

1-3-2019

U.S.A. v. NYCHA: Judge Pauley Rejects the Proposed Consent Decree

Ross Sandler

[U.S.A. v. NYCHA: Judge Pauley Rejects the Proposed Consent Decree](#)

[CityLaw](#) • [Ross Sandler](#) • [Citywide](#)
01/03/2019 • [Leave a Comment](#)



Image credit: Jeff Hopkins Art.

The New York City Housing Authority's efforts to settle with the U. S. Attorney over NYCHA's mismanagement of public housing came to an abrupt end on November 14, 2018 when U.S. District Court Judge William H. Pauley III rejected the proposed consent decree. The U.S. Attorney had charged NYCHA in a civil complaint with fraud, deception and filing false lead inspection reports. The complaint also charged NYCHA with systematically tolerating dangerous and unhealthy contamination of lead, mold and vermin, and with inadequate maintenance of essential services, including elevators, plumbing and heating.

NYCHA and the U.S. Attorney sought to terminate the litigation by proposing a consent decree, the major provision of which was the appointment of a monitor with authority to promulgate standards and action plans.

Judge Pauley rejected the proposed consent decree in a sharply worded 52-page opinion. He wrote that the proposed consent decree gave political cover to NYCHA and the City without actually benefitting the tenants. The decree lacked deadlines, pushed to the future any real reform, lacked sufficient funding, and shifted responsibility for NYCHA to an outside monitor. Judge Pauley ruled that the proposed decree would likely exceed judicial authority, violate separation of powers, and be unfair to the tenants of NYCHA who had, through their tenant organizations, filed papers opposing the proposed consent decree. In sum, Judge Pauley found the proposed consent decree unfair, unreasonable and not consistent with the public interest.

As David Schoenbrod and I wrote in [Democracy by Decree](#) (Yale Press 2003), consent decrees can do much good, but carry with them substantial risks. Among the risks are that they will allow elected officials to evade responsibility, inflate rights, and let governmental power fall into private hands. These and other risks were evident in the NYCHA consent decree.

A new proposed consent decree should provide relief to the tenants, make the U. S. Department of Housing and Urban Development a full party, and include a financial plan and sufficient funds to fix the conditions disclosed by the U. S. Attorney's complaint.

Background

For nearly three years the [Daily News](#) and other media had reported shameful conditions in public housing managed by NYCHA, including serious lead and mold contamination, along with faulty plumbing, heating, elevators, pest control, and more. Then came revelations that NYCHA officials had falsified lead inspection

reports to the U. S. Department of Housing and Urban Development. HUD requires inspections and reports as a condition for federal operating and capital funds which annually total \$1.2 billion. The revelations of false filings triggered the interest of the U. S. Attorney.

Following a widely publicized civil and criminal investigation, the U.S. Attorney in Manhattan on June 11, 2018 filed an 80-page civil complaint. In addition to the lead paint violations, the complaint also charged NYCHA with deceiving HUD inspectors by various Potemkin-like cover-ups that prevented the inspectors from viewing the unsatisfactory conditions of NYCHA properties. NYCHA employees, for example, would temporarily shut off the water to prevent HUD inspectors from observing leaky plumbing. The complaint also charged that NYCHA violated the U.S. Environmental Protection Agency's regulations specifying the training and safe working conditions for workers abating lead paint.

In a catch-all count, the U.S. Attorney charged that NYCHA violated a HUD regulation requiring public housing authorities to provide "decent, safe and sanitary" housing.

The Proposed Consent Decree

On June 11, 2018, the same date that the U.S. Attorney filed the civil complaint, the parties jointly submitted a proposed consent order that would have terminated the litigation and created a remedy under judicial supervision. The heart of the proposed consent decree was the future appointment of a monitor who would, after consultation with NYCHA, promulgate binding performance requirements, an operational plan, and an organization plan. The U. S. Attorney had to approve the monitor's plans prior to promulgation. A failure to get that approval from the U. S. Attorney would result in more negotiation and, if not successful, the plans would be submitted to the judge for adoption.

No deadlines were imposed by the proposed consent decree. There were no timetables for appointment of the monitor, or for the development of the plans or their implementation. No immediate action of any kind was required at all except for actions related to lead paint inspections, abatement and notifications. All other judicially required compliance efforts depended on the future appointment of the monitor and the eventual approval of future plans.

No funding plan for the repairs was imposed by the proposed consent decree. NYCHA's current capital needs are \$31.8 billion. The only funding mentioned in the proposed consent decree was an existing State emergency fund of \$550 million already promised by Governor Andrew Cuomo, and \$1 billion in City funds promised by Mayor Bill de Blasio to become available over the next ten years.

The proposed consent decree required modest organization changes. NYCHA would be required to appoint a chief compliance officer and an environmental health and safety officer.

In return for NYCHA's agreement to the proposed consent decree, the U. S. Attorney agreed not to file criminal charges against NYCHA, but reserved the right to file criminal charges against individuals.

Termination of the consent decree lay far in the indefinite future. The decree would continue until NYCHA met the general federal standard of providing residents with decent, safe and sanitary housing. By that measure the proposed consent decree was certain to last decades, if it could be terminated at all.

Absent and without any direct role was the U. S. Department of Housing and Urban Development, the federal agency authorized to enforce federal housing standards.

Judge Pauley's Objections

Judge Pauley called the obligations set out in the proposed consent decree "indeterminate," "formless," "amorphous," and "vague." He characterized the decree as so indefinite and lacking in clarity that it would be impossible to evaluate performance. Judge Pauley wrote that the proposed consent decree offered "scant precision" of obligations which made it impossible to define "the types of violations that may be enforced, or the

mechanisms by which noncompliance” with the proposed consent decree may be addressed. The vagueness, he wrote, violated requirements of due notice and fell below a threshold of clarity needed to accomplish a judicially imposed reform of a governmental institution.

Judge Pauley objected to the monitor’s independence from the court. “At bottom,” Judge Pauley wrote, “the proposed decree outsources the formulation of NYCHA’s obligations,”. This arrangement left the court in a secondary role and differed markedly from the role of monitors who develop reforms that first must be approved by the court.

Judge Pauley faulted the absence of the U. S. Department of Housing and Urban Development. HUD was not a party to the proposed decree, yet Congress had enacted detailed instructions on how HUD should evaluate a public housing agency’s performance and had provided HUD with broad authority to act if the public housing agency failed to perform. These remedies included a private or public takeover and appointment of a receiver or other compelled management changes. The parties instead relegated HUD to a “narrow, auxiliary role” by substituting the federal court’s equitable powers for a cabinet agency’s congressional mandate. This substitution, Judge Pauley wrote:

Implicate[d] the fundamental separation of powers among the branches of the Federal Government by commandeering a court’s equitable powers to fashion a comprehensive injunction remedy parallel to—yet entirely unmoored from – the existing statutory framework.

Stanley Brezenoff, the acting head of NYCHA described HUD’s absence more picturesquely. Brezenoff was quoted in the New York Times following Judge Pauley’s decision that HUD had little appetite to take over NYCHA. “There was talk of getting HUD to appoint a receiver and they just ran like hell.”

The proposed consent decree lacked funding. Judge Pauley called the funding “malleable” and uncertain and inadequate. He estimated that it would take 148 years to bring NYCHA into a state of good repair at the rate provided in the proposed consent decree.

Judge Pauley criticized the City for its “equivocal role” in the litigation. The City had approved the proposed consent decree, but was not bound by it. Yet the mayor, Judge Pauley wrote, completely controls NYCHA by appointing NYCHA’s chair and chief executive officer and its board, all of whom serve at the mayor’s pleasure. Judge Pauley cited the “equivocal” position of the mayor and the City as evidence that the necessary political will was absent from the proposed consent decree.

Judge Pauley also criticized the State and Governor Andrew Cuomo, writing that:

[T]he State of New York lurks in the wings with its \$550 million that may help fund NYCHA’s capital needs. The Governor – having previously overhauled the Chicago Housing Authority during his tenure as HUD Secretary—may well understand better than others what is at stake.”

Judge Pauley, finally, questioned imposing a remedy that went beyond the scope of the alleged federal violations. The federal violations actually alleged in the complaint only related to lead paint and a general requirement to provide decent, safe and sanitary housing. The parties, Judge Pauley wrote, produced a consent decree that technically addressed the violations in the complaint, yet “portend[ed] this Court’s de facto conscription into superintending NYCHA indefinitely—a role that judges are ill-equipped to assume.”

Judge Pauley viewed the proposed consent decree as a political cover rather than a bona fide attempt to improve the conditions of NYCHA. Judge Pauley wrote that:

Ultimately, whether the parties choose to address this public emergency through a judicially managed consent decree, a receivership under the U.S. Housing Act, or in some other way, it appears that half-measures that merely maintain the status quo while shielding the power-that-be from politically unpalatable solutions are doomed to fail.

Judge Pauley correctly assessed the parties' motives. Under the proposed consent decree the City evaded accountability. Unmet financial needs were pushed forward to be a problem for the next mayor. HUD ducked its statutory responsibilities. The U. S. Attorney's office claimed victory, but escaped responsibility to improve tenant conditions. The State continued to sit on the sidelines. All immediate duties to improve conditions were outsourced to an unnamed monitor. And little would have changed for the tenants of NYCHA.

Rethinking the Proposed Consent Decree

NYCHA's gross deficiencies should impel an urgent response. Now the parties have an opportunity to present a better order, one that does justice to the tenants and their rights.

Lead Violations

The new decree should separate lead paint violations from general management failures. The federal regulations governing lead paint are clear and NYCHA's violations are evident. A new order on lead paint should spell out specific obligations to correct NYCHA's violations, set a deadline for full compliance, and promptly and automatically terminate once the court is satisfied that NYCHA officials have corrected past violations and will adhere to federal law in the future.

Management failures

Judge Pauley's opinion questioned whether any consent decree addressing NYCHA's overall mismanagement would be appropriate. Judge Pauley wrote that the proposed consent decree put the judiciary in charge of NYCHA with responsibility to insure that the 400,000 NYCHA residents enjoyed "decent, safe and sanitary" housing. He wrote that approving the proposed consent decree would usurp HUD's remedial role as specified by congress. His concern is correct.

No federal statute, HUD regulation or constitutional provision creates a personal federal right enforceable in federal court to decent, safe and sanitary housing. The language to provide decent, safe and sanitary housing is a general condition attached to HUD's financial support. Congress specified the remedies available to HUD when a public housing authority that accepted federal money failed to provide decent, safe and sanitary housing. The remedies included various forms of takeover and receiverships. But HUD is not a party, and the U. S. Attorney's office has not asked the court for the remedies specified by congress.

Federal courts do not have a roving commission to reform failing state and local institutions absent a congressional or constitutional mandate. The proposed consent decree was an unlawful invitation to the court to take on that roving commission; the invitation was appropriately rejected.

But, should the court again consider a consent decree, here are some suggestions on how to make a consent decree consistent with federal law and still address NYCHA's management failures.

HUD: At a minimum a new consent decree should add HUD, the expert federal housing agency, as a party. The U. S. Attorney's office is an office of lawyers and is not expert in housing. The gulf between the lawyers in the Justice Department and operational agencies like HUD is wide and deep and can be both territorial and competitive. Judge Pauley correctly characterized HUD's absence as an abdication, and it should be promptly corrected.

With HUD as a full participant and party to the litigation, the parties should quickly agree on appropriate performance requirements and operational and organizational plans. The decree should set a deadline for the parties to submit these performance requirements and plans to the court for approval.

Funding: Without funding, any decree is merely a sham giving the appearance of reform. The new consent decree should require a budget and a plan to provide the needed financial resources. This will not be easy, but it is not unprecedented. The MTA worked its way out of an equally large service crisis in the 1980's by developing realistic five year plans that ultimately brought the system to a state of good repair. The City, in establishing

Hudson Yards, developed a funding scheme to construct the needed infrastructure and subway extension through property tax payments and dedicated revenue streams. The City recently developed a plan to support bringing Amazon to Long Island City. The City and NYCHA should be required to do no less for the City's public housing.

Termination: There are two polar choices on when to terminate the management portion of the consent decree. The decree could terminate once NYCHA establishes its plans, budget and bona fides in its efforts to providing decent, safe and sanitary housing. Under this option the federal court supervision would likely end in four or five years. Such a timetable is finite in length, is tied to achievable milestones, respects the authority of local officials to manage public housing, is realistic concerning necessary adjustments management has to make in the day-to-day management of a large public agency, and avoids making a federal judge the final arbiter of how to manage public housing.

The second choice is to maintain the consent decree indefinitely and not terminate it until NYCHA actually and substantially achieves decent, safe and sanitary housing. Under this option the termination provision is infinite in time, is tied to vague and amorphous standards, disrespects the authority of local officials to manage their affairs, is unrealistic concerning necessary adjustments NYCHA management must regularly make in managing a large public housing agency, and elevates the judge to be the final arbiter of how to manage public housing.

The first option is best; terminate the decree automatically once the plans and budget are in place and a limited period has passed sufficient to demonstrate the bona fides of NYCHA. The parties could add a provision that allows the current litigation to "sunrise," but only on an allegation of systematic and institution-wide violations.

Termination of the consent decree tied to judicial approval of the plans and budget eliminates perpetual judicial supervision of NYCHA where every dispute no matter how trivial could potentially be taken to the federal court. Termination on completing of the planning phase also eliminates the adverse effect of federal attorneys riding "sidesaddle" with NYCHA officials with a voice on every management decision. Early termination is also consistent with Supreme Court rulings that management control of state and local agencies should be returned to state and local officials as soon as practical.

Future remedies: NYCHA tenants will not be left without remedies. The parties, or anyone else, could commence an enforcement action when there are new violations of federal or state law. Individual enforcement actions could be commenced by HUD, the U. S. Attorney, the City of New York, tenant's organizations or individual tenants. An individual enforcement action has the advantage of focus, can more easily be managed by the courts, and would likely result in more timely, specific and enforceable remedies.

The federal court's strength is that it can expose publicly the shameful conditions experienced by NYCHA residents and thereby embarrass, and direct, the City's political leadership into action. A rehabilitation of the scale of NYCHA will take decades, and can only realistically be accomplished by NYCHA and the managers that the mayor appoints. The court should compel accountability, but the choices of the plans, and the implementation of those plans, have to be managed and accomplished by NYCHA.

By: **Ross Sandler** (Ross Sandler is Professor of Law at New York Law School. He is the co-author with David Schoenbrod of Democracy by Decree: What Happens When Courts Run Government (Yale 2003).)