

**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?***

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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 peculation.”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 go 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.*