"SETTLING THE QUESTION: DID THE BANK SETTLEMENT AGREEMENTS SUBVERT CONGRESSIONAL APPROPRIATIONS POWER?"

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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 Countryside'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 Act[3] and the Anti-Deficiency Act[4]—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";
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> (2) the Article I Bicameralism and Presentment Clauses establish strict and unalterable conditions to create a "Law";
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> (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,
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> (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:
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> • La Raza, which pressures banks to expand their credit box to qualify more low-income Latino immigrants for home loans;
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> • National Community Reinvestment Coalition, Washington's most aggressive lobbyist for the disastrous Community Reinvestment Act;
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> • Neighborhood Assistance Corporation of America, whose director calls himself a "bank terrorist;"
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> • Operation Hope, a South Central Los Angeles group that's pressuring banks to make "dignity mortgages" for deadbeats.

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

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[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 Mika 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

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[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 or 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"

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[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 *Reeside 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

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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 Constitution[40] creates two options for appointment of "Officers of the United States"—a term that includes anyone who exercises the power of the federal government[41]—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]

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[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

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[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-

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[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

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[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 unassailable. 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] Articles 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

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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

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[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.

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[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 courts[84] 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,

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[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.

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[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

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[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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