EXECUTIVE OVERREACH IN REGULATORY ENFORCEMENT AND INFRASTRUCTURE

HEARING

BEFORE THE

EXECUTIVE OVERREACH TASK FORCE

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

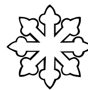
ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

JULY 12, 2016

Serial No. 114–86

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE

20–723 PDF WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

BOB GOODLATTE, Virginia, *Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
LAMAR S. SMITH, Texas
STEVE CHABOT, Ohio
DARRELL E. ISSA, California
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TOM MARINO, Pennsylvania
TREY GOWDY, South Carolina
RAÚL LABRADOR, Idaho
BLAKE FARENTHOLD, Texas
DOUG COLLINS, Georgia
RON DeSANTIS, Florida
MIMI WALTERS, California
KEN BUCK, Colorado
JOHN RATCLIFFE, Texas
DAVE TROTT, Michigan
MIKE BISHOP, Michigan

JOHN CONYERS, JR., Michigan
JERROLD NADLER, New York
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
PEDRO R. PIERLUISI, Puerto Rico
JUDY CHU, California
TED DEUTCH, Florida
LUIS V. GUTIERREZ, Illinois
KAREN BASS, California
CEDRIC RICHMOND, Louisiana
SUZAN DelBENE, Washington
HAKEEM JEFFRIES, New York
DAVID N. CICILLINE, Rhode Island
SCOTT PETERS, California

SHELLEY HUSBAND, *Chief of Staff & General Counsel*
PERRY APELBAUM, *Minority Staff Director & Chief Counsel*

EXECUTIVE OVERREACH TASK FORCE

STEVE KING, Iowa, *Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
DARRELL E. ISSA, California
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TREY GOWDY, South Carolina
RAÚL LABRADOR, Idaho
RON DeSANTIS, Florida
KEN BUCK, Colorado
MIKE BISHOP, Michigan

STEVE COHEN, Tennessee
JERROLD NADLER, New York
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
HENRY C. "HANK" JOHNSON, JR., Georgia
JUDY CHU, California
TED DEUTCH, Florida
CEDRIC RICHMOND, Louisiana
SCOTT PETERS, California

PAUL B. TAYLOR, *Chief Counsel*
JAMES J. PARK, *Minority Counsel*

CONTENTS

JULY 12, 2016

Page

OPENING STATEMENTS

The Honorable Steve King, a Representative in Congress from the State of Iowa, and Chairman, Executive Overreach Task Force 1
The Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Executive Overreach Task Force 3

WITNESSES

The Honorable Michael B. Mukasey, Of Counsel, Debevoise & Plimpton LLP
Oral Testimony 11
Prepared Statement 13
David Min, Assistant Professor of Law, University of California, Irvine School of Law
Oral Testimony 24
Prepared Statement 26
The Honorable Gary Ridley, State of Oklahoma, Secretary of Transportation
Oral Testimony 39
Prepared Statement 41

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Executive Overreach Task Force 5

EXECUTIVE OVERREACH IN REGULATORY ENFORCEMENT AND INFRASTRUCTURE

TUESDAY, JULY 12, 2016

HOUSE OF REPRESENTATIVES
EXECUTIVE OVERREACH TASK FORCE
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Task Force met, pursuant to call, at 4:38 p.m., in room 2237, Rayburn House Office Building, the Honorable Steve King (Chairman of the Task Force) presiding.

Present: Representatives King and Cohen.

Staff Present: (Majority) Paul Taylor, Chief Counsel; Zachary Somers, Parliamentarian & General Counsel, Committee on the Judiciary; Tricia White, Clerk; (Minority) James Park, Minority Counsel; Veronica Eligan, Professional Staff Member.

Mr. KING. The Executive Overreach Task Force will come to order. Without objection, the Chair is authorized to declare a recess of the Task Force at any time. I will now recognize myself for my opening statement.

Today's hearing of the Executive Overreach Task Force will focus on executive overreach in the areas of regulatory enforcement and infrastructure. I will use my time today to focus on executive overreach as it adversely affects our Nation's vital infrastructure.

Federal mandates and untimely regulatory actions can often limit the efficient investment of the Nation's core infrastructure funds. One prominent example that comes to mind is the misuse of the Highway Trust Fund to pay for liberal policy goals rather than to build and maintain our roads and bridges.

The Highway Trust Fund is primarily funded through the Federal gas tax, a user's fee, which is 18.4 cents per gallon on gasoline and 24.4 cents per gallon on diesel fuel. Rather than spending every penny directly to build, maintain, and repair our roads and bridges, the Highway Trust Fund is being diverted to pay for Davis-Bacon wages, bike trails, squirrel sanctuaries, and environmental and archaeological studies and compliance.

Davis-Bacon wages, for example, make highway construction projects 20 percent more expensive than they would otherwise be if competitive, market-driven wages were paid. And by the way, those would be my numbers that come from our construction company that has been busy doing this kind of work for 41 years.

The reason for these inefficiencies in the Highway Trust Fund largely lay that the feet of a dormant Congress that delegated funding decision to the unaccountable bureaucrats in the executive branch. Without their elected representatives to fight for them with earmarks to fund direct needs, our constituents and their direct transportation needs are often ignored.

Furthermore, Federal executive branch demands for dedicating transportation funds to secondary activities, such as bicycle and pedestrian trails and landscaping, often interfere with the funding mechanisms and list of priorities for core infrastructure programs as understood by the States involved.

Without these formulaic prescriptions, we could build five miles of road instead of four, or build five new bridges instead of four. New layers of process upon process imposed in the name of protecting the environment can also significantly delay infrastructure improvements, even when many such improvements are known to have no significant environmental impacts.

Researchers have laid out a variety of Federal regulations that make building transportation infrastructure to rural areas much more difficult today, including environmental reviews that can cause the approval process for some projects to extend 10 to 15 years.

A September 2015 study by Philip K. Howard at Common Good concluded that the cumulative effect of 6 year delays in starting construction on public projects costs the Nation a cumulative total of over $3.7 trillion, and that including the costs of prolonged inefficiencies and unnecessary pollution during the period of legal review. That waste amounts to more than double the $1.7 trillion needed through the end of this decade to modernize America's infrastructure.

As the author of that report noted, no one deliberately designed America's infrastructure approval systems. It is an accident of legal accretion over the past 50 years. Environmental review was supposed to highlight major issues in 300 pages or less on complex projects so that officials can make an informed decision.

As practiced today, environmental review often harms the environment. America's antiquated power grid, for example, wastes the equivalent of 200 coal-burning power plants. Federal agencies, such as the Environmental Protection Agency and Corps of Engineers, also often seek to expand their jurisdiction over new waters through the issuance of guidelines like WOTUS—as we call it—or Waters of the United States—that interpret Federal laws in new ways that put things like drainage ditches and minor tributaries under Federal jurisdiction.

In fact, some of this goes all the way up the dry waterway to the top of the hill or to the kitchen sink, and it has been years of facing that kind of overregulation.

All the while, Congress has largely abandoned its power to direct Federal funds to the infrastructure and other priorities of the people under the name of earmark reform. While some criticize how Members of Congress sought to direct Federal funds to some projects rather than others, the alternative now is that unelected bureaucrats who are not beholden to the people through regular elections are directing Federal taxpayer dollars to their own infra-

structure priorities, or rather to their own ideological pursuits, that may or may not have anything to do with core infrastructure priorities.

In other words, they had the earmarking that was done by individual Members of Congress in the interests of their constituents in the light of day that was focused on those priorities of infrastructure, now has been handed over to the executive branch of government for them to select those earmark priorities as opposed to Members of Congress who are up for election and reelection.

Members of Congress are uniquely positioned to better understand the need of their constituents and their districts. Renewing the use of earmarks is an important method to restore Article I authority in Congress and to exercise the powers of the purse. Prudent and authorized earmarks are an appropriate use of Congressional spending authority and ensure that Congress controls the purse strings rather than continuing to improperly delegate authority to unelected, unaccountable bureaucrats.

I look forward to hearing from all our witnesses today, and exploring how the people's elected representatives might regain more of the power to direct infrastructure priorities to the people's will instead of the will of unelected bureaucracies. I conclude my opening statement, and now I would recognize the Ranking Member from Tennessee, Mr. Cohen, for his opening statement.

Mr. COHEN. Thank you. I could read my opening statement, which is a very well-written opening statement. Staff did a great job. James, stand and take a bow. Great job, but I am not going to read it because it has things that I think my Chairman probably would not like. It suggests that we should be doing other things like voting rights and police minority problems that we have, and gun violence, and dealing with those issues, and the disparity in wealth, rather than this.

So, I am just going to ask to enter this in the record, and I am going to just say that I think the Chairman is great, and he has done a great job today in talking about earmarks, and he is right about earmarks.

We ought to have earmarks, and it is not just because it is in Article 1 and the unelected bureaucrats, but it is the oil that makes the machine run, and that is one of the reasons why we have not done much here in the last few years, is because we do not have earmarks. Where everybody has got a piece of the pie, and everybody has a reason to vote for a bill, and the speaker has got a little clout, and some other people have a little clout, and people can conform their conducts to what makes things happen, gets infrastructure projects funded, and gets money back home, which is real important.

And the taking away of earmarks was a real mistake, and it is something Congress has—it hurt Congress. It has hurt the power of the Speaker, and it has hurt the power of us to create legislation and get things past.

There should have been some reforms, and there were some reforms. There could be some reforms, but you do not just throw it out. You mend it, and that is what we ought to do, and we should do.

So, I want to hear from people about how good earmarks are. It is just music to my ears because I think it works. It is good to bring home the bacon, but it is also good to make this place get together, work with bipartisan support for bills, which we used to have in transportation, and we used to have on highway bills and we had on military defense spending and other areas, veterans bills.

Everybody had something in the pie, and so everybody wanted to get something done, and it did not come to more than one or one and a half percent of the total budget, and otherwise it is unelected folks. It is bureaucrats making the decisions, or people in the State where the money goes to, and they decide where to spend projects. And it is ridiculous to think that they do not their politics when they make their decision.

I am not even sure we consider politics in our decision. Some people may, but in my first few years when we had earmarks, I let the city mayors—who maybe had politics, but I wanted to make sure that their proposals were good government—the roads they chose were important to the development of downtown, and they would get people moving around, or there were projects that were important to the universities and medical school—University of Tennessee or the University of Memphis, and I let the leaders decide what was important, and I came up here and worked for them, and that is the way it ought to work.

So, with that, I yield back the balance of my time. I thank Mr. King for being the voice of Mr. Young and others who understand the importance of earmarks.

Mr. KING. I thank the gentleman from Tennessee for his remarks, his opening statement, as it will be introduced into the record.

[The prepared statement of Mr. Cohen follows:]

Statement of the Honorable Steve Cohen for the Hearing on "Executive Overreach in Regulatory Enforcement and Infrastructure" Before the Executive Overreach Task Force

Tuesday, July 12, 2016 at 3:00 p.m.
2237 Rayburn House Office Building

Our Nation is currently in the midst of profound divisions over how best to address two issues -- gun violence and tensions between the police and many communities of color.

Tragically, last week we saw the confluence of these two areas of division when, in heartbreaking succession, two African-American men were shot to death by white police officers over two days, only to be followed by the killings of five heroic Dallas police officers who were shot to death by a sniper.

Reports suggest that the Dallas shooter committed his killings in retaliation for the earlier shootings of African-Americans by police.

In light of these and any number of other matters, like voting rights and income inequality, that touch on fundamental questions about what kind of society we are, I find it completely inappropriate that we are devoting our very limited time in this last week before the Congressional summer recess to yet another hearing where corporate interests get to complain about regulations.

We should be using this time to move legislation to stem gun violence and to reduce police-community tensions.

We should be using this time to move legislation that restores the Voting Rights Act to full effect in this critical election year.

We should be using this time to address the yawning gap between rich and poor in what is the richest Nation on Earth.

Instead, we will have this hearing where the arguments can best be described as an attempt to throw spaghetti on the wall to see what sticks.

As an initial matter, there seems to be no argument that most of the Department of Justice's enforcement behavior that the Majority complains about is unconstitutional or even illegal.

Rather, they seem to be complaints about how the Executive Branch and states have exercised their legitimate enforcement authority.

There also seem to be complaints about Congress and how it writes statutes.

The closest we get to talking about the Constitution is the suggestion that certain settlement agreements where a corporate wrongdoer agrees to make a donation of funds to help address the societal harm it has caused may undermine Congress's power to appropriate funds.

Of course, such settlement agreements are perfectly constitutional and legal.

To begin with, any money contributed to a third party organization as part of a settlement agreement negotiated by the Department of Justice is not money for the government, and is therefore not required by the Miscellaneous Receipts Act to be deposited in the general Treasury. As such, the Appropriations Clause is not implicated.

In addition, while Congress has the power to appropriate money, the Executive Branch has broad prosecutorial discretion to decide how best to enforce the law, particularly when negotiating a settlement.

And, structuring settlement agreements to require a donation to a third party by corporate wrongdoers under certain circumstances to help address harms that they have caused falls within that broad enforcement authority.

I am not optimistic that today's hearing will be especially enlightening. Instead, it will likely be another instance of political theater, as have been most of the previous Task Force hearings.

Nonetheless, I appreciate the witnesses' willingness to provide testimony. I only wish their talents could be used for more productive ends.

Mr. KING. Without objection, other Members' opening statements will be made part of the record as well. And let me now introduce the witnesses.

Our first witness is the Honorable Michael Mukasey, former Attorney General, Federal judge, and now a counselor at the firm of Debevoise & Plimpton.

Our second witness is David Min, assistant professor of law at the University of California, Irvine School of Law; and our third witness is the Honorable Gary Ridley, the secretary of transportation for the State of Oklahoma.

We welcome you all here today and look forward to your testimony. Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each witness summarize their testimony in 5 minutes or less, and there is a clock in front of you with a green light, amber light, and a red light, which will be pretty obvious, I think.

Before I recognize the witnesses, it is the tradition of the Task Force that they be sworn in. I would ask the witnesses, would you please stand and raise your right hand? Thank you. Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Let the record reflect that the witnesses have attested in the affirmative—you may be seated—testified in the affirmative.

And I now recognize our first witness, Mr. Mukasey, and look forward to hearing your testimony, Mr. Mukasey—General Mukasey.

TESTIMONY OF THE HONORABLE MICHAEL B. MUKASEY, OF COUNSEL, DEBEVOISE & PLIMPTON LLP

Mr. MUKASEY. I think actually mister is better. I prefer it. But thank you very much, Mr. Chairman, and Ranking Member Cohen. I appreciate the opportunity to appear here in relation to what I think is an enormously important issue, and that relates to how our laws and regulations are enforced.

And I am not going to read my statement into the record, not for the reasons that the Ranking Member mentioned, but rather because I think it is already in the record, and I think it is better simply to summarize and point out what the point is I am trying to make, which is that if—when enforcing laws and regulations stops being about simply the neutral application of neutral principles, and get incentives built into it that either permit regulators or enforcers to further their own agendas—which may include the public interest, or may include perpetuating their own activities, or further the agendas of others—then you create perverse incentives, and in that situation, it is not surprising that you often get perverse results.

There are numerous cases that one could point to. The Vascular Solutions case involving a company that was selling a licensed-by-the-FDA device that was useful in treating vein disorders was able to—through results that it became aware of through physicians—found out that that device could also treat related vein disorders and so advised doctors.

They were prosecuted for 2 years for promoting an off-label use of the device, and it took them 2 years and millions of dollars to get cleared until acquittal was returned by a jury. That should not happen. That is an example of creating and permitting perverse results in law enforcement.

There are other examples. Gibson Guitar case is probably a museum-quality example. The company was prosecuted for importing wood that was gathered in violation, not of the laws of the United States, but in violation of the laws of a South American country. They had no idea that those laws were violated, but there was a provision in the regulations that made it unlawful to import wood that was harvested in violation of foreign law. Not only did they get prosecuted, but there were fines extracted from them that were then used to contribute to the National Fish and Wildlife Foundation, even though that had absolutely nothing to do with the claimed violation that they had committed.

There are a lot of other examples. The U.S. Department of Justice has an asset forfeiture—an equitable sharing program that it has entered into with the State, in which State police in essence have an incentive to stop people and seize money, which they then share with the Federal Government.

Again, they share it supposedly for law enforcement uses, but the unregulated seizure and sharing of money is something that has gotten completely outside the control of the Congress, which is supposed to be in charge of allocating money, in charge of dispersing money, and instead leaves it to the discretion of people in the agencies. That is not the way, I think, the Constitution was written. It is not, I think, the way the founders envisioned the system would work, and it is not the way, I think, the system should work. Thank you.

[The prepared statement of Mr. Mukasey follows:]

Statement of U.S. Chamber Institute for Legal Reform

BY: The Honorable Michael Mukasey, Of Counsel, Debevoise & Plimpton LLP

On Behalf of the U.S. Chamber Institute for Legal Reform

ON: Executive Overreach in Regulatory Enforcement and Infrastructure

TO: U.S. House of Representatives Judiciary Committee Executive Overreach Task Force

DATE: July 12, 2016

Testimony of The Honorable Michael Mukasey
On Behalf of the U.S. Chamber Institute for Legal Reform
Regarding Executive Overreach in Regulatory Enforcement and Infrastructure

Chairman King, Ranking Member Cohen, and distinguished members of the Task Force, good afternoon, and thank you for inviting me to testify on behalf of the U.S. Chamber Institute for Legal Reform (ILR). ILR is an affiliate of the U.S. Chamber of Commerce dedicated to making our nation's civil legal system simpler, faster, and fairer for all participants. The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million companies of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system.

I appreciate the opportunity to testify at this hearing, which deals with the important and troubling abuses that have crept into our law enforcement system in recent years, and how they affect people and businesses trying to keep our economy functioning. The result has been that a legal system intended to promote fairness and economic health has been transformed slowly, but perceptibly, into one that is seen as arbitrary and burdensome.

The symptoms include losses in court cases where the government pressed for implausibly broad reading of criminal statutes. In *Bond v. United States* and *Yates v. United States*, the Supreme Court rejected the government's arguments that a woman who put a chemical irritant on the automobile, doorknob, and mailbox of another woman

who was having an affair with her husband could be prosecuted for violating a law implementing a chemical weapons treaty, and that throwing 72 undersized fish back in the water to avoid a citation for catching them constituted destruction of a "tangible object" in order to obstruct or influence a government investigation under the Sarbanes-Oxley Act that deals principally with the record-keeping obligations of corporations.

In another case, the government spent two years criminally prosecuting Howard Root and his company, Vascular Solutions, Inc., for criminally promoting a vein treatment device administered by doctors and approved by the FDA for one condition, as a treatment for a closely related condition without seeking supplemental approval. Testimony at trial showed that the administering doctors found the device beneficial for the related condition, and that it had improved patients' lives. Total sales of the device constituted one tenth of one percent of Vascular Solutions' revenues during the relevant period. The government's conduct during this crusade to criminalize truthful speech cost Root and his company millions of dollars to defend. The trial ended in a defense verdict from a jury instructed that it could not convict if it found the promotional speech in question truthful and not misleading.

Another multi-year crusade, this one against Federal Express for allegedly acting as a co-conspirator with illegal online pharmacies because it shipped their goods, recently ended on the third day of a bench trial when the government dropped the case because it could not produce evidence that the company knew of the unlawful activities of the pharmacies, and intended drugs to be distributed illegally.

The problem here is not that the government lost cases; that happens. Rather, the problem is that in each instance the government sought criminal penalties against defendants by pressing far-fetched theories of liability against people and entities that could not reasonably have anticipated criminal prosecution for their acts. When I was a prosecutor I was taught that we should not prosecute a case unless as prosecutors we could tell ourselves truthfully that at the end of the day when the crimes in question were committed, the prospective defendant either thought or should have thought, "I committed a crime today." There is plenty of perfectly routine crime to prosecute without pressing for novel extensions of the criminal laws.

Even prosecutorial successes often are discussed by the government in financial terms that make it sound as if the principal incentive of prosecutors is to outdo one another in the size of the financial penalties they can extract from defendants, as if the proper role of law enforcement is to serve as a profit center for government rather than as a shield to protect commerce and the nation that benefits from it. Also, the incentive here appears at times to be not merely bragging rights but rather use by law enforcement agencies themselves of the proceeds to support favored causes.

Another symptom has been the swarming effect when multiple agencies and jurisdictions—state and federal—zero in on a company that has become the target of a prosecution or enforcement action in one jurisdiction, often one that has resulted in a negotiated plea and penalty supposedly calculated to address and redress the wrongdoing.

Nonetheless, others seek to share both the limelight and the spoils, and engage in a prosecutorial feeding frenzy.

To the extent that people in authority within the government have discussed this particular problem of multi-jurisdictional piling-on, there has seemed to be little interest in actually doing anything about it, and at times a disclaiming of responsibility. For example, the assistant attorney general in charge of the criminal division, in a speech in New York in April, recognized in a phrase "the unfairness when a company is asked to pay for things over and over again," but then went on quickly to point out that different regulators have different and legitimate interests, without explaining why one regulator's interest cannot legitimately satisfy another's as well, and that companies "voluntarily operate in multiple countries [and] obviously know that by doing so, they subject themselves voluntarily to those countries' laws and regulatory schemes." She said that although the Department of Justice is "trying to address this concern so that companies are not punished unfairly[,] that is often easier said than done."

There is no single factor that can account for all these developments, but it is nonetheless possible to identify contributing causes, and to do something about them.

One problem is that the statutes themselves are often are vaguely worded and leave room for novel and expansive interpretations. For example, under the Foreign Corrupt Practices Act, even when no prosecution is brought, companies devote inordinately large resources in trying to determine what value of gift is appropriate to

give to a business associate in a foreign country on the occasion of a wedding or a birthday. Or in the False Claims Act (FCA) context, an enterprising employee with information about a problem the company may be trying to resolve with respect to receipt of funds from the federal government can enlist the aid of a lawyer to act as a "private attorney general" on the government's behalf under the FCA, and recover a share of treble damages for each false request for payment, and statutory penalties of up to $11,000 per claim under current law.

Loosely drawn statutes provide the means for prosecutors so inclined to respond to periodic demands in the media to punish perceived "bad guys." Some legislators and media outlets expressed outrage that although record fines had been exacted from institutions in connection with the 2008 financial collapse, few individuals had gone to jail. In part, this was the result of institutions settling rather than face the impact of even being charged, whereas individuals with their freedom at stake fought when charges were brought, and often won.

In September 2015, Deputy Attorney General Sally Quillian Yates issued a memorandum to all Department of Justice offices with power to enforce criminal statutes, directing that priority in prosecuting corporate wrongdoing be put on prosecuting individual defendants. Often, corporations will try to settle even a barely colorable claim of wrongdoing in order to avoid the severe consequences of an indictment that can result in debarment for some and loss of market capital for most. The Yates memorandum announced six points of guidance emphasizing that the Justice Department would give no

credit to corporations for cooperation unless they provided all relevant information with respect to individuals involved in potential misconduct, and directing that prosecutors "vigorously review" information proffered by companies to assure in particular that information about individuals was disclosed. It directed prosecutors to build cases against individuals from the outset of an investigation instead of waiting, and urged that cases against even lower level employees be pressed so they can be "flipped" to cooperate against higher level corporate employees.

Further, the memo urged that Department civil and criminal lawyers share information relevant to parallel or potential investigations in order to enhance the government's ability to prosecute individuals, and that even when resolving cases against corporations those lawyers take care not to provide immunity to individual officers or employees or dismiss charges or release claims against them without the approval of a senior Justice Department official.

When a case against a corporation is to be resolved before investigation of individual misconduct has concluded, lawyers are directed to submit a plan for resolving such investigations before the statute of limitations has run.

Finally, even when potential individual defendants are not wealthy, the memo instructs that cases against them should be pursued so as to exact penalties that will hold them accountable and deter them and others.

These directives, along with others of similar import, were then incorporated into the U.S. Attorneys' Manual, the document that guides all Justice Department litigation. Although the directives themselves, taken individually, may provide useful and unexceptionable reminders to government lawyers, and although they are accompanied by disclaimers of any intent to violate norms and privileges, considered as a whole they forcefully drive a wedge between companies and their employees and create potentially perverse incentives, including the "voluntary" surrender of privileged information so as to obtain rewards for cooperation. They will also likely result in less cooperation in investigations because of this new adversarial relationship between company and employee/corporate officer.

Added to the pressure of popular demand to punish perceived villains is the attraction of generating funds either for agency projects or for favored private sector interests. Here, the potential for abuse is rivaled only by the constitutional dubiousness of the entire practice. Under Article I, Sections 7 and 8 of the Constitution, it is Congress that is supposed to determine the funding of the federal government in all its branches, with all measures for raising revenue to originate in the House of Representatives. When executive agencies adopt programs to raise funds on their own, and to spend those funds as they wish, they circumvent the constitutional structure and evade the authority and oversight of Congress. This is a defect that should be considered so fundamental as to call into question the existence of any of these programs. Yet the executive has shown little enthusiasm for curtailing these programs. It is Congress that should act at least to

bring them within legislative control and discipline. Fortunately, this is a problem that the Judiciary Committee is now working to remedy through Chairman Goodlatte's slush fund legislation.

The Department of Justice had to try to reform the asset seizure and equitable sharing feature of its narcotics program after disclosure in September 2014 that state and local police were seizing billions of dollars in assets by stopping motorists for minor infractions, pressuring them to agree to searches, and then seizing cash even when there was no evidence of drug violations. This money was then shared between those police agencies and the federal government. However, even the reforms in the program are both self-imposed and self-enforced, which is hardly reassuring.

But that program is only the tip of the proverbial iceberg when one considers the self-funding features of federal law enforcement. The Departments of Justice and Health and Human Services maintain a fund for the proceeds of all fines, settlements and civil penalties imposed in health care prosecutions under an array of statutes including the False Claims Act and the Health Insurance Portability and Accountability Act (HIPAA) that permits them to fund their own staffs and enforcement activities. The Consumer Financial Protection Bureau is itself another example of a self-propelled agency largely outside Congressional control.

Another factor that allows these abuses to continue is lack of oversight of prosecutorial decisions and lack of punishment of leaks. There are supervisors aplenty in

the Department of Justice, but if they and those they supervise are recognized and rewarded for helping to rack up litigation victories and set records in cash recoveries, they will not stop abuses but rather encourage them. Leaks to the press are too often the precursors of large settlements, and the impropriety is washed away when the case ends.

Finally, these abuses are often committed against inviting targets. As noted, corporations often find it preferable to settle than to risk the reputational and other damage that can result from indictment. There is a good reason why most Supreme Court challenges to fanciful prosecutions involve individuals; they can go to jail and have no choice but to fight. The one company to resist a high-profile prosecution was the accounting firm Arthur Andersen, which had been driven out of business by the time it "won."

There is a good deal that can be done to mitigate if not actually end these abuses. The "swarming" or agency pile-on can be stopped at the federal level. The Department of Justice is the principal law enforcement arm of the government across the board. Yes, other entities have an interest. But if the Department of Justice initiates an investigation, others should stand down. In any event, someone at DOJ should be empowered to act as traffic cop in situations where federal agencies engage in overlapping law enforcement activity. States present a tougher issue, and it may be that Congress, exercising its authority over interstate commerce, can impose some federally supervised order.

There should be legislative standards for monetary penalties so as to prevent defining each offense so narrowly that federal statutes can be used as pin-ball machines with penalties totally out of proportion to the harm caused.

End self-funding agencies and law enforcement programs by directing that penalties and settlements beyond what the agency spent to bring a case be deposited into the general fund where its disbursement can be controlled by the body constitutionally empowered to control it—Congress.

Third-party funding provisions in settlement agreements and sentences imposed in federal courts should be banned. These are simply devices to undermine the constitutional funding authority of Congress.

Encourage a culture within the Department of Justice and law enforcement generally that recognizes restraint in the exercise of federal authority as well as appropriate vigor in the application of federal law.

At the risk of sounding self-serving, I should add that when I served as an Assistant U.S. Attorney, as a U.S. District Judge, and as Attorney General, I do not think I was known as someone who was reluctant to bring the full weight of the law to bear on those who violate it, and I am proud to have done so. But I am equally proud of those instances—fewer in number, to be sure—when I recognized that it was wiser to forbear, and did so. I am happy to answer any questions you may have. Thank you.

Mr. KING. I thank our Attorney General for his testimony, and now recognize Mr. Min for his 5 minutes.

TESTIMONY OF DAVID MIN, ASSISTANT PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, IRVINE SCHOOL OF LAW

Mr. MIN. Thank you for inviting me here to testify on this important topic of potential executive branch overreach. As I discuss in my written testimony, the scope of today's hearing is quite sprawling, spreading a broad array of complex and highly technical legal and constitutional issues.

Obviously, I do not have the time to get into all of these today, but I would like to make one general observation. Today's hearing assumes that there is executive branch overreach, and this assumption is based in large part on the claim that there is a so-called swarm of litigation that DOJ and other governmental agencies have initiated in recent years. But this claim largely ignores the context of these various DOJ investigations.

Lest we forget, we are still recovering from the largest financial crisis in the history of the world, one which caused $22 trillion in total damages to the American people.

Similarly, the BP Deepwater Horizon oil spill was the largest environmental disaster we have ever seen, one whose effects will be enormous and felt for generations.

Given the magnitude of harm resulting from these and other recent incidents of business misconduct, it would be highly unusual if DOJ had not launched a wave of major prosecutions in recent years.

My testimony today, however, focuses on one discrete issue related to executive overreach, which is this: When the Federal Government settlement of litigation claims includes provisions allowing or acquiring charitable donations to be made to third parties, to what extent do these charitable payment provisions encroach on Congress' power of appropriations, and should we take measures to curb or eliminate this practice?

Of course, H.R. 5063, the Stop Settlement Slush Funds Act of 2016, would expressly prohibit the DOJ and other Federal agencies for negotiating for such charitable payment provisions unless they were specifically directed toward actual victims of the alleged misconduct.

While I appreciate all the hard work that has gone into H.R. 5063, I think it is a solution in search of problem, as there is a marked lack of evidence, other than anecdotal evidence, that charitable payment provisions actually pose any sort of problem, either from the standpoint of law or policy.

Legally, it is well settled that charitable payment provisions are permissible and enforceable under current law, so long as they meet certain conditions. They should be executed prior to an admission or finding of liability. The government should not retain any post-settlement control over the donated funds, and there should be some nexus between the donations and the underlying legal violation.

Charitable payment provisions that meet these criteria are clearly enforceable. Indeed, it is worth mentioning that the White House Office of Legal Counsel, the GAO, which advises and supports Con-

gress, and the Federal courts are all in agreement on this point, as a describe in greater detail in my written testimony.

Indeed, this very body has implicitly acknowledged the legality of charitable payment provisions by passing H.R. 5063 out of Committee. If these types of provisions were legal, of course there would be no need to pass legislation prohibiting them.

There is also no evidence that charitable payment provisions pose a policy problem. This Committee has spent significant time investigating the charitable payment provisions negotiated by DOJ in recent settlements, but while there has been a flood of incendiary rhetoric accusing DOJ of various nefarious deeds around this, there has been a notable lack of any evidence behind these claims.

The recent RMBS settlements negotiated by DOJ with the largest investment banks illustrates this point rather well, I think. These settlements, which include provisions for donations to be made to housing counseling groups, have been described by some as "liberal slush funds" because the list of approved donees includes groups like NeighborWorks or La Raza.

But this characterization of these settlements is highly misleading. The charitable payment provisions in question allow the banks to choose from among hundreds of different HUD-approved housing counselling groups, including ones that might fairly be characterized as conservative. These groups were not chosen on the basis of their ideological postures, but rather because of their proven effectiveness in prevent foreclosures.

Thus, H.R. 5063, in my view, does not actually solve any problems, but is likely to create a number of vexing problems. H.R. 5063 weakens the Federal Government's ability to pursue the best tailored remedies for civil and criminal violations. It is of course a first principle of negotiations that negotiators should have flexible and open-ended authority so as to be able to negotiation for Pareto optimal deals. H.R. 5063 would detract from that.

Moreover, limiting DOJ settlement authority is likely to drive it toward a more aggressive litigative posture. That, in turn, is likely to stunt capital formation and economic growth by shifting prosecutorial resources away from negotiation and toward litigation, thus increasing the uncertainty of the business community around litigation.

In my view, one of the key problems underlying H.R. 5063 is that it embodies a flawed view of the purpose of regulatory enforcement. Proponents of H.R. 5063 have expressed the view that civil penalties should serve a specific restitutionary function, providing compensation to injured individuals, but this view flies in the face of long-standing theory and basic logic. Civil penalties by their very nature are inefficient means of providing redress to injured parties.

The long-standing goal of civil penalties has contrarily been to survey deterrents and general compensation function. Charitable payment provisions help to facilitate the public policy goals.

If this Task Force is concerned about ensuring that victims of crime are compensated, it should create more private causes of action for these victims. Private litigation is, from both a theoretical and empirical perspective, a far more efficient vehicle for providing specific restitution. I thank you again for the opportunity to testify and look forward to your questions. Thank you.

[The prepared statement of Mr. Min follows:]

UNIVERSITY OF CALIFORNIA, IRVINE

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

SANTA BARBARA • SANTA CRUZ

Written Testimony of

David K. Min
Assistant Professor of Law
University of California Irvine School of Law

Before the Executive Overreach Task Force of the
United States House of Representatives Committee on the Judiciary

"Executive Overreach in Regulatory Enforcement and Infrastructure"

Tuesday, July 12, 2016
3:00pm
2237 Rayburn House Office Building

Chairman King, Ranking Member Cohen, and distinguished members of the Task Force, my name is David Min and I am an Assistant Professor at the University of California Irvine School of Law, where my research focuses on the federal regulation of banking, housing finance and capital markets. Before coming into academia, I spent over a decade working in financial regulation, both in private practice and in the federal government, including as a Senior Policy Advisor for the Joint Economic Committee of Congress, where I had the pleasure of working with several of your colleagues. UC Irvine is only a short drive away from the districts represented by Congressman Issa. Congresswoman Chu, and Congressman Peters, so I appreciate the opportunity to testify in front of my fellow Southern Californians today on the question of Executive Branch overreach.

The topic of today's hearing is incredibly broad, and spans a very large number of highly complex issues in constitutional and administrative law. The question of the proper bounds of Executive Branch action, vis-à-vis either the Legislative and Judiciary Branches of the federal government, or the States, or citizens, has been occupying top legal minds since the Founding of this great country of ours. Because of the sweeping breadth of today's hearing, I will discuss only one discrete aspect of this issue, one with which you are all quite familiar. To what degree do settlements negotiated between federal agencies and private parties over alleged violations of federal law impinge upon Congressional appropriations authority, when those settlements include provisions calling for charitable donations to be made to third party recipients?

These charitable payment provisions are, of course, the subject of H.R. 5063, the "Stop Settlement Slush Funds Act of 2016." H.R 5063 would expressly prohibit the Department of Justice and other federal agencies from negotiating these types of charitable payment provisions, unless they "provide restitution for or otherwise remedy the actual harm… directly and proximately caused by the alleged conduct of the party." As I will discuss, I think H.R. 5063 is a solution in search of a problem. While there are many potential nightmare scenarios being floated around about the potential for these types of charitable payment provisions leading to the creation of federal government "slush funds" used to aid political allies and the like, there is little or no evidence that this is actually happening.

At the same time, H.R. 5063 is likely to have many negative collateral consequences. It will inhibit the federal government's ability to negotiate the best deals. It is a first principle of negotiations that negotiators should have flexibility and open-ended authority. H.R. 5063 flies in the face of this accepted wisdom. H.R. 5063 also would undermine the longstanding goals of civil penalty enforcement—deterrence and general compensation—by effectively reducing the size of the settlements that the federal government can seek on behalf of the United States. Finally, it is likely that H.R. 5063 would lead to more costly litigation, which would increase uncertainty for companies doing business in the United States and thus have negative implications for capital formation and economic growth.

I. <u>General Comments About Executive Overreach</u>

Before I discuss the topic of charitable payment provisions, I would like to make two brief observations about the broader topic of today's hearing, Executive Branch overreach. First, it is important to recognize that there is a difference between what the law, as it currently stands, allows the Executive Branch to do, and what the law should allow the Executive Branch to do.

The former question is largely settled as a matter of law—despite a large number of hyperbolic, and in my view, irresponsible claims to the contrary, the Executive Branch actions being discussed today do not appear to violate the Constitution or any federal laws. The latter question—whether and to what extent Executive Branch actions should be curbed—is a matter of great importance, but one that must require deep and serious analysis from our country's leading legal experts.

Second, while there has been much criticism, including by my fellow witnesses and many of the distinguished members of this Task Force, over the supposed overreach of state and federal prosecutors in recent years, the alternative—not zealously prosecuting highly publicized and costly corporate wrongdoing—seems both unrealistic and undesirable. Critics of so-called "swarm litigation" have pointed to the large number of government investigations over the past decade of mortgage originators, investment banks, and pharmaceutical companies as evidence of a new paradigm of governmental overreach. But let me suggest an alternative explanation that I believe is more consistent with the empirical evidence—there has been more governmental prosecution of business misconduct because there has been much more business misconduct, especially misconduct that has been highly publicized and with clear and substantial negative costs for average Americans.

Lest we have forgotten, let me remind you all that we recently had the worst financial crisis in our lifetimes. This financial crisis was in large part the result of extensive wrongdoing in the U.S. financial services industry,[1] and resulted in a total cost of $22 trillion to the American people.[2] It would be highly unusual—and an indication that it was not doing its job of representing the American people—if the federal government was not seeking to prosecute more financial crimes in the aftermath of this crisis. Similarly, given the gravity of the allegations levied against the pharmaceutical industry and the large potential costs of these alleged crimes,[3] it seems somewhat curious to claim that the government has been overzealous in seeking to prosecute these allegations of criminal misconduct.

---

[1] *See generally* PHIL ANGELIDES ET AL., THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (U.S. Government Printing Office 2011).

[2] U.S. GOVT. ACCOUNTABILITY OFFICE, FINANCIAL REGULATORY REFORM: FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACTS OF THE DODD-FRANK ACT, GAO Report No. 13-180, Jan. 16, 2013.

[3] For example, Johnson & Johnson's subsidiary Janssen admitted to illegal promotion of off-label, non-approved uses of the drug Risperdal. Janssen was also accused of marketing this drug to children and the developmentally disabled without approval; of making false claims about the safety and effectiveness of this drug, including ignoring and covering up data indicating increased risk of strokes and other adverse side effects; and of paying kickbacks to doctors and pharmacists for writing more prescriptions for Risperdal. *See* Press Release, Dept. of Justice Office of Public Affairs, Johnson & Johnson to Pay More Than $2.2 Billion to Resolve Criminal and Civil Investigations (Nov. 4, 2013), *available at* https://www.justice.gov/opa/pr/johnson-johnson-pay-more-22-billion-resolve-criminal-and-civil-investigations. At the same time, J&J earned over $11.7 billion from sales of Risperdal over the period of alleged wrongdoing. *See* Peter Sullivan, *Drop in Drug Company Settlements Leads to Call for Tougher Enforcement*, THE HILL, Mar. 31, 2016, *available at* http://thehill.com/policy/healthcare/274787-drop-in-drug-company-settlements-leads-to-call-for-tougher-enforcement. While some have argued that this settlement was overly punitive, the extremely serious nature of the charges involved and the outsized gains earned for J&J from this wrongdoing have led many to claim that the DOJ's settlement was lax and overly generous to J&J. *See* Press Release, Public Citizen, Big Pharma Settlements Highlight the Need for Tougher Enforcement (Mar. 31, 2016), *available at* http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=5848.

Turning back to the topic of charitable payment provisions, I want to make three distinct but related sets of points today. First, the negotiation of charitable payment provisions as part of government settlements is unquestionably legal, provided that these provisions meet certain criteria. Second, from a public policy perspective, there is scant or no evidence that charitable payment provisions pose an actual problem. Third, limiting charitable payment provisions would create more problems than it would solve, and thus would have far greater costs than benefits.

II. Negotiating for Charitable Payment Provisions is Legally Permissible

As to the first point, it is well settled under current law that charitable payment provisions are valid, so long as they meet certain conditions. Indeed, this very body has implicitly acknowledged this point by passing H.R. 5063 out of Committee. If charitable payment provisions were already illegal, H.R. 5063 would after all be unnecessary. In recent months, a number of commentators have expressed concern that the negotiation of charitable payment provisions might impermissibly bypass Congress's appropriations and oversight authority.[4] For example, one leading critic of charitable payment provisions has argued that they "circumvent the constitutional process for appropriating taxpayer dollars."[5] This claim, while perhaps rhetorically appealing, is inaccurate as a matter of law.

Of course, the Constitution quite clearly establishes that Congress has exclusive authority over the appropriations of new money.[6] But the Executive Branch has always had broad latitude in executing and enforcing the laws passed by Congress, including plenary authority over litigation matters involving the United States, which extends to the settlement of such claims.[7] The only limitations on this settlement authority are statutes that specifically and expressly relate to the litigating authority of the Attorney General and/or Article II, § 3 of the Constitution, which imposes a duty on the President to faithfully execute the laws of the United States.[8]

Thus, there is a potential tension between the Executive Branch and Congress over settlements that might be seen as encroaching on the latter's power over the purse, one which has

---

[4] *See, e.g.*, Press Release, Congressman Bob Goodlatte, Goodlatte Introduces Bill to Halt DOJ Slush Fund Money to Activist Groups (Apr. 27, 2016), *available at* http://goodlatte.house.gov/press_releases/887 (describing DOJ settlements with third party payment provisions as a "pattern or practice" of "systematically subverting Congress's budget authority); *Consumers Shortchanged? Oversight of the Justice Department's Mortgage Lending Settlement: Hearing Before the House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (2015) (statement of Paul J. Larkin, Jr.) (arguing that third party payment provisions "should not be included in a… civil settlement… unless an act of Congress expressly and specifically authorizes the government to impose any such obligation") (hereinafter "Larkin Testimony"); U.S. Chamber of Commerce Institute for Legal Reform, *Enforcement Slush Funds: Funding Federal and State Agencies with Enforcement Proceeds* (Mar. 2015) (stating that these types of settlements "raise serious constitutional concerns under Article I, which grants to Congress—and to Congress alone—the power to control and direct spending from the public fisc").

[5] Larkin Testimony, *supra* note 4, at 8.

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

[7] *See* Assistant Attorney General Theodore Olsen, Office of Legal Counsel, The Attorney General's Role as Chief Litigator for the United States, Memorandum Opinion for the Attorney General, Jan. 4, 1982, at 47-51, 59-60.

[8] *Id.* at 60.

dated back to the first days of our Republic.[9] Over time, Congress has passed several laws specifically designed to limit executive encroachment on Congress's appropriations authority in this regard. The most important of these, for the purposes of this hearing, is the Miscellaneous Receipts Act of 1849 (MRA), which requires that, unless expressly otherwise stated, "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury..."[10] The MRA, and appropriations law more generally, is intended to prohibit federal agencies from augmenting their appropriations through their enforcement policy.[11] But this prohibition applies only to funds that are received by the federal government, as I have explained in prior testimony before the House Financial Services Committee's Subcommittee on Oversight and Investigations.[12]

To ensure that settlements between the federal government and private parties containing charitable payment provisions are upheld by the courts, the Office of Legal Counsel (OLC) has advised that such settlements should meet two criteria: first, they should be executed prior to an admission or finding of liability in favor of the federal government; and second, they should be structured so that the government does not retain post-settlement control over the disposition or management of the funds or any projects carried out under the settlement, except for ensuring compliance.[13] As long as these two criteria are met, OLC has asserted that the government's control over the charitable donations "is so attenuated that the Government cannot be said to be 'receiving money for the Government'" and therefore would fall outside the scope of the MRA.[14]

Importantly, the non-partisan Government Accountability Office (GAO), which is charged with advising and supporting Congress, has accepted this interpretation of the MRA and appropriations law.[15] The GAO has stated on several occasions that charitable payment provisions may fall outside the scope of the MRA, so long as the donations have a nexus to remediating a legal violation and the agency's overall prosecutorial goals.[16] Under the GAO's

---

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

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

[11] *See, e.g., Nuclear Regulatory Commission's Auth. To Mitigate Civil Penalties* 3-4, Comptroller General Decision, File No. B-238419 (1990).

[12] *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?: Hearing Before the Subcomm. On Oversight and Investigations of the H. Comm. On Financial Services*, 114th Cong. (2016) (statement of David K. Min).

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

[14] *Id.*

[15] The GAO is an independent, nonpartisan agency that works for Congress and is often described as the "congressional watchdog." GAO's mission is to "support Congress in meeting its constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government... [by] provid[ing] Congress with timely information that is objective, fact-based, nonpartisan, nonideological, fair, and balanced." *See* U.S. Government Accountability Office, About GAO, available at http://www.gao.gov/about/index.html.

[16] *See, e.g.*, U.S. Gov't Accountability Office, Commodity Futures Trading Comm'n—Donations Under Settlement Agreements, GAO File No. B-210210, Sept. 14, 1983 (settlement terms should be limited to "statutorily authorized prosecutorial objectives" including "correction or termination of a condition or practice, punishment, and deterrence"); U.S. Gov't Accountability Office, Nuclear Regulatory Comm'n's Auth. To Mitigate Civil Penalties, GAO File No. B-238419, Oct. 9, 1990 (while federal agencies have broad prosecutorial discretion in crafting the terms of

legal interpretation, the broad discretionary authority given to federal agencies to settle litigation over alleged violations of federal law "empowers it to adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator," so long as the remedies sought are related to the underlying violation in question.[17] As Professor Andrew Spalding of the University of Richmond School of Law has described, this logic is essentially a concession that government settlement terms allowing for reduced penalties in exchange for payments to charitable or community service groups "could actually fall within the Executive's legitimate enforcement and not run afoul of either Congress's Article I power of the purse or the MRA."[18]

Finally, it is worth noting that federal courts have long approved and upheld the negotiation and enforcement of charitable payment provisions. As the Supreme Court has described, settlements of litigation claims are best understood as voluntary mutual agreements akin to contracts.[19] As such, "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based," which creates the binding obligations.[20] Therefore, settlement terms, including charitable payment provisions, are appropriately viewed as contractual terms rather than civil penalties.[21] Based on this reasoning, lower courts across the country have had no issue with granting consent decrees approving settlement agreements containing charitable payment provisions between the federal government and private parties.[22] This includes the recent settlements with British Petroleum and with the various investment banks that were alleged to have violated various provisions of FIRREA with their sale and marketing of mortgage-backed securities.

Based on this clear and (until recently) undisputed legal background, federal agencies have been negotiating charitable payment provisions for several decades. In fact, the Environmental Protection Agency has expressly encouraged its enforcement staff to "consider every opportunity" to negotiate for such charitable payment provisions "whenever possible."[23] So long as charitable payment provisions are negotiated as a part of a settlement that does not include a finding of liability on the part of the banks, the federal government does not maintain post-settlement control over the disposition or management of the donated funds, and there is some nexus between the charitable payments and the underlying prosecutorial objectives of the federal agency that is settling, there is no question that they are legally valid and enforceable under the law today. The federal government cannot be said to have received any funds under

---

settlements of litigation with private parties, these terms must relate to the agencies' underlying prosecutorial objectives).

[17] Letter from U.S. Comptroller General James F. Hinchman to Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce Chair John D. Dingell, GAO File No. B-247155.2 (Mar. 1, 1993).

[18] Andrew Brady Spaulding, *Restorative Justice for Multinational Corporations*, 76 OHIO ST. L. J. 357, 394-95 (2015).

[19] Local No. 93, Int'l Ass'n of Firefights, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 517-19 (1986).

[20] *Id.* at 522.

[21] *Id.* at 521.

[22] *See, e.g.*, Sierra Club v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355 (1990); Nw. Envt'l Def. Ctr. V. Unified Sewerage Agency of Washington County, No. CIV 88-1128-HO, 1990 WL 191827, at *1-2 (D. Or., July 27, 1990); Friends of the Earth v. Eastman Kodak Co., 656 F. Supp. 513, 513 (W.D.N.Y), *aff'd*, 834 F.2d 295 (2d. Cir. 1987).

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

these circumstances, and thus neither the MRA nor Congress's appropriations authority can be said to have been implicated.

III. There is No Evidence That Charitable Payment Provisions Pose a Public Policy Problem

As the preceding analysis illustrates, it is unquestionable that settlements with charitable payment provisions are legally permissible. But should they be? Obviously, Congress has the power to change the law, so long as those changes are consistent with the Constitution. Should you all take action to restrict the negotiation of charitable payment provisions, as H.R. 5063 contemplates? In order to properly analyze this question, it is necessary to first address the threshold issue of how big a problem charitable payment provisions pose.

A. No Evidence that Charitable Payment Provisions Are Being Abused

While proponents of H.R. 5063 have alleged that the Department of Justice and other federal agencies have abused charitable payment provisions, effectively turning them into "slush funds" for liberal allies of the Obama administration, these allegations have surprisingly little factual support behind them. Despite a number of hearings by the Judiciary Committee, the Financial Services Committee, and numerous requests to the Department of Justice and others that have resulted in the production of thousands of pages of documents to this Committee, there is no evidence that any of the charitable payment provisions were motivated by the types of nefarious self-dealing and political patronage considerations that have been attributed to them. Indeed, much of the substantive support behind these claims appears to be based on incorrect or misleading characterizations of the facts.

A recent hearing hosted by your colleagues on the House Financial Services Committee's Subcommittee on Oversight and Investigations serves as a case in point.[24] That hearing focused on the DOJ's settlements with five financial institutions over fraudulent statements and misconduct related to those banks' packaging, marketing, and sale of mortgage-backed securities. Several of these settlements contained charitable payment provisions allowing the banks to fulfill a part of their overall obligation by donating money towards neighborhood stabilization and foreclosure prevention efforts. The HFSC hearing characterized these settlements as an effort by the Obama administration to create a "slush fund to support liberal activist groups," focusing on the fact that among the groups that the banks could make payments to were groups like NeighborWorks or La Raza, which are arguably seen as more ideologically liberal than conservative.[25]

But this characterization was highly misleading, and ignored several important facts that largely rebut the claim that these settlements represented some sort of abusive or wrongful practice. First, of the five banks that settled MBS claims with the DOJ, only two of them

[24] House Committee on Financial Services Subcommittee on Oversight and Investigations, *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?*, May 19, 2016, *available at* http://financialservices.house.gov/calendar/eventsingle.aspx?EventID=400643.

[25] *See* Press Release, Office of Rep. Sean Duffy (R-WI), Duffy Investigates Obama Administration's Slush Fund for Liberal Activist Groups (May 19, 2016), *available at* https://duffy.house.gov/press-release/duffy-investigates-obama-administration-s-slush-fund-for-liberal-activist-groups.

(Citigroup and Bank of America) required donations to be made to third party charitable organizations. This indicates that, contrary to the claims of those supporting H.R. 5063, private parties have not been strong-armed into these types of settlements.

Second, the assertion that these charitable payment provisions were structured as political giveaways to liberal "activist" groups aligned with the Obama administration—a political "slush fund" as it has been described—is unsupported by the facts and ignores several important and exonerating points. These particular charitable payment provisions allow the banks to choose to donate to one (or more) of hundreds of charities and community groups, including a number of groups that would best be described as faith-based and/or conservatively aligned.[26] The common thread among these different groups is not a shared ideology but rather a demonstrated ability to further the goals of foreclosure prevention and neighborhood stabilization.

Third and relatedly, these charitable payment provisions were intended to redress the harms that had resulted from the alleged misconduct of the banks in question. It is easy to see a clear nexus between the alleged fraud that took place in the sale and marketing of private-label MBS and the remedial goals of preventing foreclosures and/or limiting the destabilizing and wealth-eroding effects of large numbers of defaults. To the extent that some of the potential recipients of these donations might be described as ideologically liberal, this seems to be due primarily to the fact that these provisions were focused on foreclosure prevention and neighborhood stabilization. The fact is that the particular charities that have been certified as potential recipients of these donations are the ones that are most effective at delivering information and assistance to the low- and moderate-income homeowners who were hit hardest by the mortgage crisis. NCRC or La Raza may or may not be accurately described as "liberal" groups, but it seems indisputable that they are better positioned than most organizations at reaching out to distressed homeowners. The types of services that these organizations offer, including legal aid and housing counseling, have been empirically proven to be among the most effective means of preventing preventable foreclosures.[27]

Fourth, the recipients of these donations are already generally subject to strict oversight, including detailed reporting and auditing requirements, designed to ensure that the funds they receive are used only for approved activities, as Professor Alan J. White has explained.[28] To the extent that these groups rely upon federal and state funding, as well as grants from non-profit foundations, they are required to adhere to very rigorous oversight requirements.[29]

Moreover, the claims that charitable payment provisions are being used as vehicles for self-dealing, cronyism, and corruption are contradicted by the legal strictures that guide the federal government's negotiation of charitable payment provisions. As I described previously in Part I, federal agencies are already under clear guidance that any charitable payment provision

[26] Many of the controversial groups in question are approved by the U.S. Department of Housing and Development as housing counseling agencies. A full list of HUD-approved housing counseling agencies can be found at http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm.
[27] *See Consumers Shortchanged? Oversight of the Justice Department's Mortgage Lending Settlements: Hearing Before the House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (2015) (statement of Alan M. White, Jr.).
[28] *Id.*
[29] *Id.*

must be designed so that the federal government does not retain post-settlement control over the disposition or management of the donated money. This mandate alone eliminates most or all of the concerns around self-dealing and cronyism. Moreover, the requirement that there be a nexus between any remedial provision negotiated in a government settlement (such as charitable payment provisions) and the underlying prosecutorial purpose, a requirement that is drilled into government attorneys,[30] also serves to rein in prosecutorial misconduct that might arise out of negotiated settlements. These requirements buttress existing conflict and ethical rules already in place for federal employees.

In short, there are already procedures in place to address the potential problems that so deeply concern supporters of H.R. 5063. And while there is much incendiary rhetoric to the contrary, there is very little or no actual evidence of which I am aware that these procedures are not working when it comes to charitable payment provisions.

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

Another objection to charitable payment provisions is that they potentially redirect money away from the federal treasury, thus essentially taking money that belongs to taxpayers and allocating it towards other purposes. The underlying assumption here is that "[a]ny sum that the government demands that a corporation hand over to a private party is money that the corporation would otherwise pay into the federal treasury." But the federal government is often bound by statutory limitations on the amount of civil penalties it can seek. Thus, it is incorrect to assume that each dollar of charitable payment secured in a settlement is a dollar that would otherwise have gone towards civil fines. For example, one can imagine a situation in which DOJ was constrained by statutory caps from seeking more than $100 million in civil penalties, due to statutory limitations. The company may be willing, for various reasons, to accept a slightly adjusted civil penalty—say $90 million—and in return provide an additional $90 million in charitable donations aimed at remediating its wrongful conduct. In such a scenario, the overall size of the settlement would be far greater—and thus, far more beneficial to the federal government—than the alternative of merely seeking civil penalties.

Indeed, the recent MBS-related settlements appear to provide an illustration of this type of scenario. The DOJ's primary federal claims in each of the RMBS settlements were claims of FIRREA violations. Penalties for FIRREA violations are capped at $1 million.[31] Thus, it is not clear that DOJ could have procured more in civil penalties than it received from the RMBS settlements, even if it had litigated these cases and won, due to FIRREA's statutory cap on civil penalties. The charitable payment provisions negotiated by DOJ appear to have allowed it to procure more than it might otherwise have negotiated, if such provisions were prohibited.

IV. Eliminating Charitable Payment Provisions Would Be Detrimental to Public Policy Purposes

[30] *See, e.g.*, Environmental Protection Agency website, *Supplemental Environmental Projects*, *available at* https://www.epa.gov/enforcement/supplemental-environmental-projects-seps#policy; Kris Sighe, *Organizational Community Service in Environmental Crimes Cases*, *in* United States Attorneys' Bulletin (2012).
[31] 12 U.S.C. 1833a(b)(1).

The preceding section illustrates that charitable payment provisions are not a particularly important or pressing problem. As I describe in this section, eliminating these types of provisions, as H.R. 5063 would do, would have steeply detrimental effects on longstanding public policy goals. It is undeniable that charitable payment provisions may serve a valuable purpose. Indeed, even Paul Larkin, a leading critic of these types of provisions, has acknowledged this point:

> The government and a defendant could find third-party contribution requirements mutually valuable. Requiring a target to make a charitable contribution enables the government to evade statutory limitations on the amount of fines that could be imposed if the prosecution believes that the statutory cap provides an insufficient penalty. The government may find that such conditions have considerable public relations value, particularly in the community benefitting from them. A corporate target also might jump at the opportunity to engage in a charitable endeavor... Moreover, the contribution may have important public relations value for the corporation as well.[32]

A. H.R. 5063 Would Weaken Government Attorneys' Capacity to Achieve Optimal Outcomes

It is a first principle of negotiations that the negotiator should be given flexible and open-ended authority, so that she can negotiate a deal that is in the best interests of her clients.[33] Efforts to limit the negotiator's authority will typically lead to a more zero-sum game approach and outcome,[34] and exacerbate principal-agent conflicts between the client and the negotiator.[35] This is not just an academic point. As Republican presidential nominee Donald Trump has noted, it is critically important to have flexibility in negotiating an optimal deal.[36]

By taking charitable donations to third parties off the bargaining table, H.R. 5063 would weaken the federal government's ability to negotiate for Pareto-optimal outcomes. The likely outcome would be more contentious zero-sum oriented outcomes, including litigation.

B. H.R. 5063 Would Undermine Deterrence and General Compensation Goals of Settlements Negotiated in Lieu of Civil Penalties

H.R. 5063 would also undermine the principal policy purposes behind the regulatory enforcement of civil penalties, namely deterrence and general compensation to society.[37] As I

[32] Larkin Testimony, *supra* note **Error! Bookmark not defined.**, at 6.

[33] *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

[34] *See* Don Peters, *Just Say No: Minimizing Limited Authority Negotiating in Court-Mandated Mediation*, 8 PEPPERDINE DISPUTE RESOL. L. J. 273 (2008).

[35] *See* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994).

[36] Donald J. Trump & Tony Schwartz, The Art of the Deal 50-53 (stating "I always protect myself by being flexible... The worst thing you can possibly do in a deal is seem desperate to make it. That makes the other guy smell blood, and then you're dead.").

[37] *See* Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1455-56 (1979). As Diver notes, in the U.S. legal system, the function of providing specific

previously described, charitable payment provisions can significantly increase the total amount of the settlement, and this is beneficial for both the goals of deterrence and general compensation. Obviously, a larger amount paid by the alleged wrongdoer would have a larger deterrent effect on other potential wrongdoers. And a larger amount can also provide greater remediation of the effects of the misconduct, serving the general compensation principles behind civil penalties as well.

Proponents of H.R. 5063 have argued that civil penalties—or the settlements negotiated in lieu of such penalties—should serve a restitutionary function and provide "redress to actual victims" while eschewing the idea of a broader or more general compensatory function.[38] But this conception of the policy rationales behind regulatory enforcement is ungrounded in any sound theoretical basis, and is contrary to the overwhelming weight of thought as to why we should seek to enforce civil penalties. As the prominent administrative law scholar Colin Diver has described, "[b]y definition, a civil money penalty does not serve a 'specific' compensatory function" of redressing the harms done to the victim of a particular wrong, since this is the role of remedies in private causes of action.[39] Rather, the compensatory function of civil money penalties is "to compensate 'society' at large for harm that it has suffered at the hands of a violator."[40]

In my view, there are several important reasons why the enforcement of civil penalties is an inapt vehicle for seeking specific restitutionary damages. First, federal agencies are not typically tasked, either in terms of their institutional culture or their resources, with serving individual Americans over the general populace. Thus, they are not likely to be very efficient in pursuing this objective. Second, and relatedly, the incentives of federal agencies are unlikely to be well aligned with the incentives of individual victims of misconduct, posing a classic principal-agent problem. Third, there are likely to be high transaction costs in most scenarios in identifying, representing, and distributing monetary damages to injured individuals.

At the same time, private remedies (and the private causes of action that lead to them) have long proven to be an effective and efficient means of allowing victims of legal violations to seek specific restitution for the harms they have suffered. If this Task Force truly believes that more efforts must be made to ensure that victims of business misconduct are compensated, then the clear answer is that it should seek to broaden the number and scope of private causes of action allowing such victims to seek specific restitutionary justice.

Finally, it should be mentioned that one likely collateral consequence of H.R. 5063 is that federal agencies will feel more compelled to prosecute criminal and civil violations, rather than settle them. Lost in all of the criticism of the charitable payment provisions contained in the recent MBS settlements is the intense public pressure to hold Wall Street accountable for the conduct that led to the financial crisis. The charitable payment provisions negotiated between the

---

compensatory damages to individuals aggrieved by legal violations "is performed by a system of private remedies, usually enforceable through the courts..." *Id.* at note 135.

[38] *See* Press Release, Office of Rep. Bob Goodlatte (R-VA), Goodlatte Introduces Bill to Halt DOJ Slush Fund Money to Activist Groups (Apr. 17, 2016), *available at* http://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=571.

[39] *Id.*

[40] *Id.*

DOJ and the banks in question constituted a "win-win" situation—the banks got out from under the specter of costly litigation that threatened their reputation and their bottom line, while the federal government could announce a large settlement figure as evidence that it was holding these institutions accountable for their past misconduct. If the DOJ had been unable to negotiate for charitable payment provisions, it seems far likelier that it would have taken these cases to trial (and then appeal). In my view, such an outcome and the waste of resources it represents is bad for both the American public and also for businesses, who face increased uncertainty, the possibility of a "bet the firm" outcome in litigation, and perhaps more stunted capital formation as a result.

In short, I think that proponents of H.R. 5063 have misstated and grossly exaggerated the negative effects of the status quo, while overlooking the significant costs of limiting the federal government's authority to negotiate settlements on behalf of the United States.

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

Witness Background Statement

David Min is an Assistant Professor of Law at the University of California Irvine School of Law, in Irvine, California, where he teaches and conducts research in the area of financial regulation, corporate law, and contracts. Prior to joining the faculty at UC Irvine, Professor Min served as the Associate Director for Financial Markets Policy at the policy think tank Center for American Progress, Senior Policy Advisor for the Joint Economic Committee of Congress, and Banking Committee Counsel to Sen. Charles E. Schumer (D-NY).

Before working in public policy, Professor Min spent five years in practice, first as a staff attorney in the Enforcement Division of the Securities and Exchange Commission, and then as an associate in the securities regulation and enforcement group of the Washington, DC law firm Wilmer Hale LLP.

Professor Min holds a J.D. from Harvard Law School, and undergraduate degrees from the University of Pennsylvania's Wharton School of Business (B.S., Economics) and College of Arts and Sciences (B.A., Philosophy).

Professor Min has not received any compensation or grants in connection with his testimony. The views expressed in his testimony are his own and do not represent the position of UC Irvine or UC Irvine School of Law.

Mr. KING. Thank you, Mr. Min. The Chair now recognizes the Honorable Mr. Ridley for his testimony.

TESTIMONY OF THE HONORABLE GARY RIDLEY, STATE OF OKLAHOMA, SECRETARY OF TRANSPORTATION

Mr. RIDLEY. Thank you, Mr. Chairman, Ranking Member Cohen, Members of the Task Force for the opportunity to testify related to the benefits of congressionally identified transportation improvement projects, more commonly referred to as earmarks.

We also appreciate the critical charge and the important work of the Task Force, and strongly encourage all possible action, in responsible limit, to reduce and eliminate Federal regulatory burden on citizens, business, and government entities.

The deficiency of a long-underfunded national transportation system cannot be resolved by States alone. They require increasing a congressionally influenced Federal investment level and a long-term improvement strategy. Scarce Federal transportation discretionary dollars should not be unduly influenced by other fringe or completely unrelated initiatives, and should instead by wholly focused on critically needed transportation improvements.

The resolution of our ongoing transportation funding crisis and cracking of new, more efficient project and program delivery protocols must be jointly developed by a renewed State and Federal partnership. Such a partnership must be based on trust and alliance between the State, local leaders, and our congressional Members, along with the clear and mutual understanding of the critical and growing needs of the infrastructure system.

Oklahoma has had a long history of successfully communicating the State's transportation system needs to our congressional delegation and, in turn, receiving congressional support for critically needed investments.

Interstate 40 through downtown Oklahoma City and Interstate 44 east of the Arkansas River in Tulsa are two tremendously important examples of dramatic improvements to the national transportation linkage that simply would not have been possible for Oklahoma to complete without the congressionally-directed Federal support. Oklahoma utilizes an 8 year construction work program to develop and deliver many of our federally funded projects.

This plan is based on identified needs deficiency and is highly publicized around the State to ensure our transparency efforts. All projects in this plan have been fully vetted, are considered a priority, and are being actively advanced through the development process.

The encompassed projects are inherently a topic of constant conversation and focus of the Oklahoma Congressional Delegation. Our delegation was always quick to try and help with Federal funding for our 8 year plan projects when opportunities were presented.

It is important to recognize that any new addition of congressionally-identified project funding simply extended the planned investment and targeted projection, and enhanced the reach of the overall plan. While some earmarks were doomed to failure in some State, because there was never enough congressionally-identified directed funding to complete the initiative as conceived, conversely

our 8 year construction work plan projects are typically well into development, enjoy solid mix of resource commitments, multi-faceted resource availability provided by a high degree of flexibility, and offer the greatest opportunity for success.

Make no mistake, transportation infrastructure earmarks still exist today, such as the TIGER program, FASTLANE grants, but are largely directed through funding pools left to the discretion of the executive branch and the administration of the associated jurisdictional agencies. Oklahoma has been successful in garnering discretionary participation in improvement projects under these competitive programs.

However, the projects are sometimes developed to include additional elements that divert a percentage of the funding away from the more direct transportation infrastructure investments and toward fringe enhancements to garner favor with perceived executive priorities.

I believe that there is an inherent need for a methodology to facilitate congressionally identified projects that can assist with transportation infrastructure improvements of national significance and that clearly and undeniably support our national transportation network.

Opportunities that encourage State leaders' and officials' interaction with their congressional delegations that require detailed explanations of the need of the national transportation network can only have positive outcomes. A carefully direct, transparent project vetting process is paramount and should be mandated before any congressionally identified funding is committed.

In addition, the responsible congressional Committee leadership and Committee Members should be provided with greater influence to shape and direct all facets of the Federal program. Discretionary transportation funding programs should be utilized to encourage a greater understanding of the critical needs of the national transportation system, and should require the broad support of Congress, rather than to be styled to pursue a narrowly defined agenda almost entirely by the executive branch.

I might make mention also, Mr. Chairman, that a couple of earmarks that come to light are the inland waterway system was an earmark, and so was our National System of Highways or the interstate system was both earmarks.

Mr. Chairman, Members, thank you again for the opportunity to visit with you today. I will be happy to answer any questions.

[The prepared statement of Mr. Ridley follows:]

WRITTEN TESTIMONY OF

THE HONORABLE GARY RIDLEY

STATE OF OKLAHOMA
SECRETARY OF TRANSPORTATION

before the

UNITED STATES HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE

Task Force on Executive Overreach

hearing on

"Executive Overreach in Regulatory Enforcement and Infrastructure"

JULY 12, 2016

Thank you, Chairman King, Ranking Member Cohen and members of the Task Force, for the opportunity to testify related to the benefits of Congressionally identified transportation improvement projects, more commonly referred to as "earmarks". We appreciate the critical charge and important work of the Task Force and strongly encourage all possible action to responsibly limit, reduce and eliminate the federal regulatory burden on citizens, business and government entities.

My name is Gary Ridley and I serve as the Secretary of Transportation in Oklahoma.

Today, I want to emphasize several points –

The deficiencies of a long underfunded national transportation system cannot be resolved by the States alone and require an increasing and congressionally influenced federal investment level and a long term improvement strategy.

Scarce federal transportation discretionary dollars should not be unduly influenced by other fringe or completely unrelated initiatives and should instead be wholly focused on critically needed transportation improvements.

Congressionally Identified Projects in Oklahoma

The resolution of our on-going national transportation funding crisis and the crafting of new, more effective project and program delivery protocols must be jointly developed in

a renewed State and Federal partnership. Such a partnership must be based on the trust and alliance between state and local leaders and their congressional members along with the clear, mutual understanding of the critical and growing needs of the infrastructure system.

Oklahoma has a long history of successfully communicating the state's transportation system needs to our congressional delegation and, in turn, receiving congressional support for critically needed investments. Interstate 40 through downtown Oklahoma City and Interstate 44 east of the Arkansas River in Tulsa are two tremendously important examples of dramatic improvements to national transportation linkages that simply would not have been possible for Oklahoma to complete without congressionally directed federal support.

Oklahoma utilizes an Eight Year Construction Work Plan to develop and deliver many of our federally funded projects. This plan is based on identified needs and deficiencies and is highly publicized around the state to enhance our transparency efforts. All projects in this plan have been fully vetted, are considered priority and are being actively advanced through the development process. The encompassed projects are inherently a topic of constant conversation and a focus of the Oklahoma congressional delegation.

Our delegation was always quick to try and help with federal funding for "8 Year Plan" projects when opportunities were presented. It is important to recognize that any new

addition of congressionally identified project funding simply extended the planned investment in the targeted project or enhanced the reach of the overall plan. Where some "earmarks" were doomed to failure, in some states, because there was never enough congressionally dedicated funding to complete the initiative as conceived. Conversely the 8 Year Plan projects are typically well into development and enjoy a solid mix of resource commitments. Multi-faceted resource availability provides for a very high degree of flexibility and offers the greatest opportunity for success.

Competing for Assistance in Today's Administratively Influenced Discretionary Programs

Make no mistake, transportation infrastructure earmarks still exist today, such as the Tiger program and Fastlane grants, but are largely directed through funding pools left to the discretion of the executive branch and the administration of the associated jurisdictional agencies.

Oklahoma has been successful in garnering discretionary participation in important projects under these "competitive" programs. However, the projects are sometimes developed to include additional elements that divert a percentage of the funding away from more direct transportation infrastructure investments and towards fringe enhancements to garner favor with perceived executive priorities.

I believe that there is an inherent need for a methodology to facilitate congressionally identified projects that can assist with transportation

infrastructure improvements of national significance and that clearly and undeniably support our national transportation network. Opportunities that encourage state leaders and officials interactions with their congressional delegations and that require detailed explanations of the needs of the national transportation network can only have positive outcomes. A carefully directed, transparent project vetting process is paramount and should be mandated before any congressionally identified funding is committed.

In addition, the responsible congressional committee leadership and committee members should be provided with greater influence to shape and direct all facets of the federal program. Discretionary transportation funding programs should be utilized to encourage a greater understanding of the critical needs of the national transportation system and should require the broad support of congress rather than be styled to pursue a narrowly defined agenda dictated almost entirely by the executive branch.

Mr. Chairman and members thank you again for the opportunity to visit with you today and I will be happy to try and answer any questions.

Mr. KING. And I thank you, Secretary Ridley, for your testimony—all the witnesses for your testimony, and I will now recognize myself for 5 minutes.

And I would turn first to you, Mr. Ridley, and ask you, if we were to repeal the Davis-Bacon Act, how much impact would that have on your ability to develop transportation in the State of Oklahoma?

Mr. RIDLEY. Well, if I may, Mr. Chairman, give you just an example. Prior to 2010, Oklahoma had six zones that were covered under the Davis-Bacon Act. In 2010, for whatever reason, the Labor Department decided to do an audit and look at ours—and ours is a rural State, has two metropolitan areas, an Oklahoma City area and Tulsa area, but relatively a rural State other than that—and they came up with 66 zones.

Now, an average highway project can be six to eight miles long. Therefore, many times, these projects fall within two or three zones. So, if you can imagine a contractor trying to keep track of a dozer operator's wages as he passes through the total project or even a truck driver as he passes through the project, it makes it extremely difficult for a contractor to not only bid their job, but also to be able to keep track of it. Therefore, that causes risk, and any time you have risk in a highway project, that increases the cost.

It is also difficult to administer by the DOTs—difficult and almost impossible to audit. So, it is a huge cost. The dollar amount I do not know, Mr. Chairman. I do not know that I can grasp it, but you had made mention of the 15 to 20 percent. I think that is probably fairly close. It is an unbelievable cost, again, because of the time that it takes to do it, but more importantly, the risk that a contractor has in trying to develop a bid document and be able to progress the project.

Mr. KING. Thank you, Mr. Ridley, and those numbers I have estimated it back to 20 percent, but our numbers range in auditing our projects between 8 percent increase and 35 percent increase. The range varies depending on how much materials, how much labor, and what their relative competitive wage is in the area. Thank you.

I turn to Attorney General Mukasey, and I want to pose a question here that you probably have not had an opportunity to digest.

So, it has to do with some legislation that I proposed sometime back—in trying to figure out how we could get back to constitutional, authorized, and responsible earmarks. And so I had introduced in a previous Congress or two—it is called the Cut Act, and as I said, I want to be constitutional about this.

I think it is the constitutional responsibility that we have here in Congress. We should not abdicate this responsibility over to the executive branch of government. And yet, there is a political question also to go back to earmarks in the face of the pressure that is there that is focused on the idea that earmarks were out of control, there were too many, and they were growing pretty fast; means that we want to have public scrutiny.

So, I put it together in this way, that we would set up a bill that any Member of Congress could call up once a quarter, and only once a quarter, that would be a rescissions bill, that could call back earmarks after they had left the President's desk, but before they

were expenditures that were obligated. And it would be under an open rule that would allow only for those earmarks to be struck by a majority vote of Congress, and then any Member could bring an amendment to the floor to strike those earmarks.

And so, for example, I was just thinking of one, that maybe it comes out of the Army side—the Cowgirls Hall of Fame—that was an Oklahoma earmark as I remember, so I am teasing our witness just a little. But say there is an amendment to strike the funding for the Cowgirls Hall of Fame. That gets brought up on the floor, it gets voted—the strike of that. The rescission of that funding would be successful, and then a whole series of others: the Bridge to Nowhere, and on and on and on, until there was public scrutiny, public focus, and we had the judgement of Congress always with recorded votes on those things that would strike the earmarks that were irresponsible in the majority of Congress.

Would that be, Mr. Mukasey—or General Mukasey—a method by which we could restore integrity in the constitutional process and also maintain an integrity in fiscal responsibility?

Mr. MUKASEY. You are correct that I did not have an opportunity to mull that over, except during the period that you were asking the question. However, my understanding of what you have suggested is that in essence, a law gets passed providing for an earmark, it goes to the President's desk, gets signed, but that a superseding law can then undo the initial law and—when it is appropriate. I see no problem with that, and obviously each house has the power to set its own rules. That is right in the Constitution. The House of Representative is supposed to initiate all bills having to do with raising and disbursement. That is in the Constitution. So I see nothing to impede that kind of procedure, and as a matter of policy, it sounds very wise, because it allows people initially to put forward earmarks. The ones that can survive scrutiny will survive. The ones that cannot will not, and all in all, I think it makes perfectly good sense.

Mr. KING. I thank you, General Mukasey, and if the Ranking Member will indulge me, I would like to offer that also up to Mr. Min and see if he would care to comment.

Mr. MIN. I think I would echo the general's comments. It seems like this is your house. You set the rules of how you appropriate the funds.

Mr. KING. And so it sounds to me that we are relatively universal among the witnesses that restoring responsible earmarks would be a constitutional thing to do that would also restore authority back to Article I and in the legislative branch of government. And would you agree, Secretary Ridley?

Mr. RIDLEY. Certainly on the legal aspects. I would not have a comment certainly on Article I of the Constitution. My understanding is that Congress is the one that decides where the money is spent.

Mr. KING. I thank you, Mr. Ridley. And I would ask unanimous consent to introduce the Cut Act into the record. And hearing no objection, so ordered.*

***Note:** The material referred to was not available at the time this hearing record was finalized.

Mr. KING. Now, I recognize the gentleman from Tennessee, our Ranking Member, for his opportunity to question the witnesses.

Mr. COHEN. Thank you, Mr. Chair. General Mukasey, you were talking about, I guess, civil asset forfeiture?

Mr. MUKASEY. As reflected in the particular program that I was referring to.

Mr. COHEN. Yeah.

Mr. MUKASEY. That is the division of spoils between the DOJ and State.

Mr. COHEN. Right, that is what you were referring to, was it not?

Mr. MUKASEY. Correct.

Mr. COHEN. I think maybe I got it. I do not know, but there was some official with Justice who helped create that program, and then had an epiphany and sought to be forgiven for his misdeeds and has now come out strongly against, and saw how awful it was. And maybe there two of them. Do you know who I am speaking of?

Mr. MUKASEY. I do not.

Mr. COHEN. Well, I will find it eventually. It is the power of Google, but they said it would just—and it is awful, and I saw where the——

Mr. MUKASEY. I am sorry to interrupt. It is one of those bright ideas that sounds bright when you first think of it, and may have advantages, but then when it goes into practice, some things that are not so right about it emerge.

Mr. COHEN. Was it in the early 1980's that it started?

Mr. MUKASEY. Not sure when it started. I know that there was a Washington Post series back in 2014, I think that exposed it, and it has been cut back substantially. Of course, the cutback is entirely voluntary by the Justice Department, and it is self-policed. I hope it is policed well, but, you know, one never knows.

Mr. COHEN. There is a Mr. Seth wrote a piece, and maybe that is—but anyway, regardless, all those programs and the—Holder started to cut it back for some reason, and then the President, Attorney General, has reinstituted it, and it is just to take money from folks without a conviction; it is the antithesis of what you would think of as due process and government intrusion.

Mr. MUKASEY. It is, and I mean, they will take the money immediately. You may get it back at some point, but it is not going to be until you have spilled a whole lot of blood and money in order—trying to get it done.

Mr. COHEN. And does it not shift the burden on the citizen to prove it is their money?

Mr. MUKASEY. In some instances, it does. You have people who have businesses that are high-cash businesses that wind up transporting cash, get pulled over, and they are accused of planning structuring, or money laundering. The money is seized, and it is sometimes years before they get it back.

Mr. COHEN. Well, it is cash-registered justice is what it is. That happens a lot with drug laws, and a lot of these are drug cases. But in drug laws, the police get to keep cars and all kind of goods that they take, and we have really no choice in the matter.

Mr. MUKASEY. Back in my youth, when I was assistant U.S. attorney, we prosecuted a bunch of police officers who started out that way, seizing assets, using them for public purposes, and

wound up seizing assets and using them for their own purposes and keeping the money and selling the drugs. So, you really create a slippery slope.

Mr. COHEN. Yeah, we had a lot of that back in Tennessee when I was a police attorney and—after that I was a police attorney, but most of the drug agents were convicted of taking monies and taking—sometimes, it was not through the asset forfeiture program. They just took it, but neither here nor there. What do you know about deferred prosecution agreements? Those come through your office, too, do they not?

Mr. MUKASEY. Well, they come through our firm. We have——

Mr. COHEN. But they used to come through your office.

Mr. MUKASEY. Right, they did.

Mr. COHEN. Do you think there should be a different method in choosing the monitors, so that there is no politics involved in it, and having some time of ombudsman or something?

Mr. MUKASEY. I think that that whole system needs a whole lot of reform. You start out with the fact that many corporations—and I am not here to, you know, as a bleeding heart for corporations—but many corporations cannot take defending themselves against charges. Drug companies, for example——

Mr. COHEN. Medical device.

Mr. MUKASEY [continuing]. Will suffer—pardon?

Mr. COHEN. Medical device companies, too.

Mr. MUKASEY. Medical device companies will suffer debarment if they are even charged, so they do not fight. It is cheaper for them as a business matter to settle, and they do, and permit a deferred prosecution agreement in which they state certain things that may or may not be true, and then are barred by the terms of the agreement from ever challenging them publically.

In fact, those agreements sometimes provide that if anybody at the company issues a statement that is contrary to the statement of facts to which the company agreed in the deferred prosecution agreement, the government can go back and prosecute them.

Mr. COHEN. Aare you familiar with Chris Christie's adventures in those areas?

Mr. MUKASEY. I mean, the contribution to his alma mater?

Mr. COHEN. That was the one I was getting to, yeah.

Mr. MUKASEY. That is kind of legendary in the department.

Mr. COHEN. Yeah, that was just awful. It required this company to make—was it $100,000 or a quarter of a million dollars—to have a chair in ethics at some school in New Jersey, that was his school.

Mr. MUKASEY. Well, it was his alma mater.

Mr. COHEN. Yeah, right, it was not, yeah. But anyway, those things happen.

Mr. MUKASEY. Not his best moment.

Mr. COHEN. No, it was not. I wish we could do some things on civil forfeiture and get some—maybe Mr. King and I can work together on that and pass a bill.

Mr. KING. So, we can have our conversation on the sidebar.

Mr. COHEN. Thank you, sir.

Mr. KING. I thank the gentleman from Tennessee, who has yielded back, and I thank the witnesses. This concludes today's hearing, and without objection, all Members will have 5 legislative days to

submit additional written questions for the witnesses or additional materials for the record.

I thank the witnesses, and I thank the Members and the audience. This hearing is now adjourned.

[Whereupon, at 5:17 p.m., the Task Force was adjourned subject to the call of the Chair.]