

**SETTLING THE QUESTION: DID BANK
SETTLEMENT AGREEMENTS SUBVERT
CONGRESSIONAL APPROPRIATIONS POWERS?**

HEARING
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT
AND INVESTIGATIONS
OF THE
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SETTLING THE QUESTION: DID BANK SETTLEMENT AGREEMENTS SUBVERT CONGRESSIONAL APPROPRIATIONS POWERS?

Thursday, May 19, 2016

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT
AND INVESTIGATIONS,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:16 a.m., in room 2128, Rayburn House Office Building, Hon. Sean P. Duffy [chairman of the subcommittee] presiding.

Members present: Representatives Duffy, Fitzpatrick, Mulvaney, Hultgren, Tipton, Hill; Green, Cleaver, Ellison, Beatty, and Sinema.

Ex officio present: Representatives Hensarling and Waters.

Chairman DUFFY. The Subcommittee on Oversight and Investigations will come to order. Without objection, the Chair is authorized to declare a recess of the subcommittee at any time.

Also, without objection, members of the full Financial Services Committee who are not members of the subcommittee may participate in today's hearing for the purposes of making an opening statement and questioning the witnesses.

Today's hearing is entitled, "Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?"

The Chair now recognizes himself for 5 minutes for an opening statement.

Since last year, this committee has been investigating the Obama Administration's use of bank settlement agreements as a slush fund to support liberal activists' groups. Today's hearing examines this practice and its impact on Congress' constitutional power of the purse.

In the wake of the 2008 financial crisis, the Department of Justice was charged with investigating the pulling and sale of residential mortgage-backed securities which played a leading role in the housing meltdown and contributed to a global recession. Millions of Americans' mortgages went underwater and countless families faced foreclosure.

In 2013, the DOJ announced a record breaking \$13 billion settlement with JPMorgan Chase which included \$4 billion in consumer relief to come largely in the form of loan modifications. Importantly, although it contained a provision giving credit for donations

to certain community redevelopment organizations, it did not make any donation mandatory and offered only dollar-for-dollar credit to the bank to fulfill them.

Several other high-profile settlements with other large financial institutions followed. In July 2014, DOJ announced a \$7 billion mortgage lending settlement with Citigroup that included \$2.5 billion in consumer relief.

DOJ, which touted these consumer relief provisions as innovative, required a minimum \$10 million in donations to HUD-approved housing counseling agencies including, for example, the National Council of La Raza and NeighborWorks.

For every dollar donated, Citigroup could earn \$2 worth of credit against its \$2.5 billion consumer relief commitment. In effect, the Bank was actually incented to donate to these third-party groups. By contrast, for direct forms of consumer relief like principal forgiveness for homeowners in the hardest-hit areas, the base credit is merely dollar-for-dollar.

One month later, DOJ reached a settlement with Bank of America providing for \$7 billion in consumer relief which included nearly identical terms.

Earlier this year DOJ entered into settlements with Morgan Stanley and Goldman Sachs, settling for amounts of \$2.6 billion and \$5 billion respectively, allowing for much more than dollar-for-dollar credit.

These terms appeared unprecedented, and as a result liberal activist groups have or are scheduled to receive over half a billion dollars outside of the normal appropriations process, setting up-front, mandatory, minimum donations to non-victim third parties, and in some instances, liberal activists' groups.

It marks a substantial and disturbing departure from past practices. This subcommittee has two questions before it today. First, is what the Obama Administration did consistent with the law, and more importantly, Congress' Article 1 appropriations powers?

And second, should we continue to allow the Executive Branch, regardless of party, Republican or Democrat, to structure settlements in such a way as to allow third parties, who are not harmed, to get funding otherwise owed to victims or to the government and taxpayers. To answer the first question, we have invited four legal scholars.

At the very least, I would hope that we can agree that these settlements subverted or undermined Congress' appropriations power. And if not a clear violation of the Constitution, these settlements may very well have violated the Miscellaneous Receipts Act, which directs that money received by the government from any source must be deposited in the Treasury.

Furthermore, the Department of Justice's own U.S. attorney's manual says this practice is restricted because it can create actual or perceived conflicts of interest and/or other ethical issues. As a policymaker, the answer to the second question is abundantly clear to me.

Regardless of who is in power at the Department of Justice or any other agency with a role in structuring settlements on behalf of the U.S. Government, no settlement should compensate anyone other than a victim. Period.

Based on everything the committee has learned it is clear that, in fact, these settlements created the very conflicts of interest that the U.S. attorney's manual warned against, with certain conservative groups being deliberately excluded from receiving settlement funds. This kind of practice should not take place under a Democrat or Republican Administration.

The Department of Justice, and indeed the justice system itself, is supposed to be blind to this kind of behavior. It will not be tolerated. For the millions of Americans affected by the housing crisis, many may not be aware that their bank had a choice to provide them with direct relief or funnel money to a liberal activists' group.

I think it is important for our committee to try to determine why, which is the reason I intend for this subcommittee to continue to investigate the agencies involved and prohibit this from happening in the future.

I now recognize the ranking member of the subcommittee, the gentleman from Texas, Mr. Green, for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman. I thank you for the time. I do not agree with the hearing. I do not agree with the hearing because I think that there are a good many other things that we could be doing today that the American people expect us to do.

The American people are pretty fed up with what we have been doing. Not one person lately, and very few at all, have gone to jail as a result of this crisis that was created in 2008. A good many people are still concerned about our having hearings that will prevent people from acquiring the necessary aid that they need to prevent foreclosures while not having hearings that would help us bring to closure some of the atrocities that have occurred.

Now some would say that is what the Justice Department ought to do. We can have hearings to find out what happened and encourage the Justice Department to go after people. Some would say, well, this is within the purview of what we are doing. Yes, it is. But this bill that is going to be mentioned is one that emanates from the Judiciary Committee.

And if we can take up issues emanating from the Judiciary Committee with reference to legislation, we can take up these issues that relate to people going to jail. This is why people are so upset with us. That is why you see this election going in all directions. People are fed up.

So let us just talk about what we have here today. I think a more appropriate title for this hearing would be, "No Good Deed Goes Unpunished." The Justice Department lawfully settled these cases and the amounts that have been called to our attention. I would think that these banks would be a little bit concerned about the way their names are going to be thrown around today because they settled these cases for good reason.

They took advantage of consumers, and now they are having to pay. And if there is something unlawful about this, these banks have batteries of lawyers who are capable, competent, qualified, and prepared to take these issues before the judiciary in this country. Judges that we put in place.

So, it is not some alien country that is going to have to deal with these issues. If there are unlawful acts going on, they would take

them to court. No court has declared any of these settlements unconstitutional.

We are doing what is within the law, and the Justice Department really ought to be commended for the outstanding job that it has done. I would also add this, at the very heart of this is the question, are we going to allow monies from settlements, less than 1 percent by some accounts by the way, less than 1 percent of the money from these settlements is what we are talking about today.

Are we going to allow the money from settlements to go to organizations and entities that can help people stay in their homes? That is what this is about. Are we going to allow money to go to counselors who can help people stay out of foreclosure? Go to lawyers who can help them?

And all of these entities and organizations that people are all upset about have been vetted by HUD. They are on an approved HUD list. You can't get on the list without being vetted.

Do some get through that we might not want? Or someone might not want? Possibly, but they have still been vetted. And by the way, if the money could go to just any organization, the complaint would be, you are letting the money just go to anybody.

None of these people are vetted. So, either way there is going to be a complaint. I don't approve of this hearing. I think this hearing should be called the means by which we will continue a crisis that started in 2008 with the debacle associated with banks that took advantage of people.

Yes, JPMorgan Chase has a \$13 billion settlement. Yes, Bank of America has a \$7 billion settlement. And then, of course, there is Goldman Sachs at \$5 billion.

I would think that they would get sick of their names being drawn through the records of Congress and all of these things being mentioned about them. At some point they ought to say, look guys we have had enough, we settled that. We are not complaining. Or maybe they are complaining but they are not bringing it to our attention.

I don't see one banker here today complaining about what is going on. If I am wrong someone will tell me. But it seems to me that if you are a banker, or a surrogate of a banker, you ought to speak up. The point I would like to make, finally, is this: At some point, we have to get about the business the American people expect us to take care of.

They are sick of conservatives and liberals doing nothing. They want to see us deal with this crisis the way they would be dealt with if they were the culprits. Somebody ought to go to jail. We ought to be having hearings to determine who is going to jail. I yield back.

Chairman DUFFY. The gentleman yields back. We now recognize and welcome our witnesses here today.

First, we have Ambassador Boyden Gray. Ambassador Gray is the founding partner of Boyden Gray and Associates, a law and strategy firm in Washington which is focused on constitutional and regulatory issues.

Second, we have Professor Nicholas Rosenkranz who teaches constitutional law and Federal jurisdiction at Georgetown University Law School.

Third, Mr. Paul Larkin is a senior legal research fellow at the Heritage Foundation where he directs the Foundation's project to counter abuse of criminal law.

And finally, Professor Min is an assistant professor of law at the University of California Irvine School of Law. Welcome, all of you. The witnesses, in a moment, will be recognized for 5 minutes to give an oral presentation of their testimony.

And without objection, the witnesses' written statements will be made a part of the record. Once the witnesses have finished presenting their testimony, each member of the subcommittee will have 5 minutes within which to ask each of you questions.

On your table, there are three lights: green means go; yellow means you have 1 minute left; and red means your time is up.

And with that, Ambassador Gray, you are recognized for 5 minutes.

**STATEMENT OF AMBASSADOR C. BOYDEN GRAY, PARTNER,
BOYDEN GRAY & ASSOCIATES**

Mr. GRAY. Thank you very much, Chairman Duffy and Ranking Member Green, for inviting me to speak here about the importance of congressional control over the Nation's purse and how that control has eroded over the past several years. This erosion threatens the separation of powers that lies at the core of our constitutional structure.

An Executive with access to the Treasury could very well free itself from popular oversight putting the entire idea of representative self-government at risk. I have been involved with this set of issues for a long time. I was counselor to the President and you can well imagine how often this issue came up in deliberations in the White House, especially in the Antideficiency Act, which I will mention in a minute.

And later, in private practice, I was deeply involved representing Congressman Bliley and Senator Hatch in the American trucking case which addressed questions about the extent of Congress' ability to delegate authority to the Executive Branch.

Today, I am challenging the constitutionality of the Consumer Financial Protection Bureau (CFPB), which is familiar, I think, to all of you on grounds, among others, of the power of the purse and on delegation.

As my prepared text makes clear, the Appropriations Clause is a bulwark of the Constitution's separation of powers and it goes way back into English history, which is the background for our constitutional set up. In the end every constitutional power runs into the appropriations power.

All exercises of constitutional power are limited by the congressional control over funds in the Treasury. In fact, the command of the purse is what gives effect to Congress with the authority to prescribe the rules by which the duties and rights of every citizen are to be regulated.

Historically, Congress has protected its powers of the purse. The Miscellaneous Receipts Act, which is the principal topic of today's hearing, is very relevant and central. It ties the Executive Branch to Congress by requiring appropriations for any money received for the Government is spent.

And we will go into this in a little more detail in the time I have. But let me first say, to put it all in context, there are three general categories of Appropriations Clause violations.

The first is establishment of agencies that don't have congressional funding, it is self-fund, and thus escapes oversight by you, and one example is the CFTB, with which I think this subcommittee is familiar.

The second is violations of the Antideficiency Act, which prohibits the Executive from committing funds not, spending funds not appropriated by Congress. ObamaCare is an example of that.

And then there is the Miscellaneous Receipts Act, which prohibits the kind of discretionary control over funds received; and enforcement cases, the ones you are concerned about, give the banking settlements involved extraordinary sums of money which escape congressional oversight of the purse.

This committee is familiar with the CFPB, which has no obligation to answer or respond to anything you do. So, when asked by a member of this committee who is in charge of the lavish renovation expenditures of CFPB, which cost more than the building of the Bellagio Hotel in Las Vegas, the Director of the CFPB answered, "Why does that matter to you?" That is an insolent response which stuns me, and I would think you would want to clasp him in handcuffs for saying something like that.

The Affordable Care Act, sort of second bucket, involves the Antideficiency Act, and there are various payments which Congress has appropriated and various payments which Congress has authorized but not appropriated.

So-called cost-sharing reduction payments have never been appropriated by Congress. The President requested \$5.4 billion. He got \$4 billion. When the answer was no, he took the \$4 billion anyway. So I think that it is important to watch that very, very carefully.

You have covered, Mr. Chairman, the sins of the bank settlements. I don't know that there is much I can really add, except to say that the amounts are extraordinary in comparison to the other disbursements.

The CFPB, for example, at \$600 million a year, which pales in comparison to the billions that have been dispensed under the bank settlement.

So, I commend you for this hearing, and I hope you have more success with it and stop this practice. And as far as what the ranking member said, as a Republican I am quite sympathetic to almost everything you touched on. Thank you.

[The prepared statement of Ambassador Gray can be found on page 30 of the appendix.]

Chairman DUFFY. Thank you, Ambassador Gray.

Professor Rosenkranz, you are now recognized for 5 minutes.

STATEMENT OF NICHOLAS QUINN ROSENKRANZ, PROFESSOR OF LAW, THE GEORGETOWN UNIVERSITY LAW CENTER

Mr. ROSENKRANZ. Thank you, Chairman Duffy, Ranking Member Green, and members of the subcommittee. Thank you for the opportunity to express my views on this important topic.

The Constitution provides: “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” This is not a mere technical provision. This is a fundamental element of constitutional structure.

It sounds, first, in democracy, reflecting this deep constitutional principle that the power of the purse should be vested in the most representative branch. Every dollar appropriated from the Treasury may represent a dollar in taxes, so this principle applies equally to taxes and spending. Taxing and spending are the twin powers of the purse, and the legislature commands the purse.

Moreover, the House of Representatives is vested with a special role over revenues, as you know: “All bills for raising revenue shall originate in the House.” The reason is clear: House Members are more immediately representatives of the people.

But this structural role of the Appropriations Clause sounds not only in democracy but also in separation of powers. Short of impeachment, the power of the purse is Congress’ most potent check on Executive overreach.

If the President can draw money from the Treasury without an appropriation or otherwise evade the Appropriations Clause, power would shift decisively from Congress to the Executive.

It is in this context that this Appropriations Clause question arises. A willful President can evade many of the constitutional checks on his power, but Congress’ appropriations power is the ultimate backstop. Everything the Government does costs money, so the power of the purse should successfully constrain the Executive Branch if all else fails.

Moreover, all negotiations between the President and Congress, even those that have nothing to do with appropriations, happen in the shadow of this fundamental power. Alas, though, a determined President may flout this provision too.

Just last week, District Judge Rosemary Collyer of the U.S. District Court for the District of Columbia found that the Administration has paid billions of dollars to insurance companies under ObamaCare without an appropriation from Congress.

She held, in no uncertain terms, that making these payments “without an appropriation...violates the Constitution.” Under these circumstances, then, it is fair to view these provisions, these bank settlements, with a skeptical eye.

The provisions provide for payments from the banks to these third-party organizations that are neither parties nor victims of the alleged wrongdoing. It is certainly fair to say that these payments circumvent the clause at issue.

If the banks had paid this money to the United States—which, after all, was the plaintiff in the case—then the money would have gone into the Treasury. And if, subsequently, the President or the Attorney General favored using this money to subsidize various community development organizations or what have you, they would have had to request an appropriation from Congress.

By providing for direct payment from the banks to the organizations, these settlements evade the Appropriations Clause and cut Congress out of the loop.

Another way to put the point is that these settlement provisions embody two implicit decisions. The first is the value of the Govern-

ment's claims—that is, what we would have predicted it would have won from a jury, discounted by the odds of a successful trial. And that is within the core competence of the Department of Justice. That is what they are supposed to be doing.

But the second decision is the best possible use of these funds—whether to subsidize insurance companies under ObamaCare, or subsidize various community development organizations, or pay down the \$19 trillion national debt, or do any number of other things. This second decision is paradigmatically legislative. It is exactly the sort of decision the Appropriations Clause was designed to reserve to Congress.

If these funds were first paid into the Treasury and then appropriated out again, these two decisions would be distinct. The Attorney General would make the first. Congress would make the second. But by providing for direct payment, the Administration effectively arrogates both these decisions to himself.

Finally, I will just note that at least one of these provisions is problematic in another way. One of them is contingent, actually, on the extension of the Mortgage Forgiveness Debt Relief Act of 2007. This is doubly problematic because it is contingent on a future act of Congress. Quite apart from the evasion of the Appropriations Clause, it is arguably a violation of separation of powers for the Executive Branch to attach either a tax or a bonus to a legislative act in this way. To see the point, imagine a settlement provision that required the Bank of America to pay an additional \$100 million if the Senate fails to confirm Merrick Garland to the Supreme Court. Surely, the Executive Branch can't add a tax to a Senate prerogative in that way.

In short, these clauses clearly circumvent the text and subvert the function of the Appropriations Clause, and I applaud you for holding this hearing. I would certainly support legislation along the lines that have been proposed.

[The prepared statement of Professor Rosenkranz can be found on page 83 of the appendix.]

Chairman DUFFY. Thank you, Professor.

Dr. Larkin, you are now recognized for 5 minutes.

**STATEMENT OF PAUL J. LARKIN, JR., SENIOR LEGAL
RESEARCH FELLOW, THE HERITAGE FOUNDATION**

Mr. LARKIN. Thank you, Chairman Duffy, Ranking Member Green, and members of the subcommittee. I appreciate the opportunity to come and help you address this problem. The views I state will be my own and not those of the Heritage Foundation.

And today, I would like to make just two brief points. First, no private lawyer in settling a case, could enter into an agreement that has these conditions. No private lawyer could tell opposing counsel, I know you are willing to pay my client \$100 to settle this case, but he doesn't need it all. Give some of that money to whomever you want. Pick a charity and hand it out.

Any lawyer who did that would be disbarred for engaging in unethical conduct. Now, granted, government lawyers have some different responsibilities than private lawyers. But the McDade Amendment subjects government lawyers to the same ethical rules

that apply to lawyers in whatever State where that government lawyer appears.

The result is the Justice Department cannot escape the ethical responsibilities imposed on any individual lawyer by pointing to the fact that they are settling government cases, rather than private contract cases.

Second, not only do you have the problem here that the Executive is acting improperly, but you have a practice that denies voters information they are entitled to receive in deciding whether to reelect you and re-elect Senators to Congress.

What happens when Congress lets the Executive Branch take over the appropriations process is it delegates that authority beyond what any reasonable person would think Congress should do.

What you have, in essence, is the government deciding how money should come in to the Federal Treasury and by whom it should be received. That clearly is the sort of sham transaction that the Justice Department would prosecute as fraud, if private parties engaged in this. But it does create other problems.

I agree with the ranking member that there should have been more investigations into the question of whether there was fraud on Wall Street. But third-party conditions like this take money that could be used to hire more FBI agents, and to hire more SEC investigators to look into that problem, and instead gives it out in a way that doesn't guarantee that victims will get it, and doesn't guarantee that the funds will be used only for lawful reasons.

What you have then is essentially handing out money without any audit after the fact. And you have the additional problem that the public is generally unaware of what is happening and, particularly, who gets this money, and therefore, is deprived of information that it needs when deciding whether to reelect the members who voted for any such program, or to throw the bums out, as they used to say in Brooklyn.

For those reasons, I think these practices that the government has engaged into, violate the Appropriations Clause as well as the Miscellaneous Receipts and Antideficiency Acts and that Congress should recognize that this is a terrible public policy.

I yield back the rest of my time.

[The prepared statement of Dr. Larkin can be found on page 53 of the appendix.]

Chairman DUFFY. Thank you, Dr. Larkin. Professor Min, you are now recognized for 5 minutes.

STATEMENT OF DAVID K. MIN, ASSISTANT PROFESSOR OF LAW, THE UNIVERSITY OF CALIFORNIA IRVINE SCHOOL OF LAW

Mr. MIN. Chairman Duffy, Ranking Member Green, and distinguished members of the subcommittee, thank you for inviting me here to testify on the topic of the RMBS settlements negotiated by the DOJ.

Today's hearing focuses specifically on provisions contained in three of the five RMBS settlements, which allowed the settling bank to fulfill some of its obligations by donating money to third-party charitable efforts, such as foreclosure prevention, and neighborhood anti-blight provisions. And it asks whether government

settlements containing these types of charitable payment provisions subverted Congress' appropriations power.

The legal answer to this question is fairly easy to answer. Under established law, the answer is no. This is, in fact, a quite common and ubiquitous practice. While some observers, including several of my fellow witnesses, have claimed that these charitable payment provisions violate Federal law by circumventing Congress' exclusive authority over appropriations, this claim is not well-grounded in current law.

The Miscellaneous Receipts Act was passed by Congress in 1849 to set the parameters of what was acceptable versus unacceptable encroachment by the Executive Branch over Congress' appropriation authority.

Prior to the Miscellaneous Receipts Act, an official or agent of the government receiving money for the government shall deposit the money in the Treasury. The key point to note here is that the government must receive that money before it is required to send it to Treasury.

The receipt of the money may not be actual receipt but can be construed as constructive receipt of that money by the courts. Thus, the long-standing legal standard for whether the government had received this money in legal settlements has revolved around two factors.

First, is their admission of finding, for finding of liability. Second, does the government retain post-settlement control over the disposition or management of funds or projects carried out under the settlement?

If the answer to both of these questions is no, then the government relationship with the money in question is said to be so attenuated that it could not possibly be construed as having received it and thus, the settlement funds would not be subject to the appropriations process.

Importantly, the Comptroller General, which represents Congress, has endorsed this general legal framework, as have several courts. Based on this legal framework, and on the Attorney General's broad authorities to litigate and settle claims involving government, the Federal Government has crafted a wide variety of settlements with terms providing for payments to private charitable groups.

It is fair to say that these types of provisions contained in the RMBS settlements are ubiquitous and certainly not unprecedented as several of you have said today. Indeed, the House Judiciary Committee, which is chaired by Congressman Goodlatte, one of the more outspoken critics of these types of provisions, has basically conceded this point by passing H.R. 5063 out of committee.

H.R. 5063 would prohibit the DOJ from negotiating settlements with these types of charitable payment clauses. Obviously, the Goodlatte bill would not be necessary if charitable payment terms were already impermissible under existing law.

The RMBS settlement at issue should clearly fall within the criteria fall that I described. They do not include a finding of liability on the part of banks, and the Federal Government does not maintain post-settlement control over them.

Indeed, the banks themselves maintain full control over how they can disburse the funds under the Consumer Relief Provisions, and there is no requirement that they don't donate any funds to any particular third parties under the terms of these agreements. Thus, they are plainly permissible under the law.

Having dispensed with this first question, let us move onto the second question, which is implied by today's hearing. Should Congress take action to prohibit these types of settlement provisions?

I think the answer here is clearly no. It is undeniable that these types of provisions can serve a valuable purpose. Indeed, even Dr. Larkin, whom I would describe as the leading critic of these types of provisions, has acknowledged this point.

As Dr. Larkin has noted, these provisions can be mutually beneficial for both government and the private defendant. From the government's perspective, they can effectively increase the total amount of the settlement, sometimes by a large amount. And they can also benefit third-parties. From a defendant's perspective, charitable payment provisions can provide significant public relations and community outreach benefits.

Moreover, to the extent that the Federal Government may, but is not required to negotiate these types of provisions as part of its settlement, this provides it with additional flexibility to help negotiate as one of our current Presidential candidates likes to say, the best deal.

For example, DOJ has negotiated only three of these settlements, RMBS settlements, with these types of provisions, but did not include them in settlements with Goldman Sachs and Morgan Stanley.

Presumably, DOJ made the determination that, due to the specific facts and negotiating posture on that settlement, it was in the best interests of the Federal Government to seek these charitable payment provisions in some, but not all of its settlements.

So, why would anyone oppose these types of provisions from a policy perspective? One objection that you have just heard from Dr. Larkin is that they redirect money away from the Treasury. But, in fact, I would point out that that is not entirely true.

Dr. Larkin gives the example of a private attorney settling a \$100 claim and giving that \$100 to charitable interests instead. But, in fact, the Federal Government is often limited by statutory limitations on the amount of civil penalties that they can seek.

Thus, it is incorrect to assume that each dollar of charitable payment secured in a settlement, is a dollar that otherwise would have been part of the civil settlement. In fact, the RMBS settlements provide a good example of this very point.

The DOJ's primary Federal claims in each of these settlements were claims based on FIRREA violations. Penalties for FIRREA violations are capped at \$1 million. Thus, it is not clear that DOJ could have put much more, if any, instilled penalties than it already did, even if it had litigated these cases and won them.

Thus, the charitable payment provisions adhere to allowed DOJ to procure much more than it would have been able to get if it had been limited to civil penalties. And this, I argue in my written testimony, serves both a deterrent purpose, as well as a general com-

pensation purpose, which is, in fact, motivating principles behind civil penalties as it has been addressed by many legal scholars.

With that, I see my time has ended, so I thank you for your time.

[The prepared statement of Professor Min can be found on page 72 of the appendix.]

Chairman DUFFY. Thank you, Professor Min.

The Chair now recognizes himself for 5 minutes.

Looking at the 2008 financial crisis, the panel, I think, would agree that there were a lot of families who were hurt, a lot of families who lost their homes. I don't think anyone disagrees with that on the panel, correct?

And to the panel, was every family who was hurt in the 2008 crisis made whole?

Did everyone get reimbursed for their losses in the 2008 crisis, Professor Min?

Mr. MIN. The answer is no, but I would argue—

Chairman DUFFY. No, you are right. Good answer. They were not made whole.

And so, is it fair to say that instead of directing settlement money to victims of the 2009 crisis, the DOJ decided to take it away from victims and send it to third-party non-victim groups.

Do you agree with that, Professor Min?

Mr. MIN. No, I do not.

Chairman DUFFY. So, the money that went to third-party non-victim groups wasn't taken away from victims?

Mr. MIN. I am not sure how you would craft a settlement that helps out the aggrieved homeowners other than through community groups that directly interface with them.

Chairman DUFFY. There are people who have lost homes; they have been foreclosed upon. I hear the ranking member talk about that all the time.

Mr. MIN. Sure.

Chairman DUFFY. We know who they are in our communities. Why couldn't that money be directed to actual victims of the 2008 crisis?

Mr. MIN. Sure. And I believe that's what the money is intended to do.

Chairman DUFFY. No, it is not. It is going to third-party groups.

Mr. MIN. For foreclosure preventions.

Chairman DUFFY. Let me ask you this: Do you think it is appropriate, as you craft this settlement, that you craft it behind closed doors in a way to make sure that the money goes to left-leaning community activist groups instead of conservative groups?

Do you think that would be a good public policy?

Mr. MIN. I think that is actually a flawed premise because there were a number of different groups that were allowed to be given money under this.

Chairman DUFFY. Would that be a good public policy?

Mr. MIN. No, but there were conservative groups—

Chairman DUFFY. Okay.

Mr. MIN. —that were part of that list as well.

Chairman DUFFY. So would you be surprised that if later on you learned that there were emails from HUD and the DOJ that actu-

ally lay out the fact that they were structuring this deal to make sure that liberals got the money and not conservatives?

And if you heard that, you would be offended, wouldn't you?

Mr. MIN. I would be. I don't think that is what happened.

Chairman DUFFY. And so, if there is a deal that is structured like this, do you think there should be transparency to the panel? Do we think that the American people should be able to see the correspondence between the DOJ and HUD and how they determine what third-party activist group got the money?

Should that be disclosed to the American people, Professor Rosenkranz?

Mr. ROSENKRANZ. Yes, Mr. Chairman.

Chairman DUFFY. Dr. Larkin, do you think that the American people should be able to see through their Congress the documents surrounding this settlement?

Mr. LARKIN. Yes.

Chairman DUFFY. Mr. Gray?

Mr. GRAY. Yes, and how the money is to be ultimately dispersed is really up to you, not to a prosecutor.

Chairman DUFFY. We are going to come back to that in a second. I agree with you.

Professor Min, do you think that we should be able to see that?

Mr. MIN. Of course. And I think—

Chairman DUFFY. Okay. So would the—

Mr. MIN. —the fact that we are discussing this means that it was released.

Chairman DUFFY. Yes. Would the panel, by chance, be surprised that we have actually asked on this committee and this subcommittee, for the documents from the Department of Justice and HUD? And do you think that they have actually provided those documents to Congress? Take a guess.

Mr. LARKIN. I would not be surprised by the fact that they refused to turn them over.

Chairman DUFFY. They refused to turn them over. So, not only do you have a settlement that was done behind closed doors, that sends money instead of to victims and/or the Treasury, sends it to third-party activist groups, and Congress can't see the documentation surrounding that settlement.

Does that offend anybody's sensibilities on the panel?

Mr. GRAY. It offends mine, but I think it—more importantly than what I think, the Comptroller General is taking the view that all settlements must relate to the underlying violation, which principle was totally ignored in this series of settlements.

Chairman DUFFY. Professor Rosenkranz, I think you heard Professor Min's commentary and legal analysis on the DOJ settlements. Do you agree with his analysis?

Mr. ROSENKRANZ. I don't agree with his analysis. I would just make one point. He points out that arguably both sides win. The banks are happy and the Department of Justice is happy, but that's not the separation of powers standard.

That is often true in separation of powers problems. It is really Congress—and thus the American people—who are the aggrieved party. The fact that the bank is not here complaining doesn't actually prove the point.

Chairman DUFFY. They pay one way or the other, right? And so, instead of appropriating money-making decisions to the Congress, we have the Department of Justice, lawyers, and HUD. And I would just make one note.

My time is almost up, but one of the organizations that received money was NeighborWorks. Board member Helen Kanovsky is General Counsel of the U.S. Department of Housing and Urban Development. So, she is a board member of NeighborWorks but also General Counsel at HUD, and they got money. Does that offend your sensibilities, Professor Min?

Mr. MIN. I am not sure what the question is, what the offending sensibility point is.

Chairman DUFFY. My time has expired. The Chair now recognizes the gentlelady from Ohio, Mrs. Beatty, for 5 minutes.

Mrs. BEATTY. Thank you, Chairman Duffy, Ranking Member Green, and the witnesses.

First, I thought I was in the Judiciary Committee when I walked in because it seems like recently, they had some of the same witnesses, on the same topic, and for the record, that seemed very appropriate to me where this would be.

I was also surprised when I reviewed the hearing memo circulated by the Majority because it stated that this hearing would examine whether the Obama Administration encroached on Congress' appropriation powers, and if it overstepped his legal authority when crafting the settlement.

But what surprised me most about the statement was the first part is a constitutional question, which, I assume, falls under the Judiciary Committee's jurisdiction, and the second part focuses on oversight of the Department of Justice, which is also the Judiciary Committee.

Mr. Larkin, can you tell me, did you testify in the Judiciary Committee?

Mr. LARKIN. Yes. I testified at a subcommittee of the whole committee.

Mrs. BEATTY. Thank you. Okay. Just like this is a subcommittee.

Mr. LARKIN. That is right.

Mrs. BEATTY. And did you think it was appropriate for you to be there?

Mr. LARKIN. I was—

Mrs. BEATTY. Did you think this topic was appropriate in that committee, that it was the best place for it to be?

Mr. LARKIN. I think it was appropriate for that committee to look into it, but whether it was the best place is a matter for you all to decide.

Mrs. BEATTY. But you thought that this is where this issue belonged?

Mr. LARKIN. I thought that they had jurisdiction over it, no question, because it involved constitutional issues. But that doesn't mean they have exclusive jurisdiction—

Mrs. BEATTY. I didn't ask you that. I simply asked you the question, did you think it was the appropriate place for you to go and testify. That is a yes or no.

Mr. LARKIN. Oh yes, no, no, I said yes to that and I, that is, that was an appropriate place.

Mrs. BEATTY. Okay. So clearly, a renowned witness with all the things I have read about, Mr. Chairman, agrees with me, that Judiciary would be an appropriate place for it to be.

Thank you for that, Mr. Larkin.

I also find this to be ironic, this whole issue of us having this hearing here. It makes no sense to me. I think that Judiciary is where it belongs, and I have listened to the arguments by my colleagues on the other side of the aisle, how oftentimes it has been said by them that President Obama oversteps his authority as President.

He encroaches on congressional powers. And this hearing seems to be the exact same thing that we have accused him of doing, that we are having congressional overreach by bringing this here.

Mr. Chairman and Mr. Ranking Member, let me just say for the record that I take great offense to the claims that the Department of Justice is somehow diverting funds to radical, liberal, non-profit and affordable housing groups and I say that, because the National Urban League was one of those groups.

And I was so proud yesterday to get the National I am Empowered Award from them for housing, named after Shirley Chisholm, and this morning, late to this committee because I was with the Vice President of these United States at their conference.

The National Urban League has probably done more than any of the other groups as it relates to housing, and minorities, and non-minorities and so for legislation by one of my Republican colleagues to claim that it is some radical, and I think La Raza was also named in that, so I just wanted to say that this morning, clearly to the witnesses, you can see that this is something that is important to me.

Mr. Min, do you believe that any part of these bank settlements agreements were politically motivated?

Mr. MIN. I don't have any basis to make that assessment. I will say that as far as the left versus right groups, the banks that agreed to this settlement provision were given a list of hundreds of different nonprofits they could donate to.

They were able to control which ones they gave to and in what amounts. And so, there were some conservative groups, as I mentioned to Chairman Duffy earlier that were part of this list as well.

I don't see an ideological bent here just by the virtue of having La Raza and the National Urban League and NeighborWorks and other groups like that involved.

Those were the groups that you would need to get involved to try to reach out to the homeowners who were most distressed by the housing crisis, that is, low and moderate income and often unrepresented minority households, and so I don't know how you would craft a settlement that tries to reach those bars with involving those.

Mrs. BEATTY. And lastly, do you believe these settlements were constitutional?

Mr. MIN. Oh absolutely, under current constitutional understanding, absolutely, as I made clear in my written statement.

Mrs. BEATTY. Thank you very much. Thank you, Mr. Min.

Chairman DUFFY. The gentlelady yields back. Congratulations on your National Urban League award, Mrs. Beatty. I wasn't aware that you had received that.

The Chair recognizes the gentleman from Arkansas, Mr. Hill, for 5 minutes.

Mr. HILL. Mr. Chairman, thanks for this hearing.

This separation of powers and the power of the purse has been such a recurring issue for the Congress, and while I think that I understand the distinguished gentlelady's comments about the Judiciary Committee, I think that since these are so pervasively used in the financial services industry, I am glad to see that this hearing is being held in this committee too, just to expose the members of the Financial Services Committee to this level of detail.

The first thing that I want to ask Ambassador Gray is, does the worthiness of an organization receiving a mandatory donation cure the underlying problem of whether the congressional appropriations process has been circumvented? Because of this good that Professor Min talks about, is that a legitimate reason?

Mr. GRAY. If I understand your question, it doesn't matter to the principle involved and the application of the Miscellaneous Receipts Act, whether any money actually touched the hands of any man or woman in the Justice Department.

It is money due and owing the United States and should be deposited in the Treasury, and there is no excuse that the money went to worthy causes. Whether the causes are worthy is for you to decide, not for the Department to decide, and the money belongs to Congress, once it has been agreed to by the defendant in the case.

Mr. HILL. Thank you, Ambassador.

Dr. Larkin, isn't it true that some of these activist groups that we have referred to this morning, like ACORN and La Raza, pressured banks in the past to make certain kinds of loans and that even possibly contributed to the crisis, if you look back over the past 15 years or so?

Mr. LARKIN. I don't have any personal knowledge to that effect. I know there have been claims to that effect that have been reported in the media, and you would have to ask those journalists. But I couldn't give you any details about any such claims, because I just don't have personal knowledge in that regard. Oh, can I just follow up on the first question you asked?

Mr. HILL. Yes. Sure.

Mr. LARKIN. Giving money to Guide Dogs for the Blind is also going to wind up tremendously benefiting a lot of people but if Congress hasn't authorized that money to be paid out, you can't cure the antecedent illegality by virtue of the fact that the recipient is going to make good use of it. Because you also are going to have instances where there will be misuses of it.

Mr. HILL. I yield back the balance of my time, Mr. Chairman.

Chairman DUFFY. The gentleman yields back.

The Chair now recognizes the gentleman from Missouri, Mr. Cleaver, for 5 minutes.

Mr. CLEAVER. Thank you, Mr. Chairman, and Mr. Ranking Member for—well, I am not thankful that you are holding this hearing, but nevertheless, it is good to be here. Thank you for being here.

I did the commencement on Saturday for the University of Missouri Law School, so I am very qualified to talk about legal matters, even though my degree is in theology. And I am always frustrated when we travel in parallel universes on this field. I don't know what is going on.

Some of us were here and so we can speak experientially about what is going on. First of all, I don't know how in the world ACORN got into this conversation. I just think that is one of the most amazing things that happened, but that is just a weird on my part, I guess

Let me ask Professor Min, are any of you attorneys like me?

Okay. Dr. Larkin, isn't it true that all of these legal settlements were subject to a court review? Dr. Larkin, is that—

Mr. LARKIN. If there were—

Mr. CLEAVER. Go ahead. I'm sorry.

Mr. LARKIN. If there was a claim filed in court to start with, then yes. But, the review is very limited, but I don't think there were all these types of settlements. There is always a claim first filed in court. Oftentimes, you see agreements between the government and private parties to dispose of a matter without anything being filed.

Mr. CLEAVER. Yes, yes, sir. But I am talking about these settlements.

Mr. LARKIN. No, no, and I am trying to remember if they first filed anything in this case, and I can't remember if there was a complaint filed or if they settled without filing a complaint.

Mr. CLEAVER. Yes.

Mr. LARKIN. It was?

Mr. CLEAVER. There were three of them—

Mr. LARKIN. Okay. My colleagues said there was and so I will take that, yes. But the analysis is the same either way.

Mr. CLEAVER. It is?

Mr. LARKIN. Yes. The reason is, when it is filed in front of a District Court Judge, essentially the only thing a District Court Judge can do in approving a settlement is to look to see, for example, whether or not it was agreed to for an impermissible purpose.

For example, in a plea agreement, the District Court is entitled to review the plea agreement to make sure that it wasn't, for example, a product of a bribe. And I am not saying anyone was bribed here. But I am just saying the review is very limited.

Mr. CLEAVER. Yes.

Professor Min?

Mr. MIN. I would argue that the court review is implicitly endorse the idea that these types of provisions are in fact constitutional, and permissible under the Miscellaneous Receipts Act. A number of my colleagues have given maybe persuasive theoretical constitutional arguments as to why these types of provisions might not be constitutional.

But the fact is that as a matter of settled law, these types of provisions have been found to be permissible under current law.

Mr. CLEAVER. Some of us were here during all of this, from day one until today, and so we went through it, experientially, and so we know that there was a judicial involvement, and there are set-

tlements with the Federal Government, through the Justice Department, no matter who is in the White House, almost every day.

Isn't that right Ambassador Gray?

Mr. GRAY. If I understand, the—if you back up a little bit, the question of what is current practice, seems to revolve around the fact that the Miscellaneous Receipts Act was enacted a century ago, whatever, but there have been recent Office of Legal Counsel Opinions coming out of the Department of Justice which are very, very clear, about what can and what cannot happen with these settlements.

And the fact that there is a court approval does not, I think, when no one is there arguing either side of it, which is not going to happen when you have two parties who are settling a case, there is never going to be any defense of your authority and your constitutional obligation to oversee how these funds are spent and decide how these funds are spent.

Mr. CLEAVER. So, a judge is just going to ignore anything going on around a particular case and just deal with the settlement? Just forget everything else surrounding that particular case?

Mr. GRAY. There is no one arguing and the issues aren't raised in the settlement. The settlement agreements are usually reached in private and presented to the judge of the consent decree and the judge, as my colleague here has said, is not being asked to rule on the validity of the settlement under Miscellaneous Receipts Act, the Antideficiency Act or the Appropriations Clause of the Constitution.

Chairman DUFFY. The gentleman yields back.

The Chair now recognizes the gentleman from Colorado, Mr. Tipton, for 5 minutes.

Mr. TIPTON. Thank you, Mr. Chairman. I do appreciate your holding this hearing today. It is interesting to be able to hear it.

I would like to start with Professor Min. Do you believe, in your estimation, that people, through some of the alleged actions of the banks, did suffer personal damage?

Mr. MIN. If you are talking about homeowners and average Americans, sure. Absolutely.

Mr. TIPTON. They did. So, we have had abundant testimony across a variety of our whole committee, subcommittees, going through that the important thing is standing up for the individuals to make sure that they have their concerns addressed, that they are going to actually be helped.

So, if we are taking money to rebuild a bridge, maybe to be able to rebuild an equestrian center to go through, is that going to be helping people in those personal instances?

Mr. MIN. I think that, as Ambassador Gray said, there is a requirement that there is a nexus between the proposed settlement terms and the alleged misconduct. So, that is one answer.

I think also that I would point out that private parties are a little different than the government. The Federal Government is not suing on behalf of individuals. We have private causes of action for that.

The Federal Government's duty is to try to maintain civil penalties on behalf of the Federal Government as a whole, and the country as a whole and that includes, primarily, the deterrence af-

fects and general compensation for Americans, rather than to any particular interdictums.

Mr. TIPTON. And general compensation for Americans needs to be focused actually on what the injury was.

Mr. MIN. With a nexus, exactly.

Mr. TIPTON. Right. So, it probably disturbs you that there was a report in The Wall Street Journal in terms of disbursement of those funds where they were being directed for just exactly what I spoke to.

New York Governor Cuomo was rebuilding an equestrian center, and rebuilding a bridge. How is that beneficial to people in that general class to be able to redress those grievances?

Mr. MIN. Right. So I think Governor Cuomo was probably using New York funds, rather than the provisions, the charitable payment provisions that issued here.

Mr. TIPTON. According to The Wall Street Journal, these were resources that were coming in off of the—

Mr. MIN. Bank settlements.

Mr. TIPTON. They were coming in.

Mr. MIN. Right, but they would have come in from, a portion allotted specifically to the State of New York, right?

Mr. TIPTON. So, effectively, with fungibility of money, this—

Mr. MIN. I am not an expert in New York law, so I don't know what New York law allows or does not allow Governor Cuomo to do. I do find that problematic but I think it is outside the scope of the particular provisions of that issue.

Mr. TIPTON. Dr. Larkin, would you like to maybe comment on this?

Mr. LARKIN. Yes, money is fungible. So, when you give money to a particular organization, what you are doing is freeing up other funds for other purposes. So, even if you give somebody \$10 and they use it for the purpose that you have specified, that means they can use dollars they get from elsewhere for a different purpose.

And that is why Congress needs to examine critically who gets money, because it is fungible. The Justice Department would take the position, under Title VI and Title IX, that if you get any money, you are now governed entirely by what Title VI and Title IX provide, because they know that money is fungible.

And if money is fungible, then you have to be concerned about supplementing the income of people who may use it in ways that are improper. You can give money to the Red Cross, but that frees up money they could otherwise spend. If they use it for an improper purpose, in essence you have enabled them to do that.

That is why Congress needs to look into this matter, decide who gets money, and then have audits done after the fact.

Mr. TIPTON. Would you tend to share the opinion, I think there are a number of us who want to be able to reinforce Article I, to make sure that Congress is actually controlling those purse strings, no matter where those resources come from, be it a fine, a fee coming in, the only reason any of these entities exist is because of an act of Congress. So, it is very appropriate for Congress to be able to direct how every one of those dollars is spent. Would you agree with that?

Mr. LARKIN. Absolutely, and one of the ways it can be spent is to recompense the people who are actually hurt. In criminal law, there are several acts that are designed to address the needs of victims of crime. You could do the same thing here, whether it is a housing matter or generally for a non-criminal injury, but that is a program Congress can design.

But that is a program Congress can manage and that is a program that will have to have some oversight by an Inspector General or someone else to make sure the funds are properly used.

Yes, you can get money to victims. And yes, they should get money, but it should be done in the proper manner to make sure that the taxpayers' dollars are being wisely used.

Mr. TIPTON. Great. Thank you. Mr. Chairman, my time has about expired.

Chairman DUFFY. The gentleman yields back.

The Chair now recognizes the ranking member of the full Financial Services Committee, Ms. Waters, for 5 minutes.

Ms. WATERS. Thank you very much.

Professor Min, the Republicans have claimed that they don't oppose the settlements. Instead, they claim that they merely want the relief to go directly to homeowners. However, in February of this year the Republicans brought to the Floor H.R. 766 which would gut the Financial Institutions Reform, Recovery, and Enforcement Act, commonly referred to as FIRREA, a savings and loan error law that gave law enforcement the power to prosecute financial crime. As you know, the RMBS settlements were brought by the Department of Justice under FIRREA. H.R. 766 would change the Act to say that only crimes perpetrated against banks could be prosecuted under FIRREA, not crimes perpetrated by a bank.

The bill likewise severely limits the discovery power under FIRREA requiring the attorney general or the deputy attorney general to directly sign off on subpoenas. This eliminates 98 percent of the individuals in law enforcement who currently have subpoena power.

What does that suggest to you, Mr. Min, about this claim that they want the money to go directly to victims?

Mr. MIN. I think that if you were to eliminate the penalties in FIRREA against banks that were—that had engaged in wrongful conduct coupled with the Goodlatte amendment or bill you would end up with a situation in which no victims could be compensated. And that seems very problematic.

Ms. WATERS. Thank you.

Does anyone on the panel today believe that there was fraud committed by financial institutions? I can't see your hands. Does anyone on the panel believe that predatory lending by financial institutions caused people to lose their homes and diminish their quality of life?

Does anybody on the panel believe that they should be prosecuted or taken to task, or made to settle in some way for the acts they committed that caused that subprime meltdown in 2008?

And does anyone believe that the groups that are organized and have the reputation for, and do the daily work of helping people to have a better quality of life because they are advocating for

changes, they are advocating for justice, they are working on housing opportunities, they are working on making sure that they make government work for everybody? Do you believe that these people have any credibility at all? Any credibility?

Mr. GRAY. If I could respond, just make a—everything you say has merit. That is about the relevance of these potential recipients of the money. But that is a choice you should be making, not the prosecutor.

And I just would add that, although it is not part of your jurisdiction, the Environmental Protection Agency, which everyone knows, I think, is no shrinking violet and makes active use of third-party settlements, does not include cash in any kind of third-party settlement because, and this is their words, use of cash could easily be construed as a diversion from the Treasury of penalties due and owing the government.

What you say, they may very well be a better way. There is a better way to compensate victims of the original crisis, but that is not what happened. And that is for you—

Ms. WATERS. Well, let me—

Mr. GRAY. —to say.

Ms. WATERS. If I may—

Mr. GRAY. That is for you to decide.

Ms. WATERS. Reclaiming my time. Let me just say this. I would believe some of my colleagues on the opposite side of the aisle if they have not demonstrated such a dislike for activist groups. They don't like these grassroots groups that tend to speak for and act on behalf of poor people, and people who don't have the resources to go to court.

This is consistent. And, yes, ACORN was mentioned because they set ACORN up, the same people who say, ACORN came to my office and tried to set me up. And these are the people that they like because they want to prove in some—they want to put them out of business. That is what they want.

But I want to tell you something. Some of us who have been advocating for poor people and for the least of these all of our lives because we see every day what happens to poor people without resources.

We see every day how people are taken advantage of, whether it is the payday lenders or whether it is financial institutions with exotic products that literally encourage people to sign on the dotted line, knowing that they cannot afford the mortgage that they are getting them to sign.

These were the people who didn't vet. These were the people who had no documentation loans, on, and on, and on. And they should be compensated. And we trust the attorney general to do this work. And if the courts have to sign off on it, fine. Sign off on it. That is what they did.

And the system is working. And just because you don't like the activist groups does not mean that you come in here and talk about somehow we should change the system, and people who don't like these activist groups should be responsible for deciding what happens to the victims.

Thank you.

Chairman DUFFY. Does the gentlelady—

Ms. WATERS. I yield back the balance of my time if there is any left.

Chairman DUFFY. There is no time left to the ranking member. I trust you more than the DOJ, Ms. Waters.

The Chair now recognizes the gentleman from Illinois, Mr. Hultgren, for 5 minutes.

Mr. HULTGREN. Thank you, Mr. Chairman.

And thank you all for being here.

I want to address my first questions to Dr. Larkin, if I could. In general, if the congressional appropriations process is being subverted, which I believe flies in the face of Article I of the Constitution, does it matter what groups the RMBS settlement money is going to? Isn't this a slippery slope?

Mr. LARKIN. None whatsoever. It is as big a problem whether the money goes out to a conservative or a liberal group, and whether the disbursement is made by a Republican or a Democratic appointee. It doesn't matter. The process is one that is being corrupted.

Mr. HULTGREN. I think that is the point that the previous questioner just completely missed, is it doesn't matter the groups that it is going to; this is a process that is broken and a violation really of responsibility.

Ambassador Gray, I think you said it so well. This should be us. It is our responsibility to do this. And why are we abdicating our responsibility, giving it over, and whoever the group is, furthering really, I would say, a dis-justice and a failure to do our work.

Following up, Dr. Larkin, do you have any concerns with political appointees at DOJ or HUD being the ones determining which groups should get the money? And I guess, following up, I assume I know the answer. But with what Ambassador Gray said, don't you think Congress should be the one that makes these decisions?

Mr. LARKIN. Absolutely. The Appropriations Clause is quite clear. And the Supreme Court has said that on several occasions. It is your responsibility. It is not the Justice Department's responsibility.

Mr. HULTGREN. Yes. And it doesn't matter, I would assume you would agree with this, that if this happened under a Republican Administration, you would still say the same thing, that if it is still a misuse of authority that should be Congress' authority. We are giving it to somebody else.

Would you agree with that? It doesn't matter what the Administration is, it doesn't matter what the group is, this is a broken process.

Mr. LARKIN. Absolutely, and on either the last or the penultimate page of my written statement, I criticized a Republican U.S. attorney, the current Governor of New Jersey, for doing exactly that.

Mr. HULTGREN. Thank you. And I appreciate that fairness, and recognition that this is bigger than a couple of groups or one Administration.

Ambassador Gray, if I could maybe address a couple of questions to you. First, thank you for your service. Thank you for being here. But I wonder, are the RMBS settlements structured to do the most benefit to victims of the alleged misconduct, do you believe?

Mr. GRAY. I do not believe that they are directed at the people who suffered the most, no.

Mr. HULTGREN. What provisions in the settlements detract from benefiting the victims, do you think?

Mr. GRAY. I haven't read every single word of every single settlement agreement, but I think they basically ignore the victims of this. I would agree with the terminology, "predatory lending." There was a lot of predatory lending.

Unfortunately, I think a lot of it was, or much of it was initiated by the government itself, not by the banks, but however you look at the cause, the victims have not been really attended to.

Mr. HULTGREN. Let me ask your opinion on this, Ambassador. Why do you think DOJ structured the settlements in a way that does not provide the most benefit for those who are harmed, in your opinion?

Mr. GRAY. I think—I don't know how politically incorrect to be in this, but it was easier that way. The government got multibillion dollar numbers in the front pages of the papers, or at least the business section. And so, it looked very good for the prosecution, but I don't think it looked very good for the process for two reasons.

One, the victims aren't themselves really targeted for relief, and number two, and this goes back to the S&L crises of Bush 41, I would like to have seen, I mean, he insisted as a condition of any bailout that there be prosecutions that actually resulted in jail sentences for people who had really violated the criminal law.

And we don't really see that now. And that is, I think, a failing. Although, I don't want to see anyone go to jail, I do think prosecutions were appropriate.

Mr. HULTGREN. Yes. Thanks, Ambassador.

I just have a few seconds left. Professor Rosenkranz, are there provisions in these settlements that you would describe as unprecedented?

Mr. ROSENKRANZ. Certainly, the scale of these third-party payments is unprecedented. There are scattered historical examples, but the sheer number of dollars is kind of startling in these cases.

Mr. HULTGREN. As far as you are concerned, that had never happened before?

Mr. ROSENKRANZ. Certainly at this scale, I don't think so.

Mr. HULTGREN. Okay. Quickly, also Professor Rosenkranz, what should Congress do in response to the Administration usurping our appropriating authority?

Mr. ROSENKRANZ. That is a great question. The President has always been tempted to try to evade the Appropriations Clause, and Congress has often had to defend its appropriations prerogative.

So, these landmark statutes like the Antideficiency Act and the Miscellaneous Receipts Act are hugely important and appropriate. And if the Executive Branch finds a new novel way to evade this constitutional provision, you should certainly consider responding with another act of Congress to forbid this practice.

Mr. HULTGREN. Thank you all.

My time has expired. I yield back.

Chairman DUFFY. The gentleman yields back.

The Chair now recognizes the gentleman from Minnesota, Mr. Ellison, for 5 minutes.

Mr. ELLISON. Mr. Gray, could you define the term “slush fund?”

Mr. GRAY. You are asking me to define the term—

Mr. ELLISON. The term slush fund.

Mr. GRAY. Slush fund. I don’t think I use that term.

Mr. ELLISON. I just want to know if you can define that term.

Mr. GRAY. It is a fund that the dispensers of the money have complete discretion over how it is spent, under no controls or guidance from any other authority.

Mr. ELLISON. Is my bank account a slush fund to me?

Mr. GRAY. Excuse me?

Mr. ELLISON. Is my bank account a slush fund to me?

Mr. GRAY. No.

Mr. ELLISON. Because I have—

Mr. GRAY. You own—

Mr. ELLISON. —complete discretion over how it is spent.

Mr. GRAY. You own the money.

Mr. ELLISON. Right.

Mr. GRAY. But the trouble is these settlements—

Mr. ELLISON. Well, let me tell you—

Mr. GRAY. —who also own the money—

Mr. ELLISON. I reclaim my time. A slush fund is defined as something used for illicit or corrupt political purposes.

And I would just like to know, Professor Min, under the definition of the fund being used for illicit or corrupt purposes, I would just like somebody to help me understand how the funds in this case could be described as illicit or corrupt when the money is allocated to housing counseling groups like Catholic Charities USA, the United Way, the National Council of La Raza, and the Urban League, to help homeowners who were harmed during the financial crisis.

How could that be a slush fund?

Mr. MIN. I have not heard any persuasive evidence that there is any illicit affect to this. In fact, I would argue that these particular settlements were crafted the opposite way.

When we look at actual evidence as opposed to opinion or hyperbole what we see is that housing counseling, foreclosure prevention efforts of the types that these consumer provisions were designed to do, are the most effective way to help aggrieved and struggling homeowners. That is a fact, not an opinion.

Mr. ELLISON. And going back to you, Mr. Gray, I could have sworn I heard you say that predatory lending did occur, but it was done by the government, not the banks. I am not aware of the government engaging in retail mortgage lending. Are you?

Mr. GRAY. Maybe I don’t understand anything, but I think Fannie Mae and Freddie Mac were at the forefront of making—

Mr. ELLISON. Freddie Mac and Fannie Mae do not go to home mortgage buyers, and offer terms like, I don’t know, you know, pre-pay penalty, 228, 327 balloon mortgages, yield spread premium. These are the hallmarks of a predatory loan.

Professor Min, are you aware—

Mr. GRAY. Can I—

Mr. ELLISON. No. Excuse me. I reclaim my time. I gave you a chance to answer.

But, Professor Min, are you aware of the government engaging in retail mortgage lending in the way that a commercial bank, or nonbank lender?

Mr. MIN. Absolutely not. In fact, that is, again, a myth, an opinion versus facts. The facts are the Fannie and Freddie did not originate, or seek to have originated any of those types of loans. Those are originated for Wall Street securitization, which is why all of these particular fraudulent aspects were attributable to Wall Street RMBS, and these settlements with private institutions.

Mr. ELLISON. Okay.

I have another question, Mr. Gray. Could you explain to me, sir, now you just said that there were victims of predatory lending, I believe that was your testimony today, and if there were settlements why did the banks settle if they had done nothing wrong, or if all the predatory lending was by the government?

Why did they settle? They have lawyers. They have a lot of lawyers. They have well-paid lawyers. Why did they settle at all? Why didn't they just say, we are going to court, and fight it out, and we are not paying a thing? Why did they settle?

I don't know. Mr. Min, Professor Min, do you have an opinion? Because it seems like Mr. Gray doesn't have an opinion.

Mr. MIN. Clearly, I think they were misrepresentations and warranties that were not satisfied with the products that they sold and marketed.

Mr. ELLISON. So, they settled a case because they had liability exposure?

Mr. MIN. Almost certainly.

Mr. ELLISON. Yes. That is why people settle. In 16 years of me practicing law, I don't know people who settle cases if they don't think they are going to lose at trial, or at least there is some chance of it.

So let me just ask you this. Could you talk, Professor Min, about how housing counseling is actually something that helps consumers, and that the settlements that help fund this activity actually makes for clearer better markets and restores some honesty to this mortgage market?

Mr. MIN. Right. When you think about the abundance of information out there, the average homeowner, particularly the one who is struggling, doesn't necessarily have a good idea of their options, how to navigate through the foreclosure prevention process, how to get a loan refinanced, maybe how to get a principal reduction, or a qualification for one of the government programs or other programs available to them.

All of these factors can help them along with some legal guidance navigate that very, very complex, difficult process. I am sure those of us who have bought homes know how complex that mortgage agreement is, how that home purchase agreement, title insurance, all of that is very, very complex.

And you can imagine that for folks who are really struggling with a lot of things that is a very, very difficult terrain to navigate.

Mr. ELLISON. I am out of time. Thank you.

I yield back, and I thank all the witnesses today.

Chairman DUFFY. The gentleman yields back.

The Chair now recognizes the ranking member of the subcommittee, the gentleman from Texas, Mr. Green, for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman.

Let me start with where Mr. Ellison somewhat left off. I want to just highlight, emphasize, underline the notion that JPMorgan Chase settled for \$13 billion, \$13 billion. JPMorgan Chase has a battery of lawyers. If there were questions with reference to constitutionality, JPMorgan Chase has lawyers who can litigate those questions.

They were not litigated. And no court has concluded that any one of these settlements is invalid, unconstitutional, illegal, unethical, not one court. Bank of America, \$17 billion. Citigroup, \$7 billion. Goldman Sachs, \$5 billion.

You would think that at some point, these business folks would say, hey, guys, quit dragging us into this. Don't keep bringing our names before the American public with reference to these things.

You would think that at some point they would want to see this behind them, unless they are behind this. Who knows?

Let us go now to a claim that was made with reference to some of this being unethical. All lawyers are aware that if there is a grievance with reference to ethics, you can take it to an ethics commission.

They are across the length and breadth of this country. Every State has an ethics commission. If there were unethical questions, they could be addressed to an ethics commission, but we now bring them to Congress. We are going to litigate the ethics of it when there are commissions established to investigate, acquire evidence, and make decisions.

Next point. Homeowners need help. That is what these settlements do. They accord homeowners help. And they need help. If you have never dealt with one of these circumstances, you don't understand that a homeowner walks in with just a box of paperwork. They don't know what they have in the box. All they know is that they need help.

And when they go into these legal aid societies, to these NGOs, they have to sort through and sift through. The homeowner doesn't know that there is a HAMP program, a HARP program. They don't understand that there is a deed in lieu that they might engage with and acquire.

They don't understand that there are short sales. They don't understand these things. That is why these programs are so beneficial to prevent foreclosure. So the money is going to help homeowners, to help them keep their homes, and stay in their homes.

This really is an effort, it seems to me, to legitimize a process that would prevent homeowners from getting the opportunity to stay in their homes. And I regret that.

Now, finally, on a couple more points quickly, I am concerned about the notion that the banks aren't here. If we really want records from the banks, why don't we call the banks in? Let them testify. Maybe the banks are here and I don't know it.

Is anybody here representing a bank today? If so, raise your hand.

You are? Which bank are you representing, sir?

Mr. GRAY. I think you are familiar with it. It is a gigantic bank of \$270 million in Big Springs, Texas.

Mr. GREEN. Okay. Well, kindly give us the name today if you would.

Mr. GRAY. Give—

Mr. GREEN. The name of the bank.

Mr. GRAY. The National Bank of Big Springs, Texas.

Mr. GREEN. The National Bank of Big Springs, Texas.

Mr. GRAY. Jim Purcell, I think we met when he testified—

Mr. GREEN. Okay.

Mr. GRAY. —before this committee—

Mr. GREEN. All right.

Mr. GRAY. —a year or 2 ago.

Mr. GREEN. Well, your honor, I appreciate you sharing that with me.

But we have the opportunity to require JPMorgan Chase, Bank of America, Citigroup, and Goldman Sachs to come before the committee and bring the records related to the settlement. You don't have to require the Justice Department to do it. If you say they won't do it, then I believe they have given you what they can. But you can bring the banks in.

Why are we harping on the Justice Department when the banks are available to be brought in and they can give it to us? Why not? There is something about this that the American public doesn't like. And I am telling you right now, the American public is fed up with this.

They want to see people prosecuted. Here we are finding clever ways to keep homeowners from staying in their homes when we ought to be finding ways to put people in jail who participated in this fraud, that have never been properly addressed, and, yes, we could appropriate money to do it if we wanted to, and we could investigate it if we wanted to.

It is time to satiate the desires of the American public.

I yield back.

Chairman DUFFY. The gentleman yields back.

I want to thank our witnesses for their testimony today and a great conversation about what the appropriate role is through Congress or through bank settlements, where we get information whether it is from banks or from the government itself.

As the panel might realize, the voting bells have just rung. We have 10 minutes to get to votes. I was hoping to go to a second round with the panel, but you can see the room has cleared because everyone has gone to the Floor to vote.

The Chair notes that some Members may have additional questions for this panel, which they may wish to submit in writing. Without objection, the hearing record will remain open for 5 legislative days for Members to submit written questions to these witnesses and to place their responses in the record. Also, without objection, Members will have 5 legislative days to submit extraneous materials to the Chair for inclusion in the record.

I ask the witnesses to please respond as promptly as possible. I, again, want to thank you for your insight and testimony today. And with that, this hearing is now adjourned. Thank you.

[Whereupon, at 10:39 a.m., the hearing was adjourned.]

A P P E N D I X

May 19, 2016

**Hearing Before The U.S. House of Representatives Committee On
Financial Services**

Subcommittee On Oversight and Investigation

***Settling the Question: Did Bank Settlement Agreements Subvert Congressional
Appropriations Powers?***

Statement of Ambassador C. Boyden Gray

May 19, 2016

Thank you, Chairman Duffy and Ranking Member Green, for inviting me here today to speak to the Subcommittee about the importance of congressional control over the Nation's purse strings and how that control has eroded, both from within and without, over the past several years. Left unchecked, I believe this erosion threatens the separation of powers that lies at the core of our constitutional structure. Indeed, an "executive with access to the treasury" could very well "free itself from popular oversight," putting the entire enterprise of representative self-government at risk.¹

Separation of powers issues, including those related to the power of the purse, have been a focus of mine in both public and private life. As a former White House Counsel, I can tell you that Congress' tremendous power derived from its exclusive Appropriations authority frequently factored into the advice

¹ Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 Colum. L. Rev. 501, 509 (2002).

I gave to President H.W. Bush. In private practice, I was deeply involved in the *American Trucking v. Whitman* case in the late 1990s, which addressed serious separation of powers issues regarding Congress' ability to cede legislative authority to the Executive Branch. More recently, I have been on the forefront of litigation challenging the constitutionality of the Consumer Financial Protection Bureau (CFPB), created by Title X of the Dodd Frank Act, on separation of powers grounds. One of the lawsuit's core arguments rests upon Congress' decision to surrender its Appropriations Clause power to the agency—empowering it to self-fund without any congressional (or even presidential) input.

I understand the Subcommittee is examining the propriety of various multi-billion dollar settlements between the Department of Justice and some of the country's largest banks arising out of the creation, marketing, and sale of residential mortgage backed securities (RMBS) that were at the heart of the financial crisis. Of particular concern are provisions in those agreements that direct the banks to pay out more than half a billion dollars to private housing counseling agencies. These provisions raise serious separation of powers concerns under the Constitution's Appropriations Clause, which are, in my opinion, worthy of the Subcommittee's time and attention. In my remarks today, I will highlight some of the potential legal shortcomings of those

settlement agreements. Before doing so, I will seek to situate the agreements within the context of the Appropriations Clause's paramount importance to the separation of powers and within what I believe to be a broader erosion of Congress' power of the purse that has occurred over the past six years.

I. Historical background of the Appropriations Clause.

The Constitution's Appropriations Clause is short, only 16 words long. It says: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."² Removing the legalese, the Clause means simply this: Any person—including the President—who withdraws even a single dollar from the Treasury without legal authorization to do so from Congress violates the Constitution.³

The Appropriations Clause is a "bulwark of the Constitution's separation of powers."⁴ It preserves "in full vigor the constitutional barrier between each department," giving Congress "controlling influence over the executive power," since it "holds at its own command all the resources by

² U.S. Const. art. I, § 9, cl. 7.

³ *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937); *Reeside v. Walker*, 52 U.S. 272, 291 (1850) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.").

⁴ *Department of Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012); *see also Noel Canning v. NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014).

which a chief magistrate could make himself formidable.”⁵ Because of the Appropriations Clause, the executive is “dependent on Congress for its funding.”⁶ It is the “ultimate weapon . . . available to the Congress” to control Executive Branch activity.⁷

The Clause’s roots reach deep into English history and are, in large part, responsible for standing up representative government where kings once ruled. The Framers well understood this history. As James Madison observed, “power over the purse” was in large part responsible for the triumph of an “infant and humble representation of the people”—Parliament—over the “overgrown prerogatives” of the King.⁸ In light of its ability to bring even a king to heel, Madison concluded that the appropriations power should “be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people.”⁹ Other early commentators on the Constitution readily agreed, noting that the “power

⁵ 2 Joseph Story, *Commentaries On The Constitution Of The United States* § 530 (1833).

⁶ 1 GAO, *Principles of Federal Appropriations Law* 1-5 (3d ed. 2004).

⁷ *United States v. Richardson*, 418 U.S. 166, 78 n.11 (1974).

⁸ Federalist No. 58 (Madison).

⁹ *Id.*

to control, and direct the appropriations, constitutes a most useful and salutary check . . . upon corrupt influence and public speculation.”¹⁰

Notions about the potency of the power of the purse are not historical relics. Congress continues to recognize the “appropriations process” as the “most potent form of congressional oversight,” and others describe it as “the most important single curb in the Constitution on Presidential power.”¹¹

In the end, every other constitutional power runs into the appropriations power. As the Supreme Court has observed, “[a]ny exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.”¹² The appropriations power can constrain even the President’s exclusive and otherwise unrestricted power to pardon.¹³ To put it bluntly, as Alexander Hamilton did, the “power which holds the purse-strings absolutely, must rule.”¹⁴

¹⁰ 3 Joseph Story, *Commentaries On The Constitution Of The United States* § 1342 (1833).

¹¹ S. Comm. on Gov’t Operations, 95th Cong. 1st Sess., 2 *Study on Federal Regulatory Agencies* 42 (1977); 1 GAO, *Principles of Federal Appropriations Law* 1-4 (3d ed. 2004) (citing Edward S. Corwin, *The Constitution And What It Means Today* 134 (14th ed. 1978)).

¹² *OPM v. Richmond*, 496 U.S. 414, 425 (1990).

¹³ *Knote v. United States*, 95 U.S. 149 (1877).

¹⁴ 1 *Works of Alexander Hamilton* 218-19 (Henry Cabot Lodge, ed., 1904) (Letter to James Duane).

Much of Congress' own ability to drive national policy is rooted in the appropriations power. The power to spend is the power "to dictate not only the *amount* of government expenditures, but also the *purposes* to which those expenditures would be put."¹⁵ As Alexander Hamilton explained, the Clause gives Congress the authority to determine not only the "extent" of funding, but also the objects of funding, and the source of funding.¹⁶ Limitations on appropriations thus may reflect more than mere budgetary constraints. They may also reflect Congress' estimation of the object's value for or at a given time. In short, "comman[d]" of "the purse" is what gives effect to Congress' authority to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated."¹⁷

Unsurprisingly, given its potency, the Executive has consistently endeavored to seize the appropriations power from Congress. Over the years, presidents and their agents have devised several means of evading Congress' power of the purse. They have transferred money between accounts to defeat

¹⁵ Todd D. Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 Wis. L. Rev. 993, 1010 (1998) (emphasis added).

¹⁶ 8 *Works of Alexander Hamilton* 128 (Henry Cabot Lodge, ed., 1904) ("Explanation," Nov. 11, 1795) ("The public security is complete . . . if no money can be expended, but for *an object*, to *an extent*, and *out of a fund*, which the laws have prescribed.").

¹⁷ Federalist No. 78 (Hamilton).

congressional spending priorities.¹⁸ They have obligated funds in excess of appropriations, effectively daring Congress to appropriate funds lest it impair the credit of the country.¹⁹ They have also diverted receipts from the Treasury—to prevent them from becoming subject to appropriations in the first instance.²⁰

At several points in our history, Congress responded to these attempted encroachments. As early as 1809, Congress enacted legislation designed to prevent the President from repurposing appropriated funds from one object to another.²¹ By 1870, Congress had taken action to halt obligations in excess of appropriations, prohibiting all contracts “for the future payment of money in excess of . . . appropriations.”²² In 1905, Congress added criminal penalties to this law, now known as the Anti-Deficiency Act, and took steps to prevent Executive Branch agencies from exhausting their funds before the end of the year.²³

¹⁸ Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 B.Y.U. L. Rev. 327, 338 (2009).

¹⁹ *Id.* at 338-39.

²⁰ *Id.* at 340.

²¹ See Act of Mar. 3, 1809, ch. 28, 2 Stat. 535.

²² Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251.

²³ Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257-58; see also 31 U.S.C. § 1350.

Congress has also acted to prevent diversion of receipts from Treasury. In 1849, it provided that funds “from all miscellaneous sources, for the use of the United States, shall be paid . . . into the treasury.”²⁴ Today, the law is known as the Miscellaneous Receipts Act, and it requires any official “receiving money for the Government from any source” to deposit it “in the Treasury.”²⁵ The consequence of this provision, which aims to ensure Executive Branch dependence “upon the congressional appropriation process,” is that an appropriation is required before any money received “for the Government” is spent.²⁶

II. Recent actions imperiling the power of the purse.

It is necessary and proper for Congress to remain consistently vigilant and to jealously guard its appropriations power. Allowing the Executive Branch to take it—or worse, giving it to the Executive—would effectively nullify Congress’ powers to set taxes, to borrow money, and to direct the priorities of the government.²⁷

In recent years, however, Congress has failed to zealously safeguard what should be its prized possession. In a variety of contexts, and as detailed

²⁴ Act of Mar. 3, 1849, ch. 110, 9 Stat. 398, 398.

²⁵ 31 U.S.C. § 3302(b).

²⁶ 2 GAO, *Principles of Federal Appropriations Law* 6-167 (3d ed. 2004).

²⁷ See Kate Stith, *Congress’ Power of the Purse*, 97 Yale L.J. 1343, 1349 (1988).

below, Congress has affirmatively relinquished its appropriations power to the President, sat by idly while the President has “draw[n]” money “from the Treasury” absent any “Appropriations made by Law,” and watched as the President has diverted funds destined for the Treasury to political allies.

A. The Consumer Financial Protection Bureau.

In a particularly glaring abdication of its power, Congress simply entitled the CFPB to unilaterally commandeer revenues of the Federal Reserve System—up to *twelve percent* of the Federal Reserve’s total operating expenses, more than \$600 million in 2016.²⁸ Congress even denied future Congresses any power to “review” the CFPB’s budget.²⁹ These provisions were, incredibly, considered a feature and not a failing of the legislation.³⁰ The agency has crowed that its statutory entitlement to “funding outside the congressional appropriations process” ensures its “full independence” from Congress.³¹ The Framers would be stunned and dismayed.

²⁸ 12 U.S.C. § 5497(a)(2). According to the CFPB, this amounts to \$539 million in 2015 and \$605.5 million in 2016. CFPB, *The CFPB Strategic Plan, Budget, and Performance Plan and Report* 21 (Feb. 2015), http://files.consumerfinance.gov/f/201502_cfpb_report_strategic-plan-budget-and-performance-plan_FY2014-2016.pdf.

²⁹ 12 U.S.C. § 5497(a)(2)(C).

³⁰ S. Rep. No. 111-176, at 163 (2010).

³¹ CFPB, *The CFPB Strategic Plan, Budget, and Performance Plan and Report* 81 (Apr. 2013) (emphasis added), available at

The CFPB demonstrates how Congress diminishes itself when it relinquishes control of the Nation's purse-strings. Congressmen and Senators can write letters, complaining about the agency being "wholly unresponsive to . . . requests for additional budget information," or noting that the agency "has yet to explain its basis for" controversial policies.³² When it agrees to attend hearings, Members can criticize the agency for not answering questions about its secret "data gathering activities," and "deman[d] to know why the agency's director . . . and his staff have not yet answered roughly 200 questions sent to the agency."³³

But the agency need not fear any repercussions when it fails to respond to Congress. Without control over its purse strings, Congress—the men and women the people elect to represent them—is seemingly powerless to secure answers to even the most basic oversight questions, let alone to influence the

<http://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report-FY2012-14.pdf>.

³² Letter from Rep. Randy Neugebauer, Chairman, H.R. Comm. on Fin. Servs., Subcomm. on Oversight and Investigations, *et al.* to Richard Cordray, Director of the CFPB, at 1 (May 2, 2012), http://www.aba.com/aba/documents/winnews/CFPB_OversightMemo_050212.pdf; Letter from Sen. Rob Portman, *et al.* to Richard Cordray, Director of the CFPB, at 1 (Oct. 30, 2013), http://www.portman.senate.gov/public/index.cfm/files/serve?File_id=ad73c8d1-39c6-4c4f-80da-c13c57013b12.

³³ Rachel Witkowski, *Lawmakers Fume Over Unanswered Questions to CFPB*, *Am. Banker* (Sept. 12, 2013), http://www.americanbanker.com/issues/178_177/lawmakers-fume-over-unanswered-questions-to-cfpb-1062015-1.html.

country's consumer credit policy. Indeed, the Director of the CFPB can sit before this very Committee and respond dismissively to questions about projects costing hundreds of millions of dollars, asking without fear: “[*W*]*hy does that matter to you?*”³⁴

The CFPB's vast enforcement powers only serve to underscore the problems with freeing it from Congress' appropriations power. Agencies with enforcement powers must, of necessity, exercise significant discretion. In executive departments, the thinking goes that presidential control and dependence on Congress—linkages to democratic accountability—will mediate the natural tendency to wield federal authority improvidently. Independent agencies, however, are freed from presidential control, so the power to determine when, against whom, and with how much force to exercise federal authority rests with the agency head or heads. The appropriations power may be the last effectual tie between the agency and the people. When that is severed, as it is in the case of the CFPB, the agency is effectively accountable only to itself.³⁵

³⁴ See U.S. House of Representatives, Committee on Financial Services, “Committee Pushes for Accountability and Transparency at the CFPB” (Mar. 6, 2015) (emphasis added), <http://financialservices.house.gov/blog/?postid=398780>.

³⁵ Several other agencies—the Office of the Comptroller of the Currency, the National Credit Union Administration, The Farm Credit Administration,

B. The Affordable Care Act.

Sometimes, the President simply seizes the appropriations power from a compliant Congress. This has happened in at least two cases with respect to the Affordable Care Act (ACA).

1. Cost-Sharing Reductions.

In general, the Affordable Care Act provides two types of subsidies to reduce the cost of healthcare for eligible individuals, tax credits under Section 1401, which reduce the cost of insurance premiums, and cost-sharing reduction (CSRs) payments under section 1402, which reduce the cost of deductibles, co-payments, and other out-of-pocket expenses related to purchasing healthcare services. The Congressional Budget Office estimated that CSRs for the 2014-2024 fiscal year period would cost taxpayers \$175 billion.³⁶ The ACA permanently appropriated funds for section 1401 tax credits. But it did not appropriate—permanently or otherwise—funds for section 1402 CSRs.

the Federal Deposit Insurance Corporation, and the Federal Reserve—are funded outside of the appropriations process. None have regulatory and enforcement authority as broad as the CFPB. All but the Federal Reserve are subject to presidential oversight. Even the Federal Reserve’s funds are linked to its specific functions, and it must be both faithful to specific statutory direction and mindful of the reactions of private sector market participants. *See, e.g.*, 12 U.S.C. §§ 225a, 243.

³⁶ CBO, Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, at Table 3 (Apr. 2014), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/45231-ACA_Estimates.pdf.

The President repeatedly acknowledged that paying CSRs would require an appropriation. In his Fiscal Year 2014 budget submission to Congress, he specifically requested an appropriation for CSRs.³⁷ HHS, the agency charged with implementing the CSR program, said it needed a new “annually-appropriated” account to fund the program, requesting “\$4.0 billion in the first year of [ACA Exchange] operations . . . [and] a \$1.4 billion advance appropriation for the first quarter of FY 2015 . . . to permit CMS” to pay certain reimbursements.³⁸

Congress has never appropriated any funds to finance CSRs.

No matter. Reasoning that appropriations could be “inferred” from inapposite provisions of the ACA so as to avoid “unintended consequences,” in fiscal year 2014, the President reached into the permanent and unlimited funds appropriated for payment of tax credits under section 1401 to make an estimated \$4 billion in CSR payments under section 1402.³⁹

³⁷ OMB, Fiscal Year 2014 Budget of the U.S. Government, App. at 448 (Apr. 10, 2013), *available at* <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/appendix.pdf>.

³⁸ HHS, Fiscal Year 2014, CMS, Justification of Estimates for Appropriations Committees (“FY 2014 CMS Justification”), at 2, 4, 7, 183-84, *available at* <http://www.cms.gov/about-cms/agency-information/performancebudget/downloads/fy2014-cj-final.pdf>.

³⁹ *House of Representatives v. Burwell*, 2016 WL 2750934, at *1 (D.D.C. May 12, 2016); OMB, OMB Sequestration Preview Report to the President and Congress for Fiscal Year 2014 and OMB Report to the Congress on the

2. Transitional Reinsurance Program.

The Transitional Reinsurance Program (TRP) is one of several ACA programs that aims to mitigate the law's adverse effects on the cost of healthcare coverage and on the federal fisc.⁴⁰ TRP operates during the first three years of the ACA, and provides insurance to issuers of policies in the individual health insurance market, offering protection against some of the risks of covering individuals likely to have high demand for healthcare services. TRP offers \$10 billion of insurance in 2014, \$6 billion in 2015, and \$4 billion in 2016. In addition, as HHS has recognized, TRP offsets the \$5 billion cost of the Early Retiree Reinsurance Program (ERRP), yet another ACA program designed to mitigate the law's harmful consequences.⁴¹ TRP does this by directing the collection of the exact same amount, \$5 billion, from issuers: \$2 billion in each of 2014 and 2015 and \$1 billion 2016. The ACA specifically

Joint Committee Reductions for Fiscal Year 2014, Corrected Version, p. 23 (May 20, 2013) ("OMB Report FY 2014"), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/fy14_preview_and_joint_committee_reductions_reports_05202013.pdf.

⁴⁰ See 42 U.S.C. § 18061.

⁴¹ See 76 Fed. Reg. at 41935; 77 Fed. Reg. at 73154; 42 U.S.C. § 18002(e).

provides that the \$5 billion collected for Treasury cannot be used for reinsurance.⁴²

HHS initially adopted regulations to implement TRP whereby it would allocate each issuer's contributions on a pro rata basis to payments to Treasury and to reinsurance-eligible issuers. That is, for every dollar HHS collected, a portion would go to Treasury and a portion would to to reinsurance-eligible issuers.

But before that system could take effect, HHS changed course and adopted regulations that allocate contributions first to reinsurance-eligible issuers, leaving to Treasury whatever might be left over, up to \$5 billion. What that means is that if, for example, HHS underfunded TRP for 2014 by collecting only \$10 billion, issuers would get it all and Treasury would get nothing.

As it has happened, HHS has underfunded TRP. For 2014, HHS collected \$9.6 billion.⁴³ Reinsurance-eligible issuers took it all, and Treasury

⁴² 42 U.S.C. § 18061(b)(4) (“[A]ny contribution amounts [for payments to Treasury] shall be deposited into the general fund of the Treasury of the United States and may not be used for the [reinsurance] program established under this section.”).

⁴³ HHS, *Summary Report on Transitional Reinsurance Payments and Permanent Risk Adjustment Transfers for the 2014 Benefit Year 1*, 3 (June 30, 2015).

received nothing. For 2015, HHS collected \$6.5 billion.⁴⁴ \$6 billion goes to reinsurance; \$500 million goes to Treasury. We do not yet know what will happen this year. But even if Treasury receives the full \$1 billion it is owed for 2016, it will have received roughly \$3.5 billion less than Congress intended. If Treasury receives nothing for 2016, the shortfall will be \$4.5 billion.

It is my opinion that the reinsurance-first allocation scheme HHS is using to implement TRP is unlawful. The statute unambiguously requires that each issuer's contribution must "reflect" its "proportionate share" of the amount owed to Treasury.⁴⁵ Yet under HHS's allocation scheme many issuers' contributions will not reflect any contributions to Treasury, let alone a "proportionate share." Indeed, in 2014, not a single issuer's contribution reflected a cent for Treasury.

* * *

One might have thought that Executive Branch manipulations depriving Treasury of billions of dollars would unify even the most partisan Congress. It is, after all, difficult to conceive of executive actions more threatening to Congress' authority than executive expenditures on activities Congress has not authorized. For whatever reason—perhaps because of the intensely partisan

⁴⁴ HHS, *The Transitional Reinsurance Program's Contribution Collections for the 2015 Benefit Year* 1-2.

⁴⁵ 42 U.S.C. § 18061(b)(3)(B)(iv).

manner in which the ACA became law—that has not happened. Required coalitions have not formed to check the President, and money continues to flow out of the Treasury to this day, even in the absence of appropriations.

There is, however, a postscript with respect to CSR payments. In 2014, the House of Representatives filed a lawsuit, alleging that the President's actions violate the Appropriations Clause.⁴⁶ Just a few days ago, a federal district court sided with the House, declaring that the President has been violating the Constitution's Appropriations Clause for more than two years.

The district court's decision will be appealed, I am sure, perhaps even to the Supreme Court, so it is not yet clear whether the House will ultimately prevail. But whatever happens, a Congress that, as a whole and across party lines, takes the Constitution seriously should face no difficulty independently preventing the President from removing billions from the Treasury without its authorization.⁴⁷

⁴⁶ *House of Representatives v. Burwell*, No. 14-1967 (D.D.C.).

⁴⁷ See Federalist No. 51 (Madison) (“[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.”)

C. Residential mortgage-backed securities settlements.

With that context in mind, I will turn to the Department of Justice's RMBS settlements that are the focus of the Subcommittee. In addition to billions of dollars in direct fines and payments to states, several of the settlements obligate the banks to provide hundreds of millions of dollars to third party credit counseling services and lawyers' trust funds. These provisions raise difficult questions under the Appropriations Clause and the Miscellaneous Receipts Act.

The Executive's authority to prosecute and settle cases gives it enormous power it can use to divert to third parties funds that would otherwise accrue to the Treasury. With these settlements, the President can claim not to be removing funds from the Treasury without an appropriation, but rather preventing funds from becoming part of the Treasury in the first instance. But, as Congress recognized in enacting the Miscellaneous Receipts Act, the problem is effectively the same.

Both the President and Congress have long understood that enforcement and settlement authority create a loophole in the Appropriations Clause. For its part, the Executive Branch has acknowledged that the MRA prohibits diversion of settlement funds to third parties if the funds "could have [been] accepted" in a settlement, since whether any "cash actually touches the palm

of a federal official” is generally irrelevant.⁴⁸ And in 1996, it opined that the Miscellaneous Receipts Act requires settlements that divert funds to third parties to be “executed before an admission or finding of liability” and to foreclose “post-settlement control” by the agency “over the disposition or management of the funds or any projects carried out.”⁴⁹

The Justice Department’s position on these settlements appears to be twisted in knots. It is not clear, for example, why admissions of liability or post-settlement control of funds should matter to the analysis. Many settlements arise before any admission of liability occurs, and if the MRA hinged on the timing of such admissions, it could be readily evaded. Post-settlement control seems to be equally irrelevant, since the question is—or at least should be—whether the agency is using settlements as a way of directing funds to projects Congress has not funded or more funds to projects for which Congress has provided limited funding.

The Comptroller General takes a much harder line with respect to these types of settlement conditions. Without reservation, the Comptroller has said that agencies may not use their “prosecutorial authority” to pursue “enforcement scheme[s] involving supplemental projects that go beyond

⁴⁸ *In re: Steuart Transp. Co.*, 4B Op. OLC 684, 688 (1980).

⁴⁹ OLC, Miscellaneous Receipts Act and Criminal Settlements (1996).

remedying the violation in order to carry out other statutory goals of the agency.”⁵⁰ At a minimum, settlements must bear a “relationship to the violation.”⁵¹

In reaching that conclusion, the Comptroller rejected the theory that payments or conduct in lieu of penalties are permissible because they are voluntary. To the contrary, the defendants’ actions are the “result of an enforcement action and in consideration of” the agency “not imposing some further sanction or penalty.”⁵² In other words, defendants make the payments because they believe there is a reasonable likelihood that the United States is legally entitled to the funds under the legal authorities at issue.

Absent congressional vigilance, settlements that involve contributions to third parties are likely to become increasingly common across all law enforcement contexts. After all, they are popular with nearly all parties involved. Defendants like them because “community service” contributions likely have more public relations value than payment of fines. At the same time, law enforcement “may perceive that they are doing more good for the

⁵⁰ Decs. of the Comp. Gen., B-247155.2 (1993), 1993 WL 798227, at *2.

⁵¹ *Id.* at *1; *see also* Decs. of the Comp. Gen., B-247155 (1992), 1992 WL 726317, at *2.

⁵² Decs. of the Comp. Gen., B-210210 (1983), 1983 WL 197623, at *2.

community by keeping money local in the form of community service, rather than sending it to the Department of the Treasury.”⁵³

Although the practice is long-standing, it strikes me as deeply troubling from the perspective of the Appropriations Clause and Congress’ power of the purse. Whether “keeping money local in the form of community service” does more good than “sending it to the Department of the Treasury” is quintessentially a policy judgment, and one the Constitution commits exclusively to Congress. Particularly when there is no statutory authority for the condition extracted from the defendant in the settlement, agencies appear to augment their appropriations when they use settlements to direct where money should be spent. Even the EPA, which aggressively conditions settlements on defendants’ financing of private environmental projects, prohibits settlements—like the RMBS settlements—that involve cash payments to third parties on the ground that they can “easily be construed as a diversion from the Treasury of penalties due and owing the government.”⁵⁴

None of this is to say that agencies should not have authority to dispense with settlement funds without further action by Congress. In certain contexts—including perhaps in the context of the RMBS settlements—there may be very

⁵³ DOJ, *The United States Attorneys’ Bulletin* 100 (July 2012).

⁵⁴ Memorandum from John Peter Suarez, Assistant Adm’r, EPA, to Regional Counsels, at 3 (Dec. 15, 2003).

good reason for allowing agencies to dole out settlement proceeds. But limits, transparency, and aggressive oversight are essential, lest aggressive prosecutorial and enforcement agencies use their settlement authority to convert litigation-weary, risk-averse, and perhaps politically unpopular defendants into their own mini-treasuries. Absent such controls, Congress' grip on the purse strings will only become further loosened and its ability to direct the policies of the country will only become further diminished.

CONCLUSION

Protecting the appropriations power from Executive Branch encroachment can be a daunting task. The Anti-Deficiency Act and the Miscellaneous Receipts Act have, at times, proven to be insufficient measures. As one scholar has argued, the Anti-Deficiency Act has “failed to compel the executive departments to manage their appropriations so as to avoid deficiencies.”⁵⁵ There may be many reasons, but “tacit [and] conscious indulgence of Congress” is likely among them.⁵⁶

Of course, some of this indulgence is political. For those who agree with the President's policies and priorities, standing aside while he acts at the expense of congressional authority may seem preferable to the seeming

⁵⁵ Herbert L. Fenster & Christian Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 Pub. Cont. L.J. 155, 166 (1979).

⁵⁶ *Id.* at 156.

unbreakable gridlock that appears to grip Congress today. Policy victories—even those delivered by a President rather than a Congress—are no doubt sweet. And clever lawyers are always available to explain why one action or another does not run afoul of the Appropriations Clause, Anti-Deficiency Act, or Miscellaneous Receipts Act. As Justice Jackson famously wrote, “[p]arty loyalties and interests, sometimes more binding than law, extend [the President’s] effective control into branches of government other than his own, and he often may win, as a political leader, what he cannot command under the Constitution.”⁵⁷

But I would caution against that mentality. In Britain, securing the appropriations power gave Parliament the upper hand over the King. Historically, it has played the same role in the United States vis-à-vis Congress and the President. But in the end, only Congress “can prevent [its own] power[s] from slipping through its fingers.”⁵⁸ When Congress abets or indulges presidential erosion of that power, however, it takes itself out of the game, to the enduring detriment of representative self-government.

Thank you, again, for the opportunity to testify on this important issue. I welcome your questions.

⁵⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579, 654 (Jackson, J., concurring).

⁵⁸ *Id.*

**“SETTLING THE QUESTION:
DID THE BANK SETTLEMENT AGREEMENTS
SUBVERT CONGRESSIONAL APPROPRIATIONS POWER?”
TESTIMONY BEFORE THE
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**MAY 19, 2016
PAUL J. LARKIN, JR.**

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Mr. Chairman, Mr. Ranking Member, Members of the Subcommittee:

My name is Paul J. Larkin, Jr. I currently am a Senior Legal Research Fellow at The Heritage Foundation. Most of my career has involved working in the criminal justice system in one capacity or another. For example, I worked at the Department of Justice in the Organized Crime and Racketeering Section of the Criminal Division and in the Office of the Solicitor General. I also was Counsel to the Senate Judiciary Committee when Senator Orrin Hatch was the Chairman. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

Thank you for the opportunity to testify about the bank settlement agreements. I have previously discussed third-party payment conditions in a Heritage Foundation Legal Memorandum, in a law review article, and in prior congressional testimony.¹ As I said there, these conditions should not and cannot lawfully be included in a plea bargain, a civil settlement, and a nonprosecution or deferred prosecution agreement unless an act of Congress expressly and specifically authorizes the government to impose such an obligation.² The Constitution gives Congress the power to appropriate funds and the President the duty to implement Congress’ decisions. Unless an appropriations act trespasses on a constitutional power of the President, such as his authority under the Article II Pardon Clause—an issue not remotely at stake in the bank settlement cases—the President cannot ignore the dictates of an appropriations law.

The result is that the bank settlement agreements subverted Congress’ authority under the Appropriations Clause. The agreements were also an unlawful end run around two acts of Con-

¹ See Paul J. Larkin, Jr., *Consumers Shortchanged: Oversight of the Justice Department’s Mortgage Settlements*, Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 114th Cong. (2015); Paul J. Larkin, Jr., *The Problematic Use of Nonprosecution and Deferred Prosecution Agreements to Benefit Third Parties*, THE HERITAGE FOUNDATION, LEGAL MEMORANDUM No. 141 (Oct. 23, 2014), <http://www.heritage.org/research/reports/2014/10/the-problematic-use-of-nonprosecution-and-deferred-prosecution-agreements-to-benefit-third-parties>; Paul J. Larkin, Jr., *Funding Favored Sons and Daughters: Nonprosecution Agreements and “Extraordinary Restitution” in Environmental Criminal Cases*, 47 LOYOLA L.A. L. REV. 1 (2013) [hereafter Larkin, *Favored Sons and Daughters*].

² The concerns addressed here are the same whether the disposition is a plea bargain, nonprosecution or deferred prosecution agreement, or a civil settlement, although those concerns are more acute when criminal charges are a reality or a possibility. It is unknown how many of these types of settlements could have been brought as a criminal prosecution, but it is likely that some could have been criminal cases. See, e.g., Bank of America Settlement ¶¶ C.I., at 2 (Aug. 18-20, 2014) (“Bank of America and its subsidiaries originated residential mortgages using inflated appraisals and fraudulently sold those loans to the [government-sponsored enterprises] with misrepresentations as to the loans’ quality[.]”); *id.* C.ii (qui tam action alleged that Countrywide and Bank of America “fraudulently sold defective residential mortgage loans originated by Countrywide’s Consumer Markets Division and later Bank of America to the [government-sponsored enterprises] with misrepresentations as to the loans’ quality[.]”).

gress—the Miscellaneous Receipts Act³ and the Anti-Deficiency Act⁴—that implement the Appropriations Clause. In brief, four propositions demonstrate the illegality of these conditions:

- (1) The Article I Appropriations Clause prohibits the disbursement of federal funds except pursuant to “Law”;
- (2) the Article I Bicameralism and Presentment Clauses establish strict and unalterable conditions to create a “Law”;
- (3) no law authorizes the Justice Department to direct third parties to distribute to private parties funds that properly belong in the U.S. Treasury; and, on the contrary,
- (4) the Miscellaneous Receipts and Anti-Deficiency Acts forbid what the department did in the Housing Settlement cases: namely, direct settling parties to give funds to third parties not authorized in advance by Congress to receive those funds, rather than deposit those monies into the U.S. Treasury.

I. THIRD PARTY PAYMENT CONDITIONS IN THE BANK SETTLEMENT CASES

The housing settlements were controversial when inked because there was a decided ideology to many of the groups who have benefitted from the Justice Department’s largesse. According to Investor’s Business Daily, “[r]adical Democrat activist groups stand to collect millions from Attorney General Eric Holder’s record \$17 billion deal to settle alleged mortgage abuse charges against Bank of America. [¶] Buried in the fine print of the deal, which includes \$7 billion in soft-dollar consumer relief, are a raft of political payoffs to Obama constituency groups. In effect, the government has ordered the nation’s largest bank to create a massive slush fund for Democrat special interests.”⁵ Investor’s Business Daily offered the following examples:

According to the list provided by Justice, [housing activist groups approved by HUD] include some of the most radical bank shakedown organizations in the country, including:

- La Raza, which pressures banks to expand their credit box to qualify more low-income Latino immigrants for home loans;
- National Community Reinvestment Coalition, Washington’s most aggressive lobbyist for the disastrous Community Reinvestment Act;
- Neighborhood Assistance Corporation of America, whose director calls himself a “bank terrorist;”
- Operation Hope, a South Central Los Angeles group that’s pressuring banks to make “dignity mortgages” for deadbeats.

³ Act of Mar. 3, 1849, ch. 110, 9 Stat. 398 (codified as amended at 31 U.S.C. § 3302(b) (2012)).

⁴ Act of Mar. 3, 1905, ch. 1484 § 4, 33 Stat. 1214, (codified as amended at 31 U.S.C. §§ 1341-1351 (2012)).

⁵ Editorial, “Holder Cut Left-Wing Groups In on \$17 Bill BofA Deal,” INVESTOR’S BUSINESS DAILY, IBD.COM, Aug. 27, 2014, <http://news.investors.com/ibd-editorials/082714-715046-holders-bank-of-america-settlement-includes-payoffs-to-democrat-groups.htm?p=full>. The settlement agreement with Bank of America resolved one pending case and numerous other investigations that the Justice Department has pursued into alleged mortgage fraud that have not resulted in criminal charges or civil complaints. See Bank of America Settlement Agreement (signed Aug. 18-20, 2014), <http://www.justice.gov/iso/opa/resources/9622014821111642417595.pdf>.

Worse, one group eligible for BofA slush funds is a spin-off of Acorn Housing's branch in New York. [¶] It's now rebranded as Mutual Housing Association of New York, or MHANY. HUD lists MHANY's contact as Ismene Speliotis, who previously served as New York director of Acorn Housing.⁶

That is not all. The settlement stipulates that any money remaining after four years should be disposed of as follows:

If there are leftover funds in four years, the settlement stipulates the money will go to Interest on Lawyers' Trust Account (IOLTA), which provides legal aid for the poor and supports left-wing causes, and NeighborWorks of America, which provides affordable housing and funds a national network of left-wing community organizers operating in the mold of Acorn.

In fact, in 2008 and 2009, NeighborWorks awarded a whopping \$25 million to Acorn Housing.

In 2011 alone, NeighborWorks shelled out \$35 million in "affordable housing grants" to 115 such groups, according to its website. Recipients included the radical Affordable Housing Alliance, which pressures banks to make high-risk loans in low-income neighborhoods and which happens to be the former employer of HUD's chief "fair housing" enforcer.⁷

The Justice Department acknowledges that the settlement agreements require that what it termed "donations" be paid to third parties.⁸ The Department also appears to confess that those third parties are not victims of the banks' wrongdoing. As the Department noted in its January 6, 2015, letter to Chairmen Bob Goodlatte and Jeb Hensarling, "the consumer relief provisions in the Bank of America and Citigroup settlements" require those banks to make "donations to certain categories of community development funds, legal aid organizations, and housing counseling agencies[.]"⁹ The Department, however, did not identify any express statutory authority to disburse federal funds to those private parties. Instead, the government defends those requirements on the ground that they are reasonable because the amount at issue is "a much smaller commitment" than what the banks must pay to the federal government, because the "donations are calibrated to provide assistance to those consumers and communities most in need of help," and because "the banks are responsible for choosing specific recipients of consumer relief funds."¹⁰ The short answer to those defenses, however, is that the Constitution requires express statutory authority to make such disbursements, and the relevant statutes, far from authorizing this practice, expressly prohibit it.

⁶ *Id.*

⁷ *Id.*

⁸ See Letter from Peter J. Kadzik, Ass't Att'y Gen'l, to Bob Goodlatte, Chairman, H. Comm. on the Judiciary, & Jeb Hensarling, Chairman, H. Comm. on Financial Servs. 1-3 (Jan. 6, 2015).

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 1-2.

II. THE FEDERAL APPROPRIATIONS PROCESS

The contest over how to raise and spend public funds is hardly a new one. Long before our Constitution became law, the English crown and Parliament had warred against each other for sovereignty over that authority.¹¹ English kings had income from other sources (e.g., rents paid for use of royal lands), but military adventures demanded a greater than normal income, so the crown was forced to turn to Parliament for supplemental funds, which gave Parliament an advantage in their contest.¹² Parliament pressed its advantage and, by the last quarter of the seventeenth century, it had wrested control over taxes and appropriations from the Crown. Following in that tradition, Colonial legislatures also exercised a prerogative over fiscal policy.¹³

The Framers were aware of those contests, and the Constitution contains provisions that are their direct consequence. As then-Representative (later Circuit Judge for the U.S. Court of Appeals for the D.C. Circuit and White House Counsel) Abner Mikva once explained:

To ensure that Congress would act as the first branch of government, the constitutional framers gave the legislature virtually exclusive power to control the nation's purse strings. Even then, when the nation's purse was small and the amounts in question meager, experienced participants in government knew that the power of the purse was the most far-reaching and effectual of all governmental powers. This power the Framers chose to lodge in Congress. Doubtless they knew that granting the power of the purse to Congress would have costs. Doubtless they understood that a collection of diverse individuals representing diverse interests (and divided into separate chambers as well) would less efficiently and less coherently devise fiscal policy than would a single "treasurer" or "fiscal czar." Yet they chose, for good reason, to suffer this cost and bear its risks. And in so choosing, they laid down a principle of government no less grand, although apparently more prosaic, than any other in the Constitution: the government works best—works in the most desirable, balanced, and responsive way—when the power of the purse lies in the hands of the Congress. Throughout our history, numerous events have threatened this principle. Often the President has invoked the need for efficiency and sought to reorder the constitutional allocation of power; sometimes Congress itself has done so. Yet the principle has survived and will continue to do so as long as we—judges, lawyers, and citizens alike—recognize its profound importance to our nation.¹⁴

The Framers' decision reflected their commitment to limiting the federal government's power to tax the public and spend their funds to those parties who were most immediately tied to the people:

The decision of the Framers to grant Congress the power of the purse reflected their belief that a proper governmental system would have the legislature

¹¹ See, e.g., Todd David Pearson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 332-33; Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 891-92 (1994).

¹² See Pearson, *supra* note 11, at 333; Raven-Hansen & Banks, *supra* note 11, at 891.

¹³ See Pearson, *supra* note 11, at 333; Raven-Hansen & Banks, *supra* note 11, at 892-93.

¹⁴ Abner J. Mikva, *Congress: The Purse, the Purpose, and the Power*, 21 GA. L. REV. 1, 1-2 (1986).

at its core. The Framers understood the significance of the fiscal power. Alexander Hamilton wrote in the *Federalist Papers* that “[m]oney is, with propriety, considered as the vital principle of the body politic, as that which sustains its life and motion, and enables it to perform its most important functions.” James Madison added that the power of the purse is the “most complete and effectual weapon with which any constitution can arm” a governmental branch. This weapon article I of the Constitution placed squarely in the hands of Congress. Article I, section 8 gave Congress the power “to lay and collect taxes, duties, imposts, and excises.” Article I, section 9 stated that “[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law.” The effect of these provisions, in line with the intent of those who wrote them, was to give plenary power over the nation’s purse strings to Congress. It is true that a movement to make the Secretary of the Treasury directly accountable to Congress instead of to the President ultimately went down to defeat. But the very strength of this movement serves to underscore the Framers’ deep commitment to ensuring the fiscal prerogatives of Congress. Their intent, as James Madison wrote in the *Federalist Papers*, was to guarantee that “the legislative department alone has access to the pockets of the people.”

The value of granting Congress plenary power over fiscal matters is no less and perhaps even more clear today than it was in 1789. First, decisions regarding taxation and expenditure should be made in our most representative of institutions. Roger Sherman said at the Constitutional Convention that “[i]n making laws regard should be had to the sense of the people who are to be bound by them, and it is more probable that a single man should mistake or betray this sense than the legislature.” In no context are Sherman’s words more true than in the context of fiscal policy. The justice, the reasonableness, even the efficacy of fiscal decisions depend upon the government’s having taken into account the diverse interests of its citizens. No institution is more willing—no institution is better able—to consider and accommodate these interests than the legislative branch. The Framers’ decision to give budgetary power to Congress rested largely on this view. Indeed, the Framers chose to delegate only to the House—the chamber most closely connected to the electorate—the right to initiate revenue bills. Clearly, the Framers believed that decisions directly affecting the pocketbooks of our people should be made by the government institution that is closest to them.¹⁵

A. CONSTITUTIONAL REGULATION OF THE FEDERAL APPROPRIATIONS PROCESS

1. THE ARTICLE I APPROPRIATIONS PROCESS

Article I creates the Senate and House of Representatives and defines the procedure for them to exercise the “legislative Power.”¹⁶ Each chamber must pass the identical “Bill” and present it to the President for his signature.¹⁷ The President then has a binary “take it or leave it”

¹⁵ *Id.* at 3–4 (footnotes omitted).

¹⁶ See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

¹⁷ See U.S. CONST. art. I, § 7; *INS v. Chadha*, 462 U.S. 919 (1983); *U.S. House of Representatives v. Burwell*, Civil Action No. 14-1967 (RMC), slip op. 2 (D.D.C. May 12, 2016). To ensure that neither Congress nor the President could

choice; he cannot edit or erase any of its provisions and sign what remains.¹⁸ If the President signs the bill, or both houses re-pass it by a two-thirds vote following a veto, it becomes a law.¹⁹ Once enacted, Congress and the President must follow the same procedure to revise or repeal it.²⁰

Article I also carefully addresses how the federal government may raise or disburse funds.²¹ The Taxation Clause gives Congress the power “to lay and collect Taxes, Duties, Impost and Excises,”²² as long as any “Bill[] for raising Revenue . . . originate[s] in the House of Representatives,” as required by the Origination Clause.²³ The Borrowing Clause enables Congress “[t]o borrow Money on the credit of the United States,”²⁴ while the Spending Clause grants Congress the power “[t]o pay the Debts” Congress has accumulated and “[t]o provide for the common Defence and general Welfare of the United States.”²⁵ The Appropriations Clause then provides that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”²⁶ To prevent either the Congress or the President from looking the other way on any financial matter, the Statement and Accounts Clause requires “a regular Statement and Accounts of the Receipts and Expenditures of all public Money shall be published from time to time.”²⁷

The Supreme Court has often recognized that Article I grants Congress the appropriations power. In its first discussion of the Appropriations Clause, a unanimous Court held in *Reese v. Walker*²⁸ that “[i]t is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress.”²⁹ The Court has reaffirmed that proposition on several occasions.³⁰ In 1976, for example, the Court noted that “[t]he established

evade that intentionally onerous procedure and create a “Law” by labeling a proposal as something other than a “Bill,” Article I expressly applies to any “Bill” and “[e]very Order, Resolution, or Vote” requiring the approval of both chambers other than an “Adjournment.”

¹⁸ See *Clinton v. City of New York*, 524 U.S. 417 (1998).

¹⁹ See U.S. CONST. art. I, § 7.

²⁰ See *Clinton v. City of New York*, 524 U.S. 417 (1998).

²¹ The constitutional regulations on federal receipts and federal expenditures work hand-in-hand. See Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1345 (1988).

²² U.S. CONST. art. I, § 8, cl. 1.

²³ U.S. CONST. art. I, § 7, cl. 1.

²⁴ U.S. CONST. art. I, § 8, cl. 2.

²⁵ U.S. CONST. art. I, § 8, cl. 1.

²⁶ U.S. CONST. art. I, § 9, cl. 7. That last term—“Law”—is critical because it is the identical term used elsewhere in Article I to describe what Congress may enact with the President’s approval or over his veto. Compare U.S. CONST. art. I, § 7, cl. 2, with *id.* § 9, cl. 7.

²⁷ U.S. CONST. art. I, § 9, cl. 7.

²⁸ 52 U.S. (11 How.) 272 (1850).

²⁹ *Id.* at 291.

³⁰ See *Knote v. United States*, 95 U.S. 149, 154 (1877); *Hart v. United States*, 118 U.S. 62, 66 (1886); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321-22 (1937); *United States v. MacCollom*, 426 U.S. 317, 321 (1975) (plurality opinion); *OPM v. Richmond*, 496 U.S. 414, 424-30 (1990); cf. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385-86 (1947); *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 63 (1984).

rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.³¹ That is the case even when the President exercises a prerogative like the clemency power.³² The President has plenary authority to grant clemency, the Court ruled, but he “cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress.”³³

2. THE ARTICLE II IMPLEMENTATION PROCESS

By contrast, once a “Bill” becomes a “Law,” the President becomes the most important player in the game. Why? Because only “*The President*”³⁴ or one of his lieutenants—the “principal Officer in each of the executive Departments” and “all other Officers of the United States”³⁵—“shall take Care that the Laws be faithfully executed,”³⁶ a job that no member of Congress can perform. Members cannot execute the law because the Incompatibility Clause bars them from serving in the Congress and Executive Branch simultaneously.³⁷ Members cannot delegate enforcement responsibility to someone or some organization that Congress can control, such as the Government Accountability Office, because that would trespass on the President’s Article II Take Care and Appointment Clause powers.³⁸ A member cannot even appoint people to staff the “executive Departments.”³⁹ The Appointments Clause of the Constitution⁴⁰ creates two options for appointment of “Officers of the United States”—a term that includes anyone who exercises the power of the federal government⁴¹—and a member cannot select either one.⁴² If a member serves in the House of Representatives, he cannot even directly influence the appointment of executive officials because only the Senate plays a role in the appointment process.⁴³

³¹ *MacCollom*, 426 U.S. at 321.

³² *Knote v. United States*, 95 U.S. 149 (1877). *Knote* addressed the issue whether the President could pardon a former supporter of the Confederacy and also direct the U.S. Treasury to pay him for property taken from him during the Civil War. The President had the authority to accomplish the former, the Court ruled, but not the latter, since only an act of Congress can authorize a payment of funds once deposited in the treasury.

³³ *Id.* at 153–54.

³⁴ U.S. CONST. art. II, § 3, cl. 1 & 3 (emphasis added).

³⁵ U.S. CONST. art. II, § 2, cls. 1 & 2.

³⁶ U.S. CONST. art. II, § 3, cl. 1.

³⁷ The Incompatibility Clause, U.S. CONST. art. I, § 6, cl. 2, provides as follows: “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”

³⁸ See U.S. CONST. art. II, § 2, cls. 2 & 3; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Myers v. United States*, 272 U.S. 52 (1926).

³⁹ See *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976).

⁴⁰ See U.S. CONST. art. II, § 2, cl. 2.

⁴¹ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976).

⁴² See *Bowsher v. Synar*, 478 U.S. 714 (1986); *Myers v. United States*, 272 U.S. 52 (1926).

⁴³ See U.S. CONST. art. II, § 2, cl. 2 (only the Senate gives its “advice and consent” to the President’s appointments).

The result is that, as far as the implementation of a law is concerned, members of Congress are spectators.

B. STATUTORY REGULATION OF THE FEDERAL APPROPRIATIONS PROCESSES

The two statutes that implement the Appropriations Clause are the Miscellaneous Receipts Act and the Anti-Deficiency Act. The former requires government officials to deposit all funds that they receive into the U.S. Treasury so that they are subject to the appropriations process.⁴⁴ The latter statute provides that the government may spend only the money appropriated by Congress and only for the purposes it has specified.⁴⁵ In fact, it is a federal offense for a government officer to spend money in excess of the sum that Congress has appropriated.⁴⁶ Together with the Appropriations Clause, those statutes, to paraphrase Yale Law School Professor Kate Stith, generate “two governing principles.”⁴⁷ One is the “*Principle of the Public Fisc*,” under which “[a]ll funds belonging to the United States—received from whatever source, however obtained, and whether in the form of cash, intangible property, or physical assets—are public monies, subject to public control and accountability.”⁴⁸ The other is the “*Principle of Appropriations Control*,” the proposition that “[a]ll expenditures from the public fisc must be made pursuant to a constitutional ‘Appropriation[] made by Law.’”⁴⁹ Combined, those principles establish that “there may be no spending in the name of the United States except pursuant to legislative appropriation.”⁵⁰

III. THE LEGALITY OF THE THIRD-PARTY PAYMENT CONDITIONS IN THE BANK SETTLEMENT CASES

The Appropriations Clause has a clear and straightforward command: “It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.”⁵¹ That directive applies to “[a]ny exercise of a power granted by the Constitution” to one

⁴⁴ See 31 U.S.C. § 3302(b)(a) (“Except as provided by another law, an official or agent of the United States Government having custody or possession of public money shall keep the money safe without—(1) lending the money; (2) using the money; (3) depositing the money in a bank; and (4) exchanging the money for other amounts.”); *id.* § 3302(b) (“Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.”); Stith, *supra* note 21, at 1364-70. Separate legislation has created exceptions for debt collection actions, revolving funds, and gifts to agencies. See Stith, *supra* note 21, at 1365-66. The Justice Department settlement practice is not authorized by legislation and cannot be squeezed into one of those cubbyholes.

⁴⁵ The Anti-Deficiency Act prohibits the government from “mak[ing] or authoriz[ing] an expenditure or obligation exceeding . . . an appropriation” or relevant fund. 31 U.S.C. § 1341(a)(1)(A) (2012). Appropriations also must be expended during the life of the relevant authorization bill. Agencies cannot “bank” any remaining funds. See 31 U.S.C. § 1502 (2012).

⁴⁶ *Richmond*, 496 U.S. at 430 (citing 31 U.S.C. §§ 1341 & 1350 (2012)).

⁴⁷ See Stith, *supra* note 21, at 1356. Professor Stith formulated those principles in her discussion of the teachings of the Appropriations Clause, *id.* at 1356-60, but they carry through when the Miscellaneous Receipts and Anti-Deficiency Acts are added to the mix, *id.* at 1363-77.

⁴⁸ *Id.* at 1356.

⁴⁹ *Id.* at 1356-57.

⁵⁰ *Id.* at 1357.

⁵¹ *Richmond*, 496 U.S. at 424 (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)).

of the branches of government.⁵² Together with its implementing laws, the Appropriations Clause carefully regulates who may receive federal funds and how they may be spent.⁵³

The breadth of those provisions is necessary if the Appropriations Clause is to achieve its fundamental purpose: “the necessity, existing now as much as at the time the Constitution was ratified, of preventing fraud and corruption.”⁵⁴ As Justice Joseph Story explained in his treatise *Commentaries on the Constitution of the United States*:

The object is apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity, in the disbursements of the public money. As all the taxes raised from the people, as well as revenues arising from other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure. The power to control and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation[.]⁵⁵

Congress regularly exercises “the power to direct and control the appropriations” with specificity. Congress does not give the President a credit card or a cashbox that he can use to purchase goods and services or disburse appropriations as he sees fit. Congress identifies precisely who may receive federal funds. Those restrictions are important. Just as the President cannot ignore substantive rules of law, he cannot disregard appropriations laws. That is the lesson of the Supreme Court’s decisions in *Youngstown Sheet & Tube Co. v. Sawyer*,⁵⁶ also known as the *Steel Seizure Case*, and *OPM v. Richmond*.⁵⁷

In the *Steel Seizure Case*, the Supreme Court held that President Truman had acted unlawfully by directing the Secretary of Commerce to take over operation of most of the nation’s steel plants during the Korean War to prevent a nationwide strike rather than exercise the author-

⁵² *Id.* at 425 (emphasis added).

⁵³ See Stith, *supra* note 21, at 1352-53 (“The ‘Appropriations’ required by the Constitution are not only legislative specifications of money *amounts*, but also legislative specifications of the *powers, activities, and purposes*—what we may call, simply, ‘objects’—for which appropriated funds may be used. Whether the constitutional demand for legislative authorization of public expenditure stems primarily from concerns with corruption or negligence in public expenditure, or from a political fear or distrust of an Executive not subject to this check by Congress, the appropriations requirement ensures that the legislature in deciding the size and content of the federal budget decides also the size and content of the federal government.”). The Judgment Fund Act, Act of July 27, 1956, ch. 13, 70 Stat. 694 (codified as amended at 28 U.S.C. § 2414 (2012)), is an exception to that rule. It creates a permanent authorization for payment of any covered judgment or settlement regardless of the amount. That act has no bearing on the Bank Settlement Agreements because no judgment was entered against the United States and the agreements did not require the government to make any payments.

⁵⁴ *Richmond*, 496 U.S. at 427.

⁵⁵ *Id.* (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1348 (3d ed. 1858)).

⁵⁶ 343 U.S. 579 (1952).

⁵⁷ 496 U.S. 414 (1990).

ity that Congress had granted him to deal with employee work stoppages under the federal labor laws.⁵⁸ In addition, because there is no difference between substantive and appropriations laws for Article I purposes, the President is not free to disregard appropriations bills and their limitations because they do not allocate federal spending in a manner he dislikes, nor may he ignore the appropriations process because it is sometimes slow, cumbersome, or produces results he thinks unwise. Unless the President can establish that a law is unconstitutional, he is as obligated to comply with it as anyone else.⁵⁹ That is the natural, inevitable, and salutary consequence of the Framers' decision to create "a government of laws, and not of men,"⁶⁰ and to empower the nation to "elect[]" a "President," not crown a king.⁶¹

It is no argument that Appropriations Clause requirements are less weighty than the ones imposed by "substantive" provisions of the Constitution, such as the ones in Section 8 of Article I, like the Commerce Clause. Courts distinguish between "substantive" laws—*viz.*, statutes that tell the President what can or must be done (*e.g.*, to create a Department of Justice)—and "appropriations" acts—*viz.*, statutes that give the President the funds he needs to carry out those duties (*e.g.*, to pay the Justice Department officials he appoints)—for statutory interpretation purposes. The reason is that Congress disfavors making substantive law via appropriations acts to allow the Senate and House Appropriations Committees to focus on funding issues and, by assuming that appropriations may properly be spent, to avoid trespassing on substantive matters, which are the proper subject of other committees.⁶²

That principle of statutory construction, however, does not carry over into constitutional analysis. Appropriations can be made only by "Law"; and, as the Supreme Court explained in *INS v. Chadha*,⁶³ Article I defines the procedures that must be followed to create a "Law"; and Article I does *not* distinguish between the constitutional status of substantive and appropriations laws. Congress may include substantive and appropriations provisions in the same statute,⁶⁴ or

⁵⁸ *Id.* at 585-89; *id.* at 635-38 (Jackson, J., concurring).

⁵⁹ *Id.* at 585 ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."); *cf.* *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Patterson, Circuit Justice) ("The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government. In this particular, the law is paramount. Who has dominion over it? None but the legislature; and even they are not without their limitation in our republic."); *Raven-Hansen & Banks*, *supra* note 11, at 907.

⁶⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

⁶¹ U.S. CONST. art. II, § 1, cl. 1 (vesting the "executive Power" in "a President of the United States of America" who "shall hold his Office during the Term of four Years" and "be elected" by an Electoral College), *as amended by* amend. XII (revising the Electoral College presidential selection process); *id.* amend. XXII (creating term limits for "the office of the President").

⁶² *See, e.g.*, *Andrus v. Sierra Club*, 442 U.S. 347, 361 (1979); *TVA v. Hill*, 437 U.S. 153, 190 (1978); *U.S. ex rel. Chapman v. FPC*, 345 U.S. 153, 164 n.5 (1953); *Raven-Hansen & Banks*, *supra* note 11, at 839-45.

⁶³ 462 U.S. 919 (1983).

⁶⁴ *See Cincinnati Soap Co. v. United States*, 301 U.S. 308, 313 (1937) ("Standing apart, therefore, the tax is unsailable. It is said to be bad because it is earmarked and devoted from its inception to a specific purpose. But if the tax, qua tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasury, neither is made invalid by being bound to the other in the same act of legislation. The only concern which we have in that aspect of the matter is to determine whether the purpose specified is one for which Congress can make an appropriation without violating the fundamental law. If

revise substantive law solely via an appropriations act.⁶⁵ Article I makes it the responsibility of Congress and the President to work together to enact a law regardless of the label that could be given it, and Article II does not give the President the power to ignore a constitutionally valid law no matter how unwise he believes it to be.⁶⁶

The Supreme Court's decision in *OPM v. Richmond* is particularly instructive in that regard. A former welder for the U.S. Navy, Charles Richmond retired under a disability due to his poor eyesight. After finding additional work to supplement his disability annuity, Richmond sought advice from a Navy personnel specialist regarding how much additional income he could earn without exceeding the amount allowed by his annuity. Relying on the terms of a federal statute that had been repealed and an OPM letter explaining what the now-repealed statute permitted, the specialist gave Richmond incorrect information about the amount of additional income he could earn from other employment without forfeiting his disability payments. Relying on that advice, Richmond took a job whose income cost him disability payments for a six-month period because he had exceeded the total income that the new law allowed a disability recipient to earn. Richmond sued the federal government to recover his lost payments, arguing that the government affirmatively misled him and therefore should be estopped from enforcing the earning limit in his case. Richmond had mixed results in the administrative process and lower courts, but ultimately lost in the Supreme Court.⁶⁷

The Court declined to decide whether the government could ever be estopped from enforcing federal law due to its affirmative misconduct, but it did rule that an estoppel claim cannot prevail when a private party makes "a claim for payment of money from the Public Treasury contrary to a statutory appropriation."⁶⁸ The Court read "the straightforward and explicit command of the Appropriations Clause" and its own precedent to establish that "no money can be taken or drawn from the Treasury except under an appropriation by Congress."⁶⁹ The reason for that rule was not to prevent overdrawing the treasury, but to avoid "'giv[ing] to the fiscal officers a most dangerous discretion."⁷⁰ The Court had "long ago accepted this ground as a reason that claims for estoppel cannot be entertained where public money is at stake, refusing to 'introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public

Congress, for reasons deemed by it to be satisfactory, chose to adopt the quantum of receipts from this particular tax as the measure of the appropriation, we perceive no valid basis for challenging its power to do so.").

⁶⁵ See *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992); *United States v. Will*, 449 U.S. 200, 222-24 (1980); *United States v. Dickerson*, 310 U.S. 554, 555 (1940) ("There can be no doubt that Congress could suspend or repeal the authorization contained in [U.S. Const. art. I] Section 9; and it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.") (collecting cases).

⁶⁶ It is a different matter when an appropriations law is unconstitutional. See *United States v. Lovett*, 328 U.S. 303 (1946) (holding that Congress cannot use its appropriations authority to violate the Bill of Attainder Clause, U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.")). *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1871) (Congress cannot interfere with the effect of a presidential pardon). But that is not the case here.

⁶⁷ *Richmond*, 496 U.S. at 415-19.

⁶⁸ *Id.* at 424.

⁶⁹ *Id.* at 425 (quoting *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1851)).

⁷⁰ *Id.* at 425 (quoting *Reeside*, 52 U.S. (11 How.) at 291.

to protect itself.”⁷¹ What is more, the Court noted in *Richmond*, recognizing that governmental misconduct could serve to require a payment from the treasury “could in fact render the Appropriations Clause a nullity” by transferring control over public funds from the Congress to the Executive Branch.⁷² Atop that, the Court noted, “it would be most anomalous” to allow a government official “to make an extrastatutory payment of federal funds” because it is a federal offense for any such official to knowingly exceed appropriated spending limits.⁷³ “If an executive officer on his own initiative had decided that, in fairness, respondent should receive benefits despite the statutory bar, the official would risk prosecution. That respondent now seeks a court order to effect the same result serves to highlight the weakness and novelty of his claim.”⁷⁴ The Court also rejected the argument that “estoppel against the Government would have beneficial effects,” saying that “we are unwilling to ‘tamper with these established principles because it might be thought that they should be responsive to a particular conception of enlightened governmental policy.’”⁷⁵ The Court confessed that its ruling was harsh, both for *Richmond* and other parties in a similar position, but concluded that the Appropriations Clause dictated that result.⁷⁶

The *Richmond* decision compels the conclusion that the Appropriations Clause prohibits the third-party payment practice followed by the Justice Department. The scenario there presented as favorable a setting for reliance on the estoppel doctrine as the Court had previously faced, or might possibly ever arise. A lower federal court had directed the treasury to pay a blameless *Richmond* disability payments that he lost due only to the undeniably mistaken advice that he received from a government employee who had acted without any suggestion of favoritism. Requiring the government to honor its word in a setting devoid of any suggestion of “fraud and corruption” hardly risks the prospect of emptying the treasury at the behest of executive officials. Rather, it would simply apply to the government the same rule that applies to the public: “Men must turn square corners when they deal with the Government,”⁷⁷ and the government must do the same for individuals. Yet, the Court refused to create an exception to the Appropriations Clause for government-mistakes. “As for monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds. In this context there can be no estoppel, for courts cannot estop the Constitution.”⁷⁸ In sum, *Richmond* makes clear that the government cannot evade the appropriations

⁷¹ *Id.* at 425 (quoting *Lee v. Munroe & Thornton*, 11 U.S. (7 Cranch) 366, 370 (1813)).

⁷² *Id.* at 428 (“Extended to its logical conclusion, operation of estoppel against the Government in the context of payment of money from the Treasury could in fact render the Appropriations Clause a nullity. If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive. If, for example, the President or Executive Branch officials were displeased with a new restriction on benefits imposed by Congress to ease burdens on the fisc (such as the restriction imposed by the statutory change in this case) and sought to evade them, agency officials could advise citizens that the restrictions were inapplicable. Estoppel would give this advice the practical force of law, in violation of the Constitution.”).

⁷³ *Id.* at 430 (citing 31 U.S.C. § 1341, 1350 (2012)).

⁷⁴ *Id.*

⁷⁵ *Id.* at 432-33.

⁷⁶ *Id.* at 434.

⁷⁷ *Rock Island A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920) (Holmes, J.).

⁷⁸ *Richmond*, 496 U.S. at 434.

laws even to compensate an innocent, injured party victimized by the government's own negligence. Given the Supreme Court's holding in *Richmond*, it follows that the third-party payment practice is unconstitutional.

Of course, the government did not accidentally adopt these conditions in the Bank Settlement Agreements. No, the government acted quite intentionally. Third-party payment conditions unlawfully substitute appointed Justice Department officials for elected members of Congress as decisionmakers in the appropriations process. No one stumbles into making that switch. In fact, it is fair to say that those conditions are a naked attempt to circumvent the constitutional process for appropriating taxpayer dollars by the very people the clause was intended to constrain: executive branch officials. After all, corporate defendants care only about the bottom line in a settlement, the amount of money that they must pay to bring actual or pending litigation to a close, not the identity of the payee on whatever check they must write. Any sum that the government directs a corporation to hand over to a private party, whether chosen by the government or the corporation itself, is money that the corporation would otherwise pay into the federal treasury, where it would constitute a portion of the funds that Congress could use to underwrite the costs of running the government or to fund other recipients and programs. Those conditions give away federal funds that must come from somewhere else if Congress is to fund the people, programs, and activities that it chooses.

The conditions in the Housing Settlement Cases are an archetypical example of the corruption that Article I sought to because they are rife with opportunities for political or personal cronyism. They allow the Justice Department to pick-and-choose among private recipients without any direction from Congress or any oversight by the Judiciary or Appropriations Committees. Even if the Justice Department lawyers were to act with noble motives when entering into these agreements, the department does not perform regular audits of these disbursements, so there is no guarantee that the funds will compensate someone who could even allegedly be labeled as a "victim" of the banks' wrongdoing rather than be used for impermissible purposes. In sum, these agreements are precisely what the Framers had in mind when they denied executive officials the authority to decide how to disburse federal money.

Consider this issue from a different perspective: No private lawyer could direct a defendant to divert settlement funds from his client to someone else whom either the lawyer or the defendant believes can make a better use of them. That conduct is inconsistent with the duty of undivided loyalty that an attorney owes his client, and any lawyer who engaged in that practice would clearly violate an attorney's ethical obligation to zealously represent his client to the best of his ability.⁷⁹ Any state bar association would revoke or suspend the license of any lawyer who said to a defendant or potential defendant without his client's approval, "I know that you are willing to pay my client \$100 to settle his claim, but he doesn't need that much money, so give a portion of it to someone else." Here, the "client" is "We, the People of the United States,"⁸⁰ and the Appropriations Clause, backed up by the Miscellaneous Receipts and Anti-Deficiency Acts, identifies the client's wishes. Giving away the public's money is an unethical practice.

⁷⁹ See ABA, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer (2016) ("A lawyer may take such action on behalf of a the client as is impliedly authorized to carry out the representation."); *id.* Rule 1.7 Conflict of Interest: Current Clients; *cf. id.* Rule 1.15: Safekeeping Property.

⁸⁰ U.S. CONST. pmbl.

That conclusion should not come as a surprise to anyone. The ethical obligations imposed on private lawyers by state bar rules and the profession's code of conduct apply to Justice Department attorneys. The McDade Amendment, codified at Section 530B of Title 28, subjects every "attorney for the Government" to the "State laws and rules" of ethics applicable to other lawyers licensed to practice in each state in which an attorney appears in court to represent the United States.⁸¹ The term "State laws and rules" includes all rules governing the "ethical conduct" of an attorney in the relevant jurisdiction unless there is a specific federal statute or regulation to the contrary.⁸² The McDade Amendment and the implementing Justice Department regulations direct all department lawyers, "including supervisory attorneys,"⁸³ to comply with the ethical rules of each relevant state. Accordingly, even though the Attorney General is responsible for managing litigation in the federal courts⁸⁴ and, as the "Principal Officer" at the Justice Department,⁸⁵ is responsible for supervising the conduct of all other department personnel, Congress has imposed on department lawyers, including the Attorney General, the same ethical duties that the states demand of non-government lawyers.

Atop those problems is another one. This practice denies the public not only money to which it is entitled, but also the opportunity to know how public funds are spent and to hold elected officials accountable for their choices. The Constitution and federal code ensure that the Executive Branch cannot spend money without the prior approval of Congress, which requires every member to cast a ballot for the annual appropriations bills. Those provisions ensure that each voter can know what every member does with the public's tax dollars and can use that information every two or six years to decide whether to "throw the bums out." By letting the Executive Branch make decisions that the Constitution envisions that only Congress should make,

⁸¹ The McDade Amendment, 28 U.S.C. § 530B (2012), which is captioned "Ethical standards for attorneys for the Government," provides as follows:

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

(c) As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

The implementing regulations apply to lawyers at the Justice Department and in the U.S. Attorneys' Offices whether engaged in criminal or civil enforcement proceedings. 28 C.F.R. § 77.1-77.3 (2016). The regulations impose the same ethical obligations on those lawyers that apply to other lawyers in a relevant state. *Id.* § 77.3 ("In all criminal investigations and prosecutions, in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings, attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State, as these terms are defined in § 77.2 of this part.").

⁸² 28 C.F.R. §§ 77.1(b), 77.1(c), 77.2(h), 77.2(k), and 77.

⁸³ 28 C.F.R. § 77.4(e).

⁸⁴ See 5 U.S.C. § 3106 (2012); 28 U.S.C. §§ 515-16 (2012) (granting the Attorney General litigating authority for the United States); *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888).

⁸⁵ U.S. CONST. art. II, § 2, cls. 1 & 2

members of Congress who allow this practice to continue are shirking their responsibility to take a public position identifying the proper recipients of the electorate's tax dollars. Accordingly, third-party payment requirements allow legislators to escape political responsibility by denying the public valuable information that it needs to make an informed decision at the polls.

These conditions cannot be justified on the ground that they are a non-statutory mechanism for compensating the victims of crime or civil wrongdoing. Federal courts lack inherent authority to award restitution, so no court could dispense funds in this manner even after a conviction or judgment without express statutory authority.⁸⁶ Several federal statutes address the needs of victims of crime: the Victim and Witness Protection Act of 1982,⁸⁷ the Victims of Crime Act of 1984,⁸⁸ the Mandatory Victims Restitution Act of 1996,⁸⁹ and the Crime Victims Rights Act of 2004.⁹⁰ For example, the 1984 act provides that, with certain exceptions—not applicable to housing settlements—"all fines that are collected from persons convicted" of federal crimes "shall be deposited" into "a separate account" to be known as the Crime Victims Fund[.]"⁹¹ Congress has also directed that the Crime Victim Funds "shall be available only for" a few specific purposes, none of which is relevant here.⁹² Those laws demonstrate that Congress sought to limit payments to *actual, proven victims of crimes*, not to individuals or organizations that may have suffered some harm from unproved offenses or from civil wrongs, and certainly not to parties who have suffered no harm themselves.

Third-party payment requirements also cannot be defended on the ground that they are a necessary evil. Perhaps, we would need to swallow all of those harms if third-party payment requirements were necessary for plea bargains, civil settlements, and nonprosecution or deferred prosecution agreements. But they clearly are not. The federal government disposed of thousands of cases, actual or potential, long before it instituted this practice; the department has disposed of numerous cases without any such conditions since they first appeared; and it will continue to do so even if Congress prohibits their use.

⁸⁶ Larkin, *Favored Sons and Daughters*, supra note 1, at 36.

⁸⁷ Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified, as amended, at 18 U.S.C. § 3663 (2006)).

⁸⁸ Pub. L. No. 98-473, Tit. II, § 1402, 98 Stat. 2170 (codified, as amended, at 42 U.S.C. §§ 10601-10608 (2012)).

⁸⁹ Pub. L. No. 104-132, 110 Stat. 1227 (codified as 18 U.S.C. §§ 3556, 3663-64 (2006)).

⁹⁰ Pub. L. No. 108-405, 118 Stat. 2260 (2004), enacted as § 2 of the Justice for All Act of 2004 (codified, as amended, at 18 U.S.C. § 3771 (2006)).

⁹¹ 42 U.S.C. §§ 10601(a) & (b)(1). The exceptions relate to matters such as fines available to the Secretary of the Treasury pursuant to the Endangered Species Act or the Lacey Act, and fines paid into the railroad unemployment insurance account, the Postal Service Fund, the navigable waters revolving fund, and the county public schools funds pursuant to various federal laws. *Id.* § 10601(b)(1)(A) & (B).

⁹² The purposes involve child abuse prevention and treatment grants; the victim assistance programs that exist at the Federal Bureau of Investigation, at the Department of Justice, and in the U.S. Attorney's Offices, which provide services for crime victims "through victim coordinators, victims' specialists, and victims' advocates"; the training of state victim crime compensation program personnel; evaluation, training, and technical assistance for "eligible crime victim assistance programs"; "a Victim Notification System"; and an antiterrorism emergency reserve for the victims of 9/11. *See, e.g.*, 42 U.S.C. §§ 10601(d)(2), (3), (4) & (5); FBI, VICTIM ASSISTANCE, http://www.fbi.gov/stats-services/victim_assistance; DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, <http://ojp.gov/ovc/>; DEP'T OF JUSTICE, OFFICES OF THE UNITED STATES ATTORNEYS, VICTIMS RIGHTS & SERVICES, <http://www.justice.gov/usao/priority-areas/victims-rights-services>.

It is important to recognize that lawyers in Democratic *and* Republican Administrations have been equally guilty of following this practice. For example, during the George W. Bush Administration, the United States Attorney's Office for the District of New Jersey, which was then headed by current New Jersey Governor Chris Christie, negotiated a nonprosecution agreement with Bristol-Myers Squibb in which the company agreed, among other things, to make a \$5 million gift to Seton Hall University's law school—Christie's alma mater—in order to avoid prosecution for securities fraud.⁹³

Leaving appropriations decisions to members of Congress hardly guarantees that personal biases will play no role in how public funds are spent. No one is that gullible. But public deserves the opportunity to hold the government accountable for its taxing and spending decisions. Returning those decisions to Congress whenever the Justice Department uses such an agreement would be a big step in the right direction.

* * * * *

At the end of the day, it is difficult to believe that even the Justice Department lawyers who have engaged in the third-party payment practice could believe that believe it is a legitimate settlement device. At a minimum, even they would concede that the practice avoids their legal obligations under the Miscellaneous Receipts as well as the purpose of that statute and the Anti-Deficiency Acts. But there is more than just avoidance going on here. Just as there is a difference between tax avoidance and tax evasion, there is also a difference between deposit avoidance and deposit evasion—that is, between legitimately paying settlement funds to the victims of a crime or a tort and funneling money to someone else either with the intent of benefitting the intended recipient or without inspecting what that recipient does with those funds to ensure that they are not used for an unlawful purpose. The former would be deemed intentional conduct; the latter, willful blindness. The difference between them, however, is immaterial. The law, including the criminal law, holds parties who engage in the latter no less responsible than ones who engage in the former.⁹⁴

Indeed, it seems that the third-party payment practice may be the only instance in which the Justice Department refuses to treat parties who act in a supervisory or directorial capacity in the same manner as the “grunts” who carry out a superior's orders. Section 2 of Title 18 makes it a crime to direct someone else to commit an offense or to control how he carries out the crime. Other provisions in the federal criminal code also expressly make it an offense—in some cases punishable by life imprisonment or death—to manage the criminal conduct of others.⁹⁵ It surely

⁹³ See Larkin, *Favored Sons and Daughters*, *supra* note 1, at 33 & n.99.

⁹⁴ See *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011) (“The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge. Edwards, *The Criminal Degrees of Knowledge*, 17 Mod. L. Rev. 294, 302 (1954) (hereinafter Edwards) (observing on the basis of English authorities that ‘up to the present day, no real doubt has been cast on the proposition that [willful blindness] is as culpable as actual knowledge’). It is also said that persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts.”).

⁹⁵ The Continuing Criminal Enterprise Act, 21 U.S.C. § 848 (2012); the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-68 (2012).

is the case that the Justice Department Criminal Division has seen to the prosecution, conviction, and imprisonment of numerous offenders for engaging in precisely the type of sham transactions that the department now has become a party to via these third-party payment agreements. It is also a safe bet that the department would scoff at any defendant who tried to escape liability for possessing contraband—drugs, firearms, and so forth—or the proceeds of its sale by claiming that he only directed how a transaction should take place and did not get his fingerprints on any particular item. In fact, if the Justice Department truly believes that these agreements are a legitimate way of conducting financial affairs, there will be a rather large number of prisoners seeking their release or a pardon on the ground that they did not commit a crime.

CONCLUSION

The third-party payment conditions in the Bank Settlement Cases are an unlawful attempt to funnel money that belongs to the public to parties whom the Justice Department sees as its favorites. That practice enables Justice Department lawyers to disburse to third parties of their own choosing, or perhaps of the defendant's, money that properly should be paid into the federal treasury, from which funds can be paid out only if elected federal officials make the relevant appropriations decisions. Congress should prohibit this practice altogether and ensure that government lawyers use their settlement authority only to compensate proven victims of wrongdoing, not the Administration's cronies. These practices are, and should be declared to be, verboten.

APPENDIX A

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Written Testimony of

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Before the Subcommittee on Oversight and Investigations of the
United States House of Representatives Committee on Financial Services

"Settling the Question:

*Did Bank Settlement Agreements Subvert Congressional Appropriations
Powers?"*

Thursday, May 19, 2016

9:15am

2128 Rayburn House Office Building

Chairman Duffy, Vice Chairman Fitzpatrick, Ranking Member Green, and members of the Subcommittee, thank you for inviting me here to testify. My name is David Min and I am an Assistant Professor at the University of California Irvine School of Law, where I teach and research in the areas of business law, with a focus on banking, housing finance, and other financial regulation. Before coming into academia, I spent over a decade working in financial regulation, both in private practice and in the federal government, including as a Senior Policy Advisor for the Joint Economic Committee of Congress, where I had the pleasure of working with several of you and your staff. I thank you for the opportunity to testify today on the topic of whether the consumer relief provisions of the settlements negotiated by the U.S. Department of Justice (DOJ) and various state Attorneys General with financial institutions over alleged misconduct in the creation, marketing and sale of residential mortgage-backed securities (RMBS) are illegal or unconstitutional. Today's hearing focuses specifically on provisions contained in three of the five RMBS settlements, which allow the bank defendant to fulfill some of its settlement obligations by donating money to third party charitable efforts (such as foreclosure prevention). There has been significant criticism about this type of settlement provision.

The title of today's hearing is *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?* This question really has two parts. First, are the consumer relief provisions at issue legally permissible? As I shall describe, this is a settled question—yes, these types of settlement provisions are clearly allowed (and are indeed quite ubiquitous) under the Miscellaneous Receipts Act, which is the governing statute, so long as they meet two criteria. First, the settlement must be executed prior to an admission or finding of liability. Second, the federal government must not retain post-settlement control over the funds. If these two criteria are met, the federal government's control over the settlement funds is deemed to be so attenuated that it cannot be said to have "received" the money, and thus any concerns about bypassing the appropriations process are, at least from a legal perspective, inapplicable.

The second question that today's hearing implicitly asks is whether these types of settlement provisions—which allow banks to fulfill some of their settlement obligations by donating money to charities—should be permitted under current law. One of your colleagues, Rep. Goodlatte, has introduced a bill that would prohibit these types of charitable payment provisions in federal settlements. As I discuss, these charitable payment provisions serve many important public policy goals and have very little actual downside. A close analysis of these provisions indicates that the concerns raised by critics of charitable payment provisions are overstated. Moreover, the particular RMBS settlements that are the subject of today's hearing appear to be well designed, they serve a strong deterrent function, and they likely provide much greater benefits than could be gained through simply seeking civil penalties alone.

I. Background

The settlements at issue were negotiated pursuant to investigative findings made by the Residential Mortgage-Backed Securities Working Group, a collaborative effort involving resources committed by a wide variety of state and federal agencies, including the U.S. Department of Justice (DOJ), the U.S. Attorneys' Offices, the U.S. Securities & Exchange Commission, the U.S. Department of Housing and Urban Development, the Federal Bureau of

Investigation, and the New York Attorney General's Office.¹ There have been five settlements made related to wrongful or fraudulent disclosures and other misconduct around the creation, marketing and sale of RMBS, involving JP Morgan Chase, Bank of America, Citigroup, Morgan Stanley and Goldman Sachs (collectively, the RMBS settlements).

These settlements resolve a broad array of federal and state civil claims.² For example, the recent settlement with Goldman Sachs resolved claims by the States of California, Illinois and New York under their respective state laws; claims by the Federal Home Loan Bank of Chicago and the Federal Home Loan Bank of Des Moines under state securities laws; claims by the National Credit Union Administration Board under state securities laws; and claims by the federal government under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).

Four of the five RMBS settlements—those negotiated with Bank of America, Citigroup, Goldman Sachs and JP Morgan Chase—include “consumer relief” provisions that require the settling bank to direct funds to efforts to “remediate harms resulting from the alleged unlawful conduct” of the settling financial institution.³ The settling bank agrees to donate a total amount of money towards these consumer relief efforts, but is permitted to choose how it allocates this money among a broad array of different activities, including foreclosure prevention efforts (such as principal reductions or refinancing options for struggling homeowners), increased low- and moderate-income lending, greater resources for affordable rental housing, and community reinvestment and stabilization (also referred to as anti-blight) initiatives.

Three of these settlements with consumer relief provisions—those negotiated with Bank of America, Citigroup, and JP Morgan Chase—allow banks to satisfy some of their consumer relief obligations by donating money to private charitable groups, such as non-profit groups, legal aid organizations, community equity restoration funds, and HUD-approved housing counseling groups. It is these particular charitable payment provisions that are the focus of today's hearing. A number of commentators, including several members of Congress, have expressed concern that the federal government's negotiation of settlements, such as these RMBS settlements, that allow for payments to third parties bypasses the Congressional appropriations process.⁴ As you are all aware, Rep. Goodlatte, the Chairman of the House Judiciary Committee,

¹ See Press Release, Dept. of Justice, Residential Mortgage-Backed Securities (RMBS) Working Group Announces New Resources to Investigate RMBS Misconduct (May 24, 2012), available at <https://www.justice.gov/opa/pr/residential-mortgage-backed-securities-rmbs-working-group-announces-new-resources-investigate>.

² It is worth noting that these five settlements expressly exclude criminal liability. Thus, any analysis based on the settlement of criminal prosecutions (such as with non- or deferred prosecution agreements) is inapt for this particular hearing.

³ The lone exception to this is Morgan Stanley's settlement agreement.

⁴ See, e.g., Press Release, Congressman Bob Goodlatte, Goodlatte Introduces Bill to Halt DOJ Slush Fund Money to Activist Groups (Apr. 27, 2016), available at http://goodlatte.house.gov/press_releases/887 (describing DOJ settlements with third party payment provisions as a “pattern or practice” of “systematically subverting Congress's budget authority”); *Consumers Shortchanged? Oversight of the Justice Department's Mortgage Lending Settlement: Hearing Before the House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (2015) (statement of Paul J. Larkin, Jr.) (arguing that third party payment provisions “should not be included in a... civil settlement... unless an act of Congress expressly and specifically authorizes the government to impose any such obligation”) (hereinafter “Larkin Testimony”); U.S. Chamber of Commerce

has introduced legislation that would prohibit any settlement agreements made on behalf of the U.S. government that include “a term requiring that any donation be made to any person by any party (other than the United States).”⁵

As I mentioned earlier, today’s hearing really focuses on two discrete questions. First, are these RMBS settlements with charitable payment terms legally permissible? Second, should they be? I will address each of these questions in turn.

II. Charitable Payment Terms Are Clearly Permissible Under Current Law

The threshold question of today’s hearing is whether the RMBS settlement terms allowing banks to direct monies to third party charitable groups violate Congress’s appropriations powers. The very clear answer under current law is that they do not. Indeed, the House Judiciary Committee has implicitly acknowledged the legality of charitable payment terms by passing H.R. 5063 out of Committee. H.R. 5063, which would prohibit DOJ from negotiating settlements that included terms allowing for such charitable payment clauses, would not be necessary if this practice was impermissible under existing law.

The DOJ of course enjoys broad authority in deciding when and how to settle governmental claims. Since its creation in 1789, the office of Attorney General has been recognized as possessing plenary power over all legal affairs involving the United States (except for those matters in which Congress has expressly granted authority over such affairs to a specific agency).⁶ This plenary authority extends to the DOJ, and includes the power to compromise and settle litigation involving the federal government.⁷ In wielding this authority, DOJ has the duty to represent both the interests of any particular “client” agencies that are involved, but also the interests of the broader Executive Branch. This determination of whether and how to settle may be made “on the basis of national policies espoused by the Executive.”⁸ The only limitations on DOJ’s settlement authority are statutes that specifically and expressly relate to the litigating authority of the Attorney General (such as H.R. 5063’s proposed limitations on payments to third parties) and, more generally, Article II, § 3 of the Constitution, which imposes a duty on the President to faithfully execute the laws of the United States.⁹ Thus, at a high level, the RMBS settlements seem quite appropriate and consistent with the plenary authority over federal litigation granted to DOJ.

A. RMBS Settlements Are Permissible Under the Miscellaneous Receipts Act

A specific critique that has been raised by some commentators is that the charitable payment provisions of these RMBS settlements violate Congress’s appropriations and oversight

Institute for Legal Reform, *Enforcement Slush Funds: Funding Federal and State Agencies with Enforcement Proceeds* (Mar. 2015) (stating that these types of settlements “raise serious constitutional concerns under Article I, which grants to Congress—and to Congress alone—the power to control and direct spending from the public fisc”).

⁵ Stop Settlement Slush Funds Act of 2016 (H.R. 5063).

⁶ See Assistant Attorney General Theodore Olsen, Office of Legal Counsel, *The Attorney General’s Role as Chief Litigator for the United States*, Memorandum Opinion for the Attorney General, Jan. 4, 1982, at 47–48.

⁷ *Id.* at 49–51, 59–60.

⁸ *Id.* at 60 (citing *Smith v. United States*, 375 F.2d 243 (5th Cir.), cert. denied, 389 U.S. 841 (1967)).

⁹ *Id.* at 60.

authority. For example, my fellow witness, Dr. Paul Larkin, a Senior Legal Research Fellow at the conservative Heritage Foundation, has argued that settlement provisions containing charitable payment provisions are impermissible under both federal statutes and the Constitution because they constitute an appropriation and thus “circumvent the constitutional process for appropriating taxpayer dollars.”¹⁰ This claim, while perhaps rhetorically appealing, is inaccurate as a matter of law today.

As Dr. Larkin notes, the Constitution quite clearly establishes Congress’s exclusive power over the appropriations of new money.¹¹ But the President of course has always had broad authority in executing and enforcing the laws passed by Congress, and this has led to numerous instances, dating back to the origins of the Republic, in which the Executive Branch has taken actions that might be seen as encroaching on the Legislative Branch’s power over the purse.¹² In response, Congress has passed several laws specifically designed to limit executive encroachment on Congress’s appropriations authority. The most important of these, for the purposes of this hearing, is the Miscellaneous Receipts Act of 1849 (MRA), which requires that, unless expressly otherwise stated, “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury...”¹³

Whether or not a federal official actually receives any money is irrelevant. As the Office of Legal Counsel stated in 1980, as long as a federal agency could have accepted possession and retains discretion to direct the use of the money, it will be constructively found to have received money for purposes of the MRA.¹⁴ But OLC has also advised the Executive Branch that settlement proceeds can be directed to private charitable groups, so long as two criteria are met: (1) the settlement is executed before an admission or finding of liability in favor of the federal government; and (2) the federal government does not retain post-settlement control over the disposition or management of the funds or any projects carried out under the settlement, except for ensuring that the parties comply with the settlement.¹⁵ As long as these two criteria are met, “then the governmental control over settlement funds is so attenuated that the Government cannot be said to be ‘receiving money for the Government’” and thus MRA (along with other principles of appropriations oversight) would not apply.¹⁶

¹⁰ Larkin Testimony, *supra* note 4, at 8.

¹¹ U.S. CONST. art. I, § 9, cl. 7 (“[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law...”).

¹² See Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 338-42 (2009).

¹³ Act of Mar. 3, 1849, ch. 110, 9 Stat. 398, 398 (codified as amended at 31 U.S.C. § 3302(b) (2012)).

¹⁴ Deputy Assistant Attorney General Larry A. Hammond, Office of Legal Counsel, Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General, Memorandum Opinion for the Associate Attorney General, June 13, 1980, at 688.

¹⁵ Deputy Assistant Attorney General C. Kevin Marshall, Office of Legal Counsel, *Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement*, Memorandum Opinion for the General Counsel United States Trade Representative, Aug. 22, 2006, at 8.

¹⁶ *Id.* At least one court has upheld this reasoning, finding that settlement agreements in which the defendants does not admit liability are not prohibited from including terms requiring them to make payments to private third parties. See *Sierra Club v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1355 (1990).

Based on this legal framework, the federal government has crafted a wide variety of settlements with terms providing for payments to private charitable groups. Indeed, the Environmental Protection Agency has expressly encouraged the use of such provisions in settlements (which it calls Supplemental Environmental Projects or SEPs), stating that enforcement staff should “consider every opportunity to include more environmental significant SEPs wherever possible.”¹⁷

Importantly, the Comptroller General, which represents Congress, appears to tacitly agree with this reasoning. As the Comptroller General has stated, the federal government’s “discretionary authority to ‘compromise, or remit, with or without conditions,’ civil penalties... empowers it to adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator, but does not extend to remedies unrelated to the correction of the violation in question.”

In other words, in crafting settlements, the federal government may “adjust” penalties on a case-by-case basis, so long as the remedies are not “unrelated to the correction of the violation in question.”¹⁸ As Andrew Spalding, a law professor at University of Richmond School of Law, has described, this logic is essentially a concession that government settlement terms calling for payments to charitable or community service groups “could actually fall within the Executive’s legitimate enforcement and not run afoul of either Congress’s Article I power of the purse or the MRA.”¹⁹

The RMBS settlements at issue plainly fall within the criteria outlined by OLC. They do not include a finding of liability on the part of the banks, and the federal government does not maintain post-settlement control over the disposition or management of the funds. Indeed, the banks themselves maintain full control over how they can disburse the funds under the consumer relief provisions, and there is no requirement that they donate any funds to third parties under the terms of these agreements. They appear to be clearly permissible under current law.

B. Charitable Payment Terms Are Valid as Settlements of State Claims

It is also worth noting that the three RMBS settlements at issue involved state government plaintiffs. As the OLC noted in 1980, in cases where there are both federal and state plaintiffs, there is no reason why the MRA must be implicated, since any potentially offending settlement term can be attributed to the state sovereign, which has its own claims upon which to base any settlement agreement.²⁰

III. Charitable Payment Terms Are Desirable From a Public Policy Perspective

Having dispensed with the first question—are the charitable payment provisions of the RMBS settlements legally permissible—let us move on to the second question—should these

¹⁷ Assistant Administrator John Peter Suarez, Environmental Protection Agency, *Guidance Concerning the Use of Third Parties in the Performance of Supplemental Environmental Projects (SEPs) and the Aggregation of SEP Funds*, Memorandum, Dec. 15, 2003.

¹⁸ U.S. Envtl. Prot. Agency, B-247155.2, 1993 WL 798227 (Comp. Gen. Mar. 1, 1993).

¹⁹ Andrew Brady Spalding, *Restorative Justice for Multinational Corporations*, 76 OHIO ST. L. J. 357, 394-95 (2015).

²⁰ Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General, *supra* note 14 at 688-89.

types of settlement terms continue to be allowed, or should Congress take action to prohibit them? Despite the concerns raised by my fellow witnesses, I think that the charitable payment provisions in the RMBS settlements can serve a valuable purpose and that the federal government should continue to be given broad discretion in fashioning settlements that are best tailored to the particular facts of a party's alleged misconduct.

It is undeniable that charitable payment provisions can serve a valuable purpose. Indeed, even Dr. Larkin, who is the leading critic of these provisions, has acknowledged this point:

The government and a defendant could find third-party contribution requirements mutually valuable. Requiring a target to make a charitable contribution enables the government to evade statutory limitations on the amount of fines that could be imposed if the prosecution believes that the statutory cap provides an insufficient penalty. The government may find that such conditions have considerable public relations value, particularly in the community benefitting from them. A corporate target also might jump at the opportunity to engage in a charitable endeavor... Moreover, the contribution may have important public relations value for the corporation as well.²¹

As Dr. Larkin's statement describes, charitable payment provisions can be mutually beneficial for both the government and the private defendant. From the government's perspective, these provisions can effectively increase the total amount of the settlement by a large amount and also benefit injured parties. From the defendant's perspective, charitable payment provisions can provide significant public relations and community outreach benefits. Moreover, to the extent that the federal government may, but is not required to, negotiate charitable payment terms as part of its settlements, this provides it with additional flexibility to help negotiate, as one of our current Presidential candidates likes to say, the best deal. For example, DOJ negotiated a settlement with Morgan Stanley that did not contain any consumer relief provisions. Presumably, DOJ made the determination that, due to the specific facts and negotiating posture around that settlement, it was not in the best interests of the federal government to seek charitable payment provisions in its settlement with Morgan Stanley.

A. Charitable Payment Provisions Are Unobjectionable on Policy Grounds

So why would anyone oppose these provisions which help the public good and can be beneficial to all involved parties? I have come across several public policy objections to charitable payment provisions in federal settlements, but none of them appear to be particularly problematic, as I describe.

1. Charitable Payment Provisions Do Not Take Money From the Public Fisc

One objection is that such third party payment provisions potentially redirect money away from the federal treasury. As Dr. Larkin has stated this point, "[a]ny sum that the government demands that a corporation hand over to a private party is money that the corporation would otherwise pay into the federal treasury." But as Dr. Larkin himself notes, the federal government is often bound by statutory limitations on the amount of civil penalties it can seek. Thus, it is incorrect to assume that each dollar of charitable payment secured in a

²¹ Larkin Testimony, *supra* note 4, at 6.

settlement is a dollar that could have been secured in civil fines. For example, one can imagine a situation in which DOJ was constrained by statutory caps from seeking more than \$100 million in civil penalties, due to statutory limitations. The company may be willing, for various reasons, to accept a slightly adjusted civil penalty—say \$90 million—and in return provide an additional \$90 million in charitable donations aimed at remediating its wrongful conduct. In such a scenario, the overall size of the settlement would be far greater—and thus, far more beneficial to the federal government—than the alternative of merely seeking civil penalties.

Indeed, the RMBS settlements appear to provide an illustration of this type of scenario. The DOJ's primary federal claims in each of the RMBS settlements were claims of FIRREA violations. Penalties for FIRREA violations are capped at \$1 million.²² Thus, it is not clear that DOJ could have procured much more in civil penalties than it received from the RMBS settlements, even if it had litigated these cases and won, due to FIRREA's statutory cap on civil penalties. The charitable payment provisions appear to have allowed DOJ to procure much more than it would have been able to get if it had been limited to civil penalties. The consumer relief provisions negotiated by DOJ were quite substantial in size, totaling many billions of dollars. It seems likely that in the absence of any charitable payment provisions, the total effective amount paid by the banks would have been many billions of dollars lower.

2. Charitable Payment Provisions Are Consistent With the Policy Rationale Behind Civil Penalties

Another criticism of charitable payment provisions is that they undermine the public policy purposes behind civil penalty schemes, insofar as they do not compensate actual victims of the alleged misconduct, but direct the money towards uninjured third parties (with the goal of helping victims). This critique, which has been expressed by Dr. Larkin²³ and Rep. Goodlatte,²⁴ among others, seems to be implicitly rooted in a restitutionary theory of civil penalties. For example, Rep. Goodlatte has stated that “[t]he purpose of DOJ enforcement actions should be punishment and redress to actual victims.”²⁵

But the assumption underlying this view is incorrect. The penalties sought in governmental litigation (such as DOJ actions) are generally not based on a theory of restitutionary or restorative justice, but rather are based on two different but overlapping objections—deterrence and general compensation to society.²⁶ As the prominent administrative law scholar Colin Diver has described, “[b]y definition, a civil money penalty does not serve a ‘specific’ compensatory function” of redressing the harms done to the victim of a particular

²² 12 U.S.C. 1833a(b)(1).

²³ Larkin Testimony, *supra* note 4, at 7-8 (arguing that “the practice of required third-party contributions is inconsistent with the federal laws that supply financial assistance to the victims of crime”).

²⁴ Press Release, Congressman Bob Goodlatte, Goodlatte Praises Committee Passage of Bill to Stop Obama's Settlement Slush Fund (May 11, 2016), available at http://goodlatte.house.gov/press_releases/894 (stating that settlement funds should go to either the federal government or to injured victims).

²⁵ *Id.*

²⁶ See Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1455-56 (1979). Indeed, it is worth noting that principles of restorative justice may be particularly inapt for civil penalties, where there is often not a particular identifiable “victim” other than the general public.

wrong, since this is the role of remedies in private causes of action.²⁷ Rather, the compensatory function of civil money penalties is “to compensate ‘society’ at large for harm that it has suffered at the hands of a violator.”²⁸ While there have been some recent efforts to try to recast civil money penalties as implements of restorative justice,²⁹ the general consensus is still that these penalties are primarily grounded in principles of deterrence and general compensation.³⁰

As described in the previous section, charitable payment provisions can significantly increase the total amount of the settlement, and this is beneficial for both the goals of deterrence and general compensation. Obviously, a larger amount paid by the alleged wrongdoer would have a larger deterrent effect on other potential wrongdoers. And, to the extent that this money is used to remediate some of the effects of the wrongdoing, this can increase the general compensation (and for that matter, any restorative) principles behind civil penalties. The RMBS settlements appear to be good examples of this point. It appears that the banks agreed to pay far more because of these consumer relief provisions than they would have otherwise. Thus, the consumer relief provisions were consistent with and for that matter enhanced the public policy goals behind civil penalty authority.

B. Concerns About Cronyism Are Overstated and Can Be Addressed Through Intermediate Steps

Another concern that has been raised about charitable payment provisions is that they create a potential for political cronyism, insofar as DOJ and other litigating federal agencies can require payments be made to political allies. In my view, this concern is valid but greatly overstated. Theoretically, the problem of DOJ settlements being used to create backdoor “slush funds,” as the RMBS settlements have been sensationally characterized, is a huge one. But in reality, there is simply no evidence that this is an actual concern.

As I discussed previously in Part I, in order to be in compliance with the Miscellaneous Receipts Act, any charitable payment provision that is part of a government settlement must be designed such that the federal government does not retain post-settlement control over the disposition or management of the funds. This alone would mitigate many of the potential self-dealing and “slush fund” problems that have been described by critics of the RMBS settlements. But government settlements typically also comply with several other criteria, that have been put in place specifically to mitigate concerns about cronyism and favoritism. For example, charitable payment terms are required to be consistent with the provisions of the underlying statute(s), and they must advance at least one of the objectives of the underlying statute(s) that is the basis of the enforcement or litigation action.³¹ In other words, there must be a nexus between the charitable payment and the violation.³²

²⁷ *Id.*

²⁸ *Id.*

²⁹ See, e.g., Spaulding, *Restorative Justice for Multinational Corporations*, *supra* note 19.

³⁰ Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. POL. REV. 453, 460-61 (2010).

³¹ See Environmental Protection Agency website, *Supplemental Environmental Projects*, available at <https://www.epa.gov/enforcement/supplemental-environmental-projects-seps#policy>.

³² See Kris Sighe, *Organizational Community Service in Environmental Crimes Cases*, in UNITED STATES ATTORNEYS' BULLETIN (2012).

The charitable payment terms of the RMBS settlements seem particularly unobjectionable in this regard. The banks can choose to donate to any one (or more) of hundreds of charities and community groups. Some conservative commentators, including Rep. Goodlatte, have noted that these options include a number of community groups that are seen as ideologically aligned with liberals, but they notably omit that there are many conservative groups represented in this regard as well. Moreover, this criticism also ignores the fact that these particular charities are also among the most effective at delivering information and aid to many of the low- and moderate-income homeowners who were hardest hit by the mortgage crisis. NCRC or La Raza may or may not be ideologically aligned with the Obama administration, but it is fairly hard to argue that they are not better positioned than most organizations at reaching out to distressed homeowners. The types of services that these organizations offer, including legal aid and housing counseling, have been empirically proven to be among the most effective means of preventing preventable foreclosures.³³

Finally, it is important to recognize that there are already laws and rules in place designed to prevent exactly the type of self-dealing that has been alleged by Rep. Goodlatte and others. The non-profit groups eligible to receive donations from banks under the terms of the RMBS settlements are subject to rigorous oversight to ensure that the money goes to its intended purposes—foreclosure prevention, anti-blight, and community stabilization—rather than to other, potentially nefarious ends. In the absence of any actual evidence that there has been any wrongdoing, it is hard to argue that there has been any real problem of political cronyisms or self-dealing.

C. Charitable Payment Provisions in the RMBS Settlements Are Well Designed

I would like to conclude my testimony by pointing out how well designed the RMBS settlements actually have been. In case we have all forgotten, we are only now emerging from the worst mortgage and housing crisis of our lifetimes, which was caused in large part by the wrongful conduct of RMBS sponsors and underwriters, which helped to create a massive housing bubble followed by an even larger housing bust. Millions of Americans have not yet recovered from this housing crisis, and run the risk of being left behind. To the extent that DOJ was able to negotiate sizable settlements that exceeded all but the most wildly optimistic estimates, which help the struggling homeowners and communities most affected by the crisis, we should be applauding these actions. This is particularly true, given that they were designed in such a careful and judicious way so as to clearly address and avoid the various concerns raised by my fellow panelists.

The charitable payment provisions of the RMBS settlements were designed to give banks significant flexibility in how they might provide consumer relief, by effectively providing them with a broad menu of options among which they could choose. Such flexibility was likely essential to procuring such large consumer relief provisions.

³³ See *Consumers Shortchanged? Oversight of the Justice Department's Mortgage Lending Settlements: Hearing Before the House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (2015) (statement of Alan M. White, Jr.).

I thank you again for your time, and for the opportunity to testify here today on this critically important topic. I look forward to your questions.

**Hearing Before
The United States House of Representatives
Committee on Financial Services
Subcommittee on Oversight and Investigations:**

**“Settling the Question: Did Bank Settlement Agreements Subvert
Congressional Appropriations Powers?”**

May 19th, 2016

**Prepared Statement
of**

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Mr. Chairman, Ranking Member Green, Members of the Committee: I thank you for the opportunity to express my views about these bank settlements and whether they circumvent Congress’s appropriations powers.

The Appropriations Clause in Constitutional Context

The Constitution provides: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”¹ This is not a mere technical provision but rather a fundamental element of constitutional structure.

It sounds, first, in democracy, reflecting the deep constitutional principle that the power of the purse should be vested in the most representative branch. Every dollar appropriated from the Treasury may represent a dollar of taxes, and so this principle applies to both taxing and spending. Indeed, the taxing and spending powers are the first ones granted to Congress in Article I, section 8, and the first runs directly into the second: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”² Taxing and spending are the twin powers of the purse, and “[t]he legislature . . . commands the purse.”³ Moreover, the House of Representatives is vested with a special role over revenues: “All Bills for raising Revenue shall originate in the House of Representatives”⁴ And the reason is clear: House Members are “more

¹ U.S. CONST. art. I, § 9, cl. 7.

² *Id.* art. I, § 8, cl. 1.

³ THE FEDERALIST NO. 78 (Alexander Hamilton).

⁴ U.S. CONST. art. I, § 7, cl. 1.

immediately the representatives of the people, and it was a maxim that the people ought to hold the purse-strings.”⁵

The structural role of the Appropriations Clause sounds not only in democracy but also in separation of powers. Short of impeachment, the power of the purse is Congress’s most potent check on executive overreach. If the President could draw money from the Treasury without an appropriation—or otherwise evade the Appropriations Clause—power would shift decisively from Congress to the Executive, and the careful constitutional separation of powers would be thrown into disequilibrium. So, as Alexander Hamilton explained, the Executive Branch is limited to “application and disbursement of the public moneys *in conformity to the general appropriations of the legislature*.”⁶

The Framers placed great stock in the appropriations power as a check on the Executive Branch, because, in Great Britain, it had proven so effective for restraining the king. As James Madison explained:

The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.⁷

To see just how essential is this check on executive power, consider some of the other major congressional checks on executive power, and how they have fared in the current Administration. As a general matter, the President cannot appoint principal officers without the advice and consent of the Senate.⁸ But, as the Supreme Court

⁵ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 233 (Max Farrand ed., Yale Univ. Press 1911) (June 13, 1787) (statement of Elbridge Gerry).

⁶ THE FEDERALIST NO. 72 (Alexander Hamilton) (emphasis added).

⁷ THE FEDERALIST NO. 58 (James Madison).

⁸ U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as

unanimously held, President Obama violated this provision by attempting recess appointments when the Senate itself said that it was not in recess.⁹ As a general matter, the President cannot wage war without a congressional authorization to use military force.¹⁰ Yet this President has waged war against ISIS for almost two years without one.¹¹ Treaties require the advice and consent of the Senate,¹² yet this President has entered into the most consequential international agreement in recent memory without going through the treaty process.¹³ The President is obliged to “take Care that the Laws

they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

⁹ See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); see also Nicholas Quinn Rosenkranz, *Linda Greenhouse and Noel Canning*, THE VOLOKH CONSPIRACY (Sept. 7, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/07/linda-greenhouse-on-noel-canning/>.

¹⁰ See U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . .”); see also War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2012) (requiring the President to report to Congress the introduction of armed forces into hostilities, and to terminate the use of armed forces if Congress does not authorize such use within sixty days).

¹¹ See, e.g., Bruce Ackerman, *The War Against ISIS Is Unconstitutional*, LAWFARE (May 5, 2016, 2:10 PM), <https://www.lawfareblog.com/war-against-isis-unconstitutional>; Jack Goldsmith, *Obama’s Breathtaking Expansion of a President’s Power to Make War*, TIME (Sept. 11, 2014), <http://time.com/3326689/obama-isis-war-powers-bush/> (“[Future historians] will puzzle over how Barack Obama the prudent war-powers constitutionalist transformed into a matchless war-powers unilateralist. And they will wonder why he claimed to ‘welcome congressional support’ for his new military initiative against the Islamic State but did not insist on it in order to ensure clear political and legal legitimacy for the tough battle that promised to consume his last two years in office and define his presidency. . . . [Obama’s] announcement that he will expand the use of military force against the Islamic State without the need for new congressional consent marks his latest adventure in unilateralism and cements an astonishing legacy of expanding presidential war powers. . . . The President’s gambit is, at bottom, presidential unilateralism masquerading as implausible statutory interpretation.”).

¹² U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

¹³ See, e.g., Charles Krauthammer, *How Obama Swindled Americans on Iran*, NATIONAL REVIEW (Sept. 10, 2015, 8:00 PM), <http://www.nationalreview.com/article/423845/how-obama-swindled-americans-iran-charles-krauthammer> (“As a matter of constitutional decency, the president should have submitted [the Iran deal] to Congress first. And submitted it as a treaty. Which it obviously is. No international agreement in a generation matches this one in strategic significance and geopolitical gravity.”); David B. Rivkin Jr. & Lee A. Casey, *The Lawless Underpinnings of the Iran Nuclear Deal*, THE WALL STREET JOURNAL (July 26, 2015, 6:32 PM), <http://www.wsj.com/articles/the-lawless-underpinnings-of-the-iran-nuclear-deal-1437949928>.

be faithfully executed,”¹⁴ but I have testified before the House Judiciary Committee that President Obama has flouted his obligation to enforce the immigration laws,¹⁵ and Texas just last month presented the same argument to the Supreme Court.¹⁶

It is in this context that the Appropriations Clause question arises. A willful President may evade many of the constitutional checks on his power. But Congress’s appropriations power is the ultimate backstop. The constitutional rule is clear, and explicit, and absolute: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”¹⁷ Everything that government does costs money, and so the power of the purse should successfully constrain the executive branch even if all else fails. Moreover, all negotiations between the President and Congress—even those that have nothing to do with appropriations—happen in the shadow of this fundamental power. “Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions.”¹⁸ At the end of the day, the President knows that Congress holds the purse strings, and every choice he makes is implicitly informed by this crucial structural fact.

Alas, a determined President may flout this provision too. Just last week, District Judge Rosemary M. Collyer of the U.S. District Court for the District of Columbia found that the Administration has paid billions of dollars to insurance companies under ObamaCare without an appropriation from Congress. She held, in no uncertain terms, that making these payments “without an appropriation . . . violates the Constitution.”¹⁹

Bank Settlement Payments To “Community Development” Organizations

Under these circumstances, then, it is fair to view certain provisions of these bank settlements with a skeptical eye. The provisions at issue provide for payments from the banks to various third-party organizations that were neither parties to the case nor victims of the alleged wrongdoing.²⁰ Many of these “community development” organizations seem to have only a tenuous connection to the gravamen of the complaint against the banks. Yet the banks are to make payments directly to these organizations—payments that presumably could have been directed to the U.S. Treasury instead.

¹⁴ U.S. CONST. art. II, § 3.

¹⁵ See *The President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 26–32 (2013) (testimony and prepared statement of Nicholas Quinn Rosenkranz, Professor of Law, Georgetown University Law Center and Senior Fellow in Constitutional Studies, Cato Institute).

¹⁶ See *United States v. Texas*, No. 15-674 (S. Ct. argued Apr. 18, 2016).

¹⁷ U.S. CONST. art. I, § 9, cl. 7.

¹⁸ THE FEDERALIST NO. 30 (Alexander Hamilton).

¹⁹ *House of Representatives v. Burwell*, No. 14-1967, 2016 WL 2750934, at *7 (D.D.C. May 12, 2016).

²⁰ See, e.g., *Holder Cut Left-Wing Groups in on \$17 Bil BoA Deal*, INVESTOR’S BUSINESS DAILY (Aug. 27, 2014, 6:43 PM), <http://www.investors.com/politics/editorials/holders-bank-of-america-settlement-includes-payoffs-to-democrat-groups/>.

These payments admittedly do not violate the literal terms of the Appropriations Clause. The Clause provides: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”²¹ Under the settlement provisions at issue, funds are paid directly from the banks to the third-party organizations. These funds were never actually in the Treasury, and so they are not literally “drawn from the Treasury” under the Appropriations Clause.

But if these provisions do not literally *violate* the Appropriations Clause, it is certainly fair to say that they *circumvent* the Clause. If the banks had paid this money to the United States—which is, after all, the plaintiff in these cases—then the money would have gone into the Treasury. And if, subsequently, the President or the Attorney General favored using this money to subsidize various “community development” organizations, they would have had to request an appropriation from Congress; doling out such money “without an appropriation . . . violates the Constitution,”²² as the President was reminded just last week. By providing for direct payment from the banks to the organizations, these settlement provisions evade the Appropriations Clause and cut Congress out of the loop.

Another way to put the point is that these settlement provisions embody two implicit decisions. The first is the value of the government’s claims against the banks: the predicted damages at trial, discounted by the odds of a verdict for the government. The responsibility to make this judgment inheres in the Attorney General’s litigation authority,²³ and it is well within the expertise of the Department of Justice. The second implicit decision is the best possible *use* of these funds—whether to subsidize insurance companies under ObamaCare,²⁴ to subsidize various “community development” organizations, to pay down the \$19,000,000,000,000 national debt, or to do any number of other things. This second decision is paradigmatically legislative, and it is exactly the sort of decision that the Appropriations Clause reserves to Congress. If the funds were first paid into the Treasury and then appropriated out again, these two decisions would be separated: the Attorney General would make the first and Congress would make the second. But by providing for direct payment from the banks to third-party organizations, the Administration effectively combined these two decisions and arrogated them both to itself.

Again, the structural role of the Appropriations Clause sounds in democracy (ensuring that spending decisions are made by the most representative branch) and in separation of powers (as a fundamental backstop against an overreaching executive branch). These settlement provisions evade the Appropriations Clause and thus subvert

²¹ U.S. CONST. art. I, § 9, cl. 7.

²² *House of Representatives*, 2016 WL 2750934, at *7.

²³ See 28 U.S.C. § 516 (2012) (granting the Attorney General authority over “the conduct of litigation” for the United States); *Compromise of Claims Under Sections 3469 and 3229 of the Revised Statutes—Power of the Attorney General in Matters of Compromise*, 38 Op. Att’y Gen. 98 (1934).

²⁴ *Cf. House of Representatives*, 2016 WL 2750934.

these structural principles.

Settlement Payments Contingent on Subsequent Acts of Congress

Finally, it should be noted that at least one of these settlement provisions includes an additional problematic feature. Under the Bank of America Settlement Agreement, certain funds are designated for “the payment of consumer tax liability as a result of consumer relief”²⁵ unless and until, inter alia, “any extension to the Mortgage Forgiveness Debt Relief Act of 2007 or its equivalent becomes effective through the end of 2015,”²⁶ at which point remaining designated funds would go to NeighborWorks America and IOLTA.²⁷ This provision is doubly problematic, because it is *contingent on a future Act of Congress*, and it thus has the pernicious effect of changing the political calculus for extending the Act.

The altered incentives would affect different actors in different ways. Taxpayers who would otherwise stand to gain from extension of the Act are made indifferent to it, because their taxes will be paid by Bank of America in any case. Conversely, IOLTA, which might otherwise have no particular interest in the Mortgage Debt Relief Act, suddenly stands to gain tens of millions of dollars from its extension. And for Congress itself, an appropriation that is ostensibly for taxpayer relief is partially converted, in effect, into an appropriation for IOLTA and NeighborWorks.

Quite apart from the evasion of the Appropriations Clause, it is arguably a violation of the separation of powers for the Executive Branch to attach either a “tax” or a “bonus” to a legislative act in this way. To see the point, imagine a settlement provision that required the Bank of America to pay an additional \$100 million to NeighborWorks if the Senate fails to confirm Merrick Garland to the U.S. Supreme Court. Presumably, the President cannot impose this sort of “tax” on an exclusive Senate prerogative, any more than Congress can “tax” presidential pardons.²⁸ Above and beyond the Appropriations Clause problem, a settlement payment that is contingent on a future Act of Congress would seem to run afoul of this separation-of-powers principle.

Conclusion

²⁵ *Settlement Agreement Between Bank of America and the United States*, DEP’T OF JUSTICE, <https://www.justice.gov/iso/opa/resources/3392014829141150385241.pdf> (last visited May 19, 2016).

²⁶ *Settlement Agreement Between Bank of America and the United States: Annex 3*, DEP’T OF JUSTICE, <https://www.justice.gov/iso/opa/resources/4922014829141329620708.pdf> (last visited May 19, 2016).

²⁷ *See id.*

²⁸ *See United States v. Klein*, 80 U.S. 128, 147–48 (1871) (“It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit. . . . Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law.”).

In short, these settlement provisions do not violate the literal terms of the Appropriations Clause, but they clearly circumvent its text and subvert its function, thus undermining the separation of powers. Congress has often found it necessary to protect against circumventions of this Clause, and it has done so with landmark legislation like the Antideficiency Act²⁹ and the Miscellaneous Receipts Act.³⁰ The novel innovation in these settlement agreements likewise necessitates a legislative response. I would support legislation along the lines of the proposed Stop Settlement Slush Funds Act of 2016, and I would be happy to work with the Committee to further refine this bill.

²⁹ The Antideficiency Act, Pub. L. No. 97–258, 96 Stat. 923 (1982).

³⁰ 31 U.S.C. § 3302(b) (2012).

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May 21, 2016

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20510

The Honorable Jeb Hensarling
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20510

Re: Mortgage Lending Settlements of the Department of Justice With Banks

Dear Chairman Goodlatte and Chairman Hensarling:

On February 11, 2015, I sent you a letter that examined the settlements the United States Department of Justice (DOJ) had entered into with JP Morgan Chase, Citigroup and Bank of America with respect to their handling of disputes over residential mortgage-backed securities (RMBSs). Since that time the DOJ has entered into two other settlements with Morgan Stanley and Goldman Sachs. These settlements allowed the banks to reduce the amount of the payments into the Treasury by instead making contributions of millions of dollars to designated community groups for supposed third-party charitable purposes. In exchange for the contributions the banks received a reduction in their liabilities for various assorted legal violations. The question is whether these settlements subverted the exclusive power that Congress has over the appropriation process. Let me repeat once again that I am writing this letter solely on my own behalf. I have no client interest in this matter. As I noted in my earlier letter, I have done extensive work on many of these issues, and remain (for identification purposes only) the Laurence A. Tisch Professor of Law, New York University School of Law, the Peter and Kirsten Bedford Senior Fellow, Hoover Institution, and the James Parker Hall Distinguished Professor of law emeritus and senior lecturer at the University of Chicago.

In my February letter, I concluded that this redirection of Treasury-bound funds to other private organizations was an illegal and unconstitutional appropriation of federal funds to private groups. The argument made by the DOJ and other proponents of these settlements—namely, that these settlements were made in good faith with banks that were represented by counsel—was wholly

beside the point. It was completely in the interest of the banks to reduce their financial liability by whatever means were available to them. Their acceptance of the offer in no way gives the DOJ the authority to make that offer, when the DOJ knows full well that the banks are under a duty to their own shareholders to take the best offer available to them.

The purpose of this letter is to extend my earlier analysis by reviewing the Miscellaneous Receipts Act (MRA), 31 U.S.C. § 3302, which governs the disposition of funds paid into the United States Treasury. Since the time of my earlier analysis, David K. Min, Assistant Professor, has offered his own testimony supporting the position of the DOJ on this fundamental issue.¹ In his testimony he comments extensively on the testimony of Paul Larkin² as well as on other sources. Examining this body of work only reinforces the conclusion I reached in my February 11, 2015 letter. The DOJ settlement practices are illegal and pose a serious threat to the sound administration of justice.

By way of setting the stage for this analysis, it is useful to refer briefly to the important recent decision of Judge Rosemary Collyer, in *United States House of Representatives v. Burwell* (*HR v. Burwell*), which held unconstitutional the payments made by Treasury under Section 1402 of the Affordable Care to insurance companies that waived deductibles and co-pays and provided other benefits to potential insureds to induce them to enroll in ACA-approved health care plans. Judge Collyer held that the Affordable Care Act did authorize a program for such reimbursements, but did not fund them, so it was unconstitutional for Treasury to make those payments to any health care insurer in the absence of some explicit appropriation by Congress for that purpose. In her view, the interpretive question was clearly a matter of law, so the government did not receive any deference in its interpretation of Congress' appropriation power. I take that same position here. The language of the MRA forbids the diversion of funds by any executive branch officials from the Treasury to any private organization.

The MRA provides, in relevant part, as follows:

¹ Written Testimony of David K. Min, Assistant Professor of Law, University of California Irvine School of Law, Before the Subcommittee on Oversight and Investigations of the United States House of Representatives Committee on Financial Services, *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriation Powers?*, Thursday, May 19, 2016 9:15 am, 2128 Rayburn House Office Building, available at <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-dmin-20160519.pdf>

² Written Testimony of Paul J. Larkin, PhD, Senior Research Fellow, The Heritage Foundation, Before the Subcommittee on Oversight and Investigations of the United States House of Representatives Committee on Financial Services, *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriation Powers?*, presented on February 12, 2015, available at <http://www.heritage.org/research/testimony/2015/consumers-shortchanged-oversight-of-the-justice-departments-mortgage-lending-settlements>,

(a) Except as provided by another law, an official or agent of the United States Government having custody or possession of public money shall keep the money safe without—

- (1) lending the money;
- (2) using the money;
- (3) depositing the money in a bank; and
- (4) exchanging the money for other amounts.

(b) Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.

The clear intention of this provision is to make sure that money owed to the Treasury is promptly put into the general fund in order to prevent its diversion for purposes Congress has not authorized. The immediate deposit of these funds into the Treasury achieves that result by preventing any money from being used, lent, deposited, or exchanged by some inferior government official in transactions that have not been authorized by law. The American system of constitutional law contains key principles of separation of powers and checks and balances. Under these principles, any expenditure must be authorized by Congress, which *alone* can set the overall parameters under which the money is spent. It is for Congress to say how much money should be spent and on what purposes.

As Judge Collyer's recent decision in *HR v. Burwell* stresses, the Constitution invests *all* legislative power in the Congress of the United States. U.S. Const. art. I, § 1. Among the powers included in that delegation to Congress is the power to appropriate funds for specific government purposes. "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." *Id.* at § 9, cl. 7. In most cases the revenues received by the United States are from taxation, and these provisions ensure that the taxes cannot be diverted to enterprises that have not been authorized by the Congress. It would be a massive circumvention of the constitutional scheme if any official in the executive branch, from the President on down, could evade this structural limitation on government power by the simple expedient of diverting the money to some other payee *before* it had been deposited.

By way of comparison, the situation here is no different from what would arise if an individual taxpayer, who was owed payment for services, could either reduce or avoid his income tax liability by diverting moneys owed him to some other person or entity with either lower or no tax liability. *Lucas v. Earl*, 281 U.S. 111 (1930), held that income was taxed to the party who earned it, and could not be diverted to another person by any prearranged contract directing that payment be

made to his wife instead. Justice Holmes sets out the futility of those anticipatory arrangements as follows:

[T]his case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing act. There is no doubt that the statute could tax salaries to those who earned them, and provide that the tax could not be escaped by anticipatory arrangements and contracts, however skillfully devised, to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us, and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew. 281 U.S. at 114-115.

It is just that logic that applies to the existing situation. No official in the executive branch should be allowed to defeat the MRA by diverting Treasury funds through, as Holmes observed, any “anticipatory arrangement, however skillfully devised[.]” Yet this is precisely what the DOJ has done under these bank settlements. DOJ’s pattern of evasion is stunningly simple, but should nonetheless be wholly forbidden. The DOJ enters into negotiations with a bank it suspects of improper behavior in connection with issuing or otherwise handling RMBS. It then tells the bank prior to settlement that it will reduce the total amount of money it will demand so long as the bank agrees in advance to provide funds to some executive branch-approved organization that will provide charitable services to individuals who are in personal distress with their own financial situation.

The arrangements here are suspect for two clear reasons. First, the defalcations that DOJ challenges are not in the primary lending market, but, as Professor Min notes, “over the alleged misconduct in the creation, marketing, and sale of residential mortgage-backed securities.” Min, Testimony at 1. In simple terms, the banks were charged with misconduct in the securitization of residential home mortgages. They were not charged with any misconduct in connection with the origination of any of these loans. There is therefore no more reason to divert the money to these organizations and their beneficiaries than there is to any other individuals who were in no way hurt by the asserted wrongs of the bank. Second, the DOJ often suggests that the money be paid to organizations that Congress has refused to fund or has already provided funding by explicit appropriations. As Chairmen Hensarling and Goodlatte noted in their November 25, 2014, letter to then U.S. Attorney General Eric H. Holder Jr., Citigroup was required to make a minimum of \$10 million payment to HUD-approved “housing counseling agencies,” which include La Raza and NeighborWorks. It is worth adding that HUD is part of the Obama administration, so that close coordination between two parts of the executive branch is to be presumed. It is not the case that these settlements would allow the banks to make their contributions to the American Cancer Society.

Looking at the settlement as a whole therefore, it seems clear that these provisions are intended to divert money from Treasury to causes that Congress already funded, may not have approved, or may have directly opposed. In order to justify this questionable result, Professor Min insists in his testimony (at page 1) that these settlements are proper so long as two conditions are satisfied:

First, the settlement must be executed prior to an admission or finding of liability. Second, the federal government must not retain post-settlement control over the funds. If these two criteria are met, the federal government's control over the settlement funds is deemed to be so attenuated that it cannot be said to have "received" the money, and thus any concerns about bypassing the appropriations process are, at least from a legal perspective, inapplicable.

Min's analysis, however, is fatally flawed because it renders wholly useless all the protections that the MRA affords to the public treasury. The first point dealing with the pre-liability timing of the settlement offers no protection against any form of collusive behavior. It simply provides a roadmap whereby the DOJ and the target bank first agree on a settlement and then conveniently announce that there is at that time no determination of liability. Both parties to the deal have every incentive to agree to that result, which can be done each and every time the parties wish to settle.

The second requirement is both ambiguous and irrelevant. It is ambiguous because the condition that the government "must not retain post-settlement control over the funds" does not give the settling bank full and complete discretion on where to pay the money in question. So long as the banks are required to pick organizations from some approved HUD list, the government has retained all the control it needs to steer the money into its intended hands, even though the parties for whose benefit the moneys are ultimately paid are not in any sense victims of the wrongful conduct for which the banks were sued. The point is also irrelevant, for even if the banks had *carte blanche* on how to spend the funds, there is no explanation for why they, and not the Congress, should determine who receives the money.

In the end, therefore, these two supposed conditions impose *zero* constraint on what the DOJ can do to direct the expenditure of money even without any appropriation by Congress. It is just wrong for Professor Min to assert that the control of DOJ over these funds is so "attenuated" that the entire process should not be treated as "receipt" of the funds in question. Exactly the opposite is true. The control that DOJ has in the design of the settlement and the distribution of the funds is in fact complete, such that the practice in this case manifestly violates the MRA even if it meets the two conditions that Min sets out.

Professor Min seeks to evade these arguments by correctly noting that "DOJ of course enjoys broad authority in deciding when and how to settle governmental

claims.” Min, Testimony at 3. The point is surely true, for when the government faces the risk of defeat and the cost of litigation, it is always entitled to settle a claim in ways it thinks will result in the highest net benefit to the United States. This authority is, as Professor Min notes, “broad.” But it is by no means absolute. In ordinary litigation the DOJ always has to act in good faith in its effort to provide maximum benefit to the United States. It follows therefore that the United States cannot enter into collusive settlements that allow private parties to do far better than the government’s own evaluation concludes they should be able to. The DOJ may well conclude that an uncertain claim for \$1,000,000 has between a 40 and 60 percent chance of success. If it then decides to settle the claim for \$100,000, or ten percent of face value, it is as though it has made an illicit appropriation of somewhere between \$300,000 and \$500,000 to the party with whom it has settled. It is in order to guard against this risk that ample authority exists to review settlements.

Professor Todd David Peterson explored this risk in his article, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU LAW REV. 327 (2009), available at <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2483&context=lawreview>. His article addresses how “the executive branch has sought ways to circumvent congressional control over the federal purse and achieve its own ends outside of the will of Congress.” *Id.* at 330. It is worth quoting his conclusions in full:

First, when the Department is enforcing a federal statute, it may propose a settlement that requires the defendant to perform certain actions that benefit the Department or other federal agency. These actions may not violate the Miscellaneous Receipts Act because there are technically not “receipts,” but it circumvents Congress’s appropriations power by augmenting the agency’s budget.

Second, when the Department defends cases brought against the federal government, it may wish to compensate plaintiffs for political reasons or because the administration favors the plaintiff’s cause, even though the plaintiff’s legal claim is weak. This type of action is aided by the existence of the Judgment Fund, a permanent unlimited appropriation that may be used for paying judgments and settlements against the United States without charging the budget of any executive branch agency. Settlements that take advantage of this governmental deep pocket to evade Congress’s appropriations power amount to unauthorized grants to the plaintiffs.

Id. at 331.

Professor Min cites the Peterson article, Testimony at 4, but only for the bland observation that Congress sought to address this problem of improper

settlement. But he nowhere notes that the above passages show that the legislation was intended to respond to the very issues raised in this case. Indeed, in these circumstances the evidence of circumvention is apparent on the face of the settlement. The cases that Professor Peterson refers to are ones in which the beneficiary of DOJ largesse is the party with whom it is in dispute. In those cases, it is necessary to peel back the onion to discover whether the settlement was for a fair valuation. But that problem does not arise here because every dime that is explicitly directed to a third party charity counts as a diversion of funds. The settlement can therefore be condemned on its face, without going through the evaluations that are needed when there are no transfers to third parties.

Professor Min seeks to evade this conclusion by insisting that the use of third party payments allows the government to increase the pressure on the banking defendants. He thus gives the example where the government is supposedly constrained by a statutory cap from demanding more than \$100 million. Min, Testimony at 7. Nonetheless, it is “for various reasons” able to secure a settlement whereby it reduces the statutory damages to \$90 million so long as the bank offers \$90 million to charity. His argument is surreal. It is easy enough to understand why the DOJ might like to obtain a settlement above the maximum recoverable amount. But it is utterly impossible to figure out why any bank, without any compulsion, would prefer to increase its total financial payments by \$80 million by taking this deal instead of standing on its rights. If the bank wants to make charitable deductions for increasing good will, the last thing it wants to do is announce to the world that its contribution was to cope with serious allegations of civil or criminal wrongdoing.

Indeed, it is easier to find a better explanation for what the government has done—namely, it has taken advantage of the very elastic definition of what counts as a civil wrong. Professor Min notes that 12 U.S.C. 1833a(b)(1) caps penalties for FIRREA violations at \$1 million per violation. He then writes:

Thus, it is not clear that DOJ could have procured much more in civil penalties than it received from the RMBS settlements, even if it had litigated these cases and won, due to FIRREA’s statutory cap on civil penalties. The charitable payment provisions appear to have allowed DOJ to procure much more than it would have been able to get if it had been limited to civil penalties.

Min, Testimony at 7.

This analysis is, however, completely in error, because Professor Min does not explain why any one would pay an amount in excess of that \$1 million figure. Part of the answer lies in subsection (b)(2), which Professor Min does not quote, which provides: “In the case of a continuing violation, the amount of the civil penalty may exceed the amount described in paragraph (1) but may not exceed the lesser of \$1,000,000 per day or \$5,000,000.” The leverage, however, is not as limited as it

sounds, because these figures apply to multiple violations of the law in independent transactions. The RMBS involve many different deals, incorporating many different mortgages from different sources, so it is easy to multiply by the number of offenses to which the \$1 million and \$5 million limits apply. It follows that these large settlements are obtained because of enormous government leverage, not from some benighted sense of public duty. It is therefore no surprise that the astute bank will look for any avenue to avoid these crushing penalties, which is why the evasion of the MRA in these cases are so clear.

Nor is there anything in the literature that alters the conclusion. Professor Min cites an article by Professor Colin Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1455-56 (1979), for this unexceptionable proposition: "By definition, a civil money penalty does not serve a 'specific' compensatory function of making whole an identifiable individual specifically injured by the offending conduct. Money penalties can, however, be used to serve a 'general' compensatory function—that is, to compensate 'society' at large for harm that it has suffered at the hands of a violator."

When examined carefully, however, Diver's proposition cuts in exactly the opposite direction for which it was quoted. The penalties to which Diver refers are paid directly into the Treasury, where they compensate for a diffuse set of social losses. Professor Diver at no point mentions the diversion of public funds to specific organizations that will thereafter use them to assist discrete groups that were not injured by the conduct for which the settlement in question was reached. These payments would, under his argument, count as private and not social. Nothing in Diver's article offers the slightest defense for the settlement diversions by the DOJ in these bank cases.

Finally, Professor Min cites *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990)[*ECD*], for the proposition that "settlement agreements in which the defendants does [sic] not admit liability are not prohibited from including terms requiring them to make payments to private third parties." Min, Testimony at 4. But the assertion in question reveals a complete misunderstanding of the case. The Sierra Club brought a citizen's action under the Clean Water Act against ECD for the wrongful discharge of pollutants into the Molalla River in Oregon. The case was settled by consent decree before trial. That settlement contained a term that provided that ECD would "pay \$45,000 to various identified private environmental organizations for their efforts to maintain and protect water quality in Oregon." The Department of Justice then intervened and claimed that any civil penalty under the CWA had to be paid by law to the United States Treasury and not to a private party. The Court then held:

We agree with the district court that if the payments required under the proposed consent decree are civil penalties within the meaning of the Clean Water Act, they may be paid only to the U.S. treasury. We

disagree, however, that the payments are civil penalties. No violation of the Act was found or determined by the proposed settlement judgment. When a defendant agrees before trial to make payments to environmental organizations without admitting liability, the agreement is simply part of an out-of-court settlement which the parties are free to make.

It should be evident that the DOJ provision in *ECD* is the antithesis of the position here, where the DOJ has diverted money that should go into the Treasury into the hands of private parties who had no connection whatsoever with the suit, and who were not injured in any way by the underlying conduct of the banks, unlike the payments to the Sierra Club in the private settlement by *ECD*. Neither the Sierra Club nor the *ECD* were bound by the MRA as branches of the federal government. The settlement terms, moreover, did not make transfers to unrelated third parties, but instead were obviously intended to reimburse it in part for the costs of bringing suit and to provide a benefit to both the Sierra Club and the public at large. The case certainly does not support, let alone stand for, the proposition that the DOJ may conduct settlement negotiations that divert money that should be paid into the Treasury to private parties that have done nothing whatsoever to correct any underlying harm in the case.

In sum, there are no credible arguments either in the case law or in the presentation of Professor Min that lend any support to the proposition that the DOJ may divert money from the Treasury to private parties by offering private banks a financial break if they pay money directly to third parties. The practice is wholly illegal. It is also wholly undesirable as well. The DOJ's job is to enforce the law, not to direct resources to its favored clients or causes. Allowing these diversions of funds will have the undesirable effect of encouraging all kinds of interest groups to step forward to ask the DOJ to direct the proceeds of settlement in their direction. Indeed, there is no reason to believe that they will stop with asking the government to divert funds. It is all too likely that, through back channels, a wide range of interest groups of all persuasions will lobby DOJ to bring key law suits against their preferred defendants so that they can then claim their piece of the action when the case is settled. These are dangerous practices and dangerous precedents. The defense of these practices offered by DOJ and Professor Min should be decisively rejected. Practices of this sort should end right now.

Sincerely yours,



Richard A. Epstein