argued or reversed on appeal.

Furthermore, judicial approval of a consent decree, even if the decree is later modified or lifted, theoretically strengthens any future third-party lawsuits that might seek to claw back certain concessions won by the Trump administration from a university, said Lake.

"One of the most powerful arguments they would have to get past prima facie elimination of the claim is that a former judicial authority had vetted the decree," Lake said.

Gaining access to a federal judge for approval of a potential consent decree requires the initiation of a legal proceeding, and neither the Trump administration nor Columbia have yet filed such a lawsuit. The administration could memorialize a decree in court in at least two ways. It could initiate a federal lawsuit against Columbia with the sole purpose of seeking judicial approval. Or it

could intervene in an ongoing third-party lawsuit that alleges Columbia failed to adequately respond to claims of antisemitic harassment. The government could then seek approval from the federal judge overseeing that case.

Have universities been parties to federal consent decrees before?

For at least the last 35 years, civil-rights regulation of universities has generally been handled by the executive branch, not the courts. But prior administrations have entered into some consent decrees with institutions to enforce compliance with federal findings regarding disabilities law. In each of the cases, the universities entered into the agreement without admitting to any liability or unlawful conduct.

- In late 2022, the University of California at Berkeley agreed to "make all future and the vast majority of its existing online content accessible to people with disabilities." The university also pledged to "revise its policies, train personnel, designate a web-accessibility coordinator, conduct accessibility testing of its content, and hire an independent auditor."
- Miami University, in Ohio, agreed in 2016 to "make significant improvements to ensure that technologies across all its campuses are accessible to individuals with disabilities," "pay $25,000 to compensate individuals with disabilities," and change its technology-procurement practices.
- The University of Michigan agreed in 2015 "to pay the employees a total of approximately $215,000 for monetary and compensatory damages, revise the university's policies on reassignments and

transfers, provide training to university staff on Title I of the [Americans With Disabilities Act], and file periodic reports with the department."

Except for the presence of monetary penalties, the terms memorialized in the three decrees cited aren't all that different from the terms reached previously in resolution agreements between universities and the Education Department's Office for Civil Rights.

Beyond civil-rights enforcement, perhaps the best-known use of consent decrees against universities dates back to the early 1990s, when the federal government sought to memorialize concessions from Ivy League institutions that were alleged to have fixed tuition prices. More recently, the government has relied on consent decrees with universities to facilitate environmental cleanup efforts at Superfund sites, areas with high levels of hazardous waste.

So if Columbia and the Trump administration settle via consent decree, it's no big deal?

For Lake, there's a big difference between the consent decrees of yesteryear and the one that could be finalized between Columbia and the Trump administration. It's a matter of context: Trump has explicitly linked the work undertaken by its Task Force to Combat Anti-Semitism to future cuts of Columbia's federal funding. That raises the prospect that any concessions made by Columbia are the product of government coercion — coercion which would, in theory, be antithetical to the very premise of a *consent* decree, argued Lake.

With varying degrees of combativeness, the Obama, Biden, and

first-term Trump administrations sometimes advanced the prospect that universities' access to federal funding might be withdrawn if they failed to abide by an administrations' interpretations of certain Title IX and free-speech regulations. But Lake couldn't recall another instance since the early-'90s Ivy League case when the executive branch had sought a consent decree from a university while using the federal government's spending powers to exert such explicit, intense, and real-time pressure.

Were Columbia to enter into a consent decree with the Trump administration, approval from a federal judge could hinge on that question of coercion, among several others, Lake said.

Of course, what qualifies as potentially coercive government conduct can differ across courtrooms and judges' chambers. In 2022, U.S. District Judge Terry Doughty ruled that the Biden administration had violated the First Amendment by "coercing" or "significantly encouraging" social-media platforms to make certain content-moderation decisions. However, when the case reached the Supreme Court, Associate Justices Amy Coney Barrett and Brett M. Kavanaugh, as well as Chief Justice John G. Roberts Jr., sided with the court's three liberal justices, ruling that the Biden administration's interactions amounted to constitutionally permitted "jawboning" — that is, an informal effort to persuade a third party to take some sort of action.

In *National Federation of Independent Business v. Sebelius*, the Supreme Court found that certain Medicaid expansion provisions of the Affordable Care Act were unconstitutionally coercive as

written, and that Congress could not threaten to completely terminate federal Medicaid funding as a means of forcing otherwise-unwilling states to expand access to Medicaid.

“I think any judge that looks at this is going to consider, ‘Is the reason this university is entering into this agreement simply motivated by the magnitude of the risk to federal funding? Or is it related to actual factual disputes or issues that are at play?’” Lake said. “It boils down to a question of fair process, which I suspect will come to a head one way or another.”

Ultimately, Lake said, precedents established now and over the next four years will strongly influence whether or not future administrations can target or not target colleges for funding cuts based on policy disagreements or alleged civil-rights violations.

“Once a weapon has been tested at a new level, it’s always in the arsenal,” Lake said. “And I think it’ll be a permanent part of the discussion going forward: To what extent the federal government can or should have the level of power to be able to go down to this level of micromanagement within an institution?”

“When you step back and take a look from a political, historical point of view, this weapon today may be used in a way that conservatives are very happy with,” he said. “But it could turn around at some point to be used in a different direction.”