STOP SETTLEMENT SLUSH FUNDS ACT OF 2016

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

ON

H.R. 5063

APRIL 28, 2016

Serial No. 114–69

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

99–944 PDF WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
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STOP SETTLEMENT SLUSH FUNDS ACT OF 2016

THURSDAY, APRIL 28, 2016

HOUSE OF REPRESENTATIVES,

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

COMMITTEE ON THE JUDICIARY,

Washington, DC.

The Subcommittee met, pursuant to call, at 10:07 a.m., in room 2141, Rayburn House Office Building, the Honorable Tom Marino (Chairman of the Subcommittee) presiding.

Present: Representatives Marino, Goodlatte, Walters, Ratcliffe, Johnson, and Conyers.

Staff Present: (Majority) Dan Huff, Counsel; Andrea Lindsey, Clerk; and (Minority) Slade Bond, Minority Counsel.

Mr. MARINO. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law will come to order. Good morning, everyone.

Without objection, the Chair is authorized to declare a recess of the Committee at any time.

We welcome everyone to today's hearing on H.R. 5063, the "Stop Settlement Slush Funds Act of 2016."

And I now recognize myself for an opening statement.

The bill's title sums up the issue. A Judiciary Committee investigation has revealed that DOJ is requiring settling parties to donate money to third-party groups. At issue are large sums of money; close to $1 billion in just the last 2 years. Of that, over half-a-billion has already been disbursed or is committed to be disbursed.

I purposely did not make this hearing about groups that received the money. I did not want to distract from the central issue, and I feel the central issue is the harm that these provisions do to Congress as an institution. The spending power is Congress' most effective tool in reining in the executive branch. This is true no matter which party is in the White House.

A Democrat-led Congress passed the Cooper-Church Amendment to end the Vietnam war. More recently, Congress used a funding restriction to prevent the transfer of Guantanamo Bay prisoners to the United States mainland. Bipartisan funding restrictions were passed to block lavish salary and conference spending by Federal agencies and grantees. This policy control is lost if the Executive gains authority over spending.

Serious people on both sides of the aisle understand this. Consider Todd Peterson, former Deputy Assistant Attorney General for the Office of Legal Counsel in the Clinton administration. He warned in 2009, that "because the Department of Justice has such broad settlement authority, it has the ability to use settlements to circumvent the appropriations authority of Congress." In 2008, a top Republican DOJ official circulated a memo to Federal prosecutors restricting mandatory donation provisions, because they can "create actual or perceived conflicts of interest and or other ethical issues."

So, again, serious people understand that this is fundamentally a bipartisan, institutional issue. Indeed, the language on which this bill is based passed the House last year, by a voice vote.

The "Stop Settlement Slush Funds Act of 2016" prohibits settlement terms that require donations to third-parties. It states explicitly that payments to provide restitution for actual harm, directly caused, including harm to the environment, are not donations.

As a former Federal prosecutor, I am acutely aware of the needs of DOJ in negotiating settlements. Now, as a Congressman, I am also aware that a line has to be drawn. This commonsense bill merely ensures that settlement money goes either to direct victims or to the U.S. Treasury so that the people's elected Representatives can decide how best to spend it.

I understand we could differ on the details, but today is not a markup. This is an opportunity to hear from expert witnesses to ensure that the legislation has the proper scope. Let's work together from a common premise. So I call on my colleagues to join me in defending the fundamental principle: Elected, accountable Members of Congress should decide how Federal funds are spent.

I am pleased that every Republican Subcommittee Member is already a cosponsor. I hope my Democratic colleagues will soon join this important effort.

I thank our witnesses for appearing and look forward to the discussion.

[The text of the bill, H.R. 5063, follows:]

.....

(Original Signature of Member)

114TH CONGRESS
2D SESSION

H. R. _____

To limit donations made pursuant to settlement agreements to which the United States is a party, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

M__. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To limit donations made pursuant to settlement agreements to which the United States is a party, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Stop Settlement Slush Funds Act of 2016".

SEC. 2. LIMITATION ON DONATIONS MADE PURSUANT TO SETTLEMENT AGREEMENTS TO WHICH THE UNITED STATES IS A PARTY.

(a) LIMITATION ON REQUIRED DONATIONS.—An official or agent of the Government may not enter into a settlement agreement on behalf of the United States, or enforce such a settlement agreement, if that agreement includes a term requiring that any donation be made to any person by any party (other than the United States) to such agreement.

(b) PENALTY.—Any official or agent of the Government who violates subsection (a), shall be subject to the same penalties that would apply in the case of a violation of section 3302 of title 31, United States Code.

(c) DEFINITIONS.—In this section:

(1) SETTLEMENT AGREEMENT.—The term "settlement agreement" means a settlement agreement resolving a civil action or potential civil action.

(2) DONATION.—The term "donation" does not include any payment by a party to provide restitution for or otherwise remedy the actual harm (including to the environment), directly and proximately caused by the alleged conduct of the party, that is the basis for the settlement agreement.

Mr. MARINO. The Chair now recognizes the Ranking Member of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Mr. Johnson of Georgia, for his opening statement.

Sir.

Mr. JOHNSON. Thank you, Mr. Chairman.

H.R. 5063, the "Stop Settlement Slush Funds Act of 2016," would remove an important civil enforcement tool available to agencies to hold corporations accountable for the general harm caused by unlawful conduct and would create waves of uncertainty, delay, and needless litigation in the enforcement of civil law.

H.R. 5063 would have potentially disastrous consequences on the remediation of generalized harms in civil enforcement actions. For unlawful conduct with systemic harms, such as environmental catastrophe—or an environmental catastrophe, settlements provide a mechanism to provide for the remediation of generalized harms through offsets and other indirect remedies. Similarly, parties seeking to regain public trust may also wish to include voluntary auditing requirements in settlement agreements that ensure that similar violations do not occur in the future.

Joel Mintz, an expert in environmental law and enforcement, observes that these settlements "can create a win-win scenario for all parties involved, including regulators, regulated companies, and local communities," by creating a flexible regulatory climate and repairing "corporate public images that would otherwise be further harmed by negative environmental publicity."

For example, in 2012, the Mitsui Oil Exploration Company settled its liability for violations of the Clean Water Act resulting from the Deepwater Horizon oil spill. In addition to civil penalties, Mitsui Oil agreed to facilitate land projects in several States, including Texas, Mississippi, Alabama, Louisiana, and Florida, to conserve critical habitat within the Gulf of Mexico.

In this case and others like it, donations under settlement agreements serve as a critical tool to remedy a general harm and provide the settling party with an opportunity to re-earn the public's trust. H.R. 5063 would eliminate these donations in both existing and future settlement agreements. This is true even in cases where the settling party seeks a donation to offset its unlawful conduct or where a party's harmful conduct could not otherwise be remedied.

This legislation is also an unwarranted encroachment on the prosecutorial discretion of civil enforcement agencies. The exercise of enforcement discretion is a traditional power of executive branch agencies. This authority provides broad prosecutorial flexibility to civil enforcement agencies when crafting settlement agreements within the scope of their statutory authority.

It is little surprise that the Supreme Court has consistently held that the exercise of such discretion is a core function of the Executive's power under the take-care clause, as it did in *Heckler v. Chaney*, where the Court observed that the characteristics of a decision of a prosecutor in the executive branch have long been regarded as the special province of the executive branch inasmuch as it is the executive branch who is charged by the Constitution to take care that the laws be faithfully executed.

Under this constitutional norm, agencies' prosecutorial discretion to settle potential civil actions extends to requiring donations in

settlement agreements. Additionally, settlement agreements may exceed the remedies identified in an agency's underlying statute so as long as they relate to the agency's statutorily authorized prosecutorial objectives, which generally requires that donations have a sufficient nexus between the underlying violation and the proposed remedy. H.R. 5063 represents a severe departure from these core principles, raising separation-of-powers concerns and threatening to curtail agency discretion in the enforcement of the law.

In closing, I'd like to thank our witnesses for appearing today. I'd like to welcome our former colleague Dan Lungren back to the other side.

And I yield back the balance of my time.

Mr. MARINO. Thank you.

The Chair now recognizes the Chairman of the full Judiciary Committee, Mr. Bob Goodlatte of Virginia, for his open statement.

Mr. GOODLATTE. Well, thank you, Mr. Chairman. I appreciate your holding this hearing.

Eighteen months ago, this Committee commenced a "pattern or practice" investigation into the Justice Department's mortgage lending settlements. We found that the Department of Justice is systemically subverting Congress' spending power by requiring settling parties to donate money to activist groups.

In just the last 2 years, the Department of Justice has directed nearly a billion dollars to third-parties entirely outside of Congress' spending and oversight authority. Of that, over half a billion has already been disbursed or is committed to be being disbursed. In some cases, these mandatory donation provisions reinstate funding Congress specifically cut.

Whether the beneficiaries of these donations are worthy entities or not is entirely beside the point. The Constitution grants Congress the power to decide how money is spent, not the Department of Justice. This is not some esoteric point. It goes to the heart of the Separation of Powers theory and Congress' ability to rein in the Executive in practice.

Certainly, the Department of Justice's authority to settle cases necessarily includes the ability to obtain redress for victims. However, Federal law understands victims to be those "directly and proximately harmed" by a defendant's acts. Once those victims have been compensated, deciding what to do with additional funds extracted from defendants becomes a policy question properly decided by elected Representatives in Congress, not agency bureaucrats or prosecutors. It is not that Justice Department officials are necessarily funding bad projects. It is that, outside of compensating actual victims, it is not their decision to make.

We have brought these reasonable concerns to the Department of Justice. But rather than suspend the practice of mandatory donations, DOJ has doubled down. Just 2 weeks ago, a major DOJ bank settlement required $240 million in "financing and/or donations" toward affordable housing.

It is time for Congress to take action to end this abuse.

The "Stop Settlement Slush Funds Act of 2016" bars mandatory donation terms in DOJ settlements. It is a bipartisan bill.

It makes clear that payments to provide restitution for actual harm, directly caused, are not donations. It explicitly references the

environmental context where the injury to the environment may be diffuse and there may be no identifiable victims. The bill deals with this by explicitly permitting payments to remediate environmental damage. If direct remediation of the harm is impossible or impractical, the violator is not let off the hook. The full penalty is paid, but into the Treasury.

The principle is clear, but the details need to be studied. I am pleased that we have an expert panel today to offer views. I am particularly interested to hear their thoughts on the scope of the bill. It covers civil settlements. Is that sufficient? What about the language permitting remediation of harm "directly and proximately" caused? Does this impose a sufficiently tight nexus between the payment and the offense to prevent further DOJ mischief?

So I am eager to hear from our witnesses, and I thank them for coming. And I also want to thank all of the bill's cosponsors, particularly Chairman Marino, Representative Peterson, Chairman Culberson, and every Republican Member of this Subcommittee.

And it's also a pleasure to welcome back to the Judiciary Committee my longtime friend and former colleague, Dan Lungren, who I'm sure has a keen interest and insight into this issue. And I welcome the other witnesses today as well.

Thank you, Mr. Chairman. I yield back.

Mr. MARINO. Thank you.

The Chair recognizes the full Judiciary Committee Ranking Member, Mr. Conyers of Michigan, for his opening statement.

Mr. CONYERS. Thank you, Chairman Marino.

And I join all of us in welcoming back Dan Lungren in his newer capacity. He was an outstanding Member of the Judiciary Committee, and we look forward to his testimony.

Today's hearing concerns legislation that would prohibit the enforcement or negotiation of any settlement agreement requiring donations to remediate harms that are not directly and proximately caused by a party's unlawful conduct.

The proponents of this bill assert that the Justice Department and civil enforcement agencies used such settlement agreements to unlawfully augment their own budgets as an end-run around the congressional appropriation process.

I believe that this bill is a seriously misguided effort for a number of reasons.

To begin with, these settlement agreements have been successfully used, for example, to facilitate an effective response to the predatory and fraudulent mortgage lending activities that nearly caused the economic collapse of our Nation. Settlement agreements with two of these culpable financial institutions, Bank of America and Citigroup, require a donation of less than 1 percent of the overall settlement amount to help affected consumers.

The majority initially claimed, however, that the Justice Department used these settlement agreements as a vehicle for funding activist groups. Notwithstanding the production of hundreds of pages of documents by the Justice Department, along with hundreds of pages of documents produced by private parties, the majority's investigation has not produced any evidence that the government included unlawful or politically motivated terms in its settlement

agreement with Bank of America or Citigroup, let alone slush funds.

In the absence of any facts to support their initial claim, the majority now asserts that the Justice Department and other agencies have augmented their appropriations through civil enforcement. But existing law already prevents agencies from augmenting their own funds through civil enforcement. These laws require that donations in settlement agreements have a clear nexus to the prosecutorial objectives of the enforcement agency. And both the Government Accountability Office and the Congressional Research Service conclude that the settlement agreements providing for secondary remediation do not violate Congress' constitutional power of the purse.

And, finally, I'm also very concerned that this measure will have potentially disastrous consequences on the remediation of systemic harms in civil enforcement actions. Settlement agreements allow parties to resolve their civil liability by voluntarily remediating the harms caused by their conduct. In the context of environmental enforcement actions, for example, parties may voluntarily agree to undertake restoration projects to protect local ecosystems in order to offset environmental damage.

Moreover, for some unlawful conduct, such as, for example, employment discrimination, secondary remediation of harms may be the only remedy available for systemic violations of the law. Employment discrimination lawsuits typically affect the interests of employees who are not parties to an action. Secondary remediation in these cases serves as an important tool to protect victims of workplace harassment and establish lawful workplace norms through voluntary compliance and training programs.

So you can see I have some serious concerns about this legislation, but I thank our witnesses for being with us today, and I look forward to hearing their testimony.

Mr. Chairman, I yield back.

Mr. MARINO. Thank you.

Without objection, other Members' opening statements will be made part of the record.

I will begin by swearing in our witnesses before I introduce them.

Would you please stand and raise your right hand?

Thank you.

Do you swear that the testimony you are about to give before this Committee is the truth, the truth, and nothing else but the truth, so help you God?

Please be seated.

Let the record reflect that all the witnesses have responded in the affirmative.

And I'm going to just take several minutes to introduce all three of you at once, and then we'll start with Congressman Lungren, but I like to refer to you as "General," because you know how we prosecutors are. As a matter of fact, all of you as along those lines.

But Daniel Lungren is a principal at Lungren Lopina LLC. Mr. Lungren has served nine terms as a Member of the U.S. House of Representatives from California, as well as two terms as attorney general of California. In Congress, he was a Member of the House

Judiciary Committee, House Intelligence Committee, and was a senior Member of the House Committee on Homeland Security, where he worked on a number of important legislative reforms.

As attorney general, Mr. Lungren led an office of nearly 1,000 lawyers with an annual criminal and civil caseload of approximately 50,000 cases. In that capacity, Mr. Lungren achieved record settlements under California's environmental laws, including the largest environmental settlement up to that time in California in a toxic spill case. He also won two of the largest settlements ever under the Federal Clean Water Act and the Federal Superfund law.

Mr. Lungren earned his bachelor's degree from the University of Notre Dame and his law degree from Georgetown University Law Center.

Welcome, Congressman.

Professor Paul Figley is the associate director of the legal writing and rhetoric program and professor of law at the American University Washington College of Law.

Prior to joining the faculty at Washington College of Law, Professor Figley served as a U.S. Department of Justice litigator for three decades, with the last 15 years as Deputy Director in the Torts Branch of the Civil Law Division. At Justice, Professor Figley represented the United States and its agencies involving tort, national security, and informational law.

Professor Figley earned his bachelor's degree from the Franklin and Marshall College and his law degree from the Southern Methodist University School of Law.

Welcome, Professor.

Professor David Uhlmann—am I pronouncing that correctly, sir?

Mr. UHLMANN. You are, sir.

Mr. MARINO [continuing]. Is the director of the environmental law and policy program at the University of Michigan Law School and is the Jeffrey F. Liss Professor from Practice.

Prior to joining the Michigan faculty, Professor Uhlmann served for 17 years at the United States Department of Justice and the last 7 as Chief of the Environmental Crime Section, where he chaired the Justice Department's Environmental Crimes Policy Committee.

Professor Uhlmann has published in various national publications and leading law journals and has testified before Congress. Professor Uhlmann graduated with a bachelor's degree in history, with high honors, from Swarthmore College, and a law degree from Yale Law School.

Professor, welcome.

Mr. UHLMANN. Thank you, sir.

Mr. MARINO. Each of the witnesses' written statements will be entered into the record in its entirety.

I ask that each witness summarize his testimony in 5 minutes or less. And to help you state within that 5 minutes, there are light in front of you. But as I do on occasion when I'm out there making a statement, I pay no attention to the lights. So what I will do is very diplomatically sort of pick up the hammer here and just give a little tap and ask—by doing that, asking you to wrap up.

So I will now recognize the former attorney general of California, former Congressman, the Honorable Dan Lungren, for his opening statement.

TESTIMONY OF THE HONORABLE DANIEL E. LUNGREN, ESQ., PRINCIPAL, LUNGREN LOPINA LLC

Mr. LUNGREN. Thank you, Mr. Chairman. And thank all Members of the Subcommittee, particularly the Chairman of the full Committee, the Ranking Member of this Committee, the Ranking Member of the full Committee, who I refer to as Chairman *emeritus* from time to time.

Like many—well, first of all, let me just say I'm going to try and give a perspective of both a former Member of Congress and attorney general in this matter. And like many of you, I have observed with concern the American public, who appears to have lost some considerable faith with the present state of our politics and governance.

In other words, a healthy skepticism of government, which I believe is enshrined in our opening documents—founding documents, has been replaced in some cases with outright cynicism, and that is in fact harmful to our democracy. There are many reasons for this corrosive development, but they are too numerous to mention here, but I do believe they establish a context for a discussion today.

I fear the growing trend in law enforcement is contributing to the erosion of the public's trust that it will receive impartial and fair justice. And I think also, particularly in the case that we are talking about here today, it is intruding on the core prerogatives of the Congress as well.

There are about four points that I make in my written presentation. The first deals with the specific subject matter we're talking about here, where executive branch agencies now use settlements of enforcement actions to fund private parties whose activities further the policy and, I believe, in some cases, the personal goals of the agency officials.

Secondly, law enforcement officials and their offices increasingly have a direct financial stake in the outcome of prosecutions. At the Federal level, we talk about asset forfeiture and equitable sharing programs which allow law enforcement agencies to retain a share of their forfeiture proceedings.

Let me be clear. I was present at the creation of the 1984 iteration of that law and proudly claim some share of authorship. But I think abuses have arisen, and they must be dealt with, and I think this Congress must review them in some detail.

Third, such practices have not been limited to the Federal Government. State enforcement officials, including State attorneys general, have used settlements to fund their own operations and create new grant programs outside their State legislative processes and sometimes in conjunction with the Federal Government.

Fourthly, there is a modern 24 news—24-day news cycle that's transformed the public information domain and how public officials act. The pressure is even greater on public officials, particularly those who are law enforcement. How do we help them make sure

that they are doing justice? How do we help them make sure that they are making their decisions without fear or favor?

I think there are at least three things we ought to look at: clear rules of the road; secondly, defendants given a fair chance to defend themselves rather than being subjected to multiple overlapping enforcement actions that leave no choice in some cases but an unfair and unjust settlement; and punishments should fit the offense. And Congress—it ought to be looked as to whether or not we have excessive demands that are coercing settlements from the innocent.

Let me go back to my first point and the subject of specific legislation before this Committee. Does anyone believe that these donations are freely given, voluntary expressions of support for these organizations? No, they're coerced—coerced payments to the entities mandated by the officials acting with the full power and majesty of the government.

Let me just give a few examples of these grant phenomenas.

In 2012, the Department of Justice forced Gibson Guitars to pay a $50,000 community service payment to the National Fish and Wildlife Foundation even though the foundation was not a victim of the alleged crime and had no direct connection with the case. It was simply a nongovernmental organization that DOJ employees liked.

In 2006, the DOJ forced a wastewater plant that had been accused of violating the Clean Water Act to give a million dollars to the United States Coast Guard Alumni Association. Looking at the case, I can find that the association had absolutely no connection and had suffered no harm, direct or indirect.

This Committee, I think, is to be commended for your investigation into the contours of DOJ settlements with our country's largest banks. Look, we could go through detail after detail on this, but the Bank of America settlement is most curious to me. The bank was to set aside $490 million to pay any potential tax liability to be incurred by their customers occasioned by loan modification or forgiveness. In other words, if there is a forgiveness, the net result of the forgiveness is viewed as an income to the individual who held the loan, and the government comes after them for taxes.

So I can understand why that was done. However, Congress, in its infinite wisdom—I always thought we were going to do this—extended the non-tax liability in those cases. So what happened to the $490 million? Well, they were donated to the NeighborWorks America and Interest on Lawyers Trust Accounts groups.

Look, some of us here, those on the Committee and I, might agree with the worthiness of these organizations. However, is that the Department of Justice's decision to make? I would argue that under the Constitution it is not. I would argue that in my years in Congress I saw some of the core prerogatives of the Congress ceded either by omission or comission to the executive branch.

And, thirdly, I would just say that, as the American people are looking at their institutions of governance on all levels, Congress ought to at least follow the Constitution. And as Senator Byrd said, appropriations go to the legislative branch because it is the most open and responsive or representative branch of our government. So we're talking about accountability and transparency.

Thank you for your consideration.
[The prepared statement of Mr. Lungren follows:]

Statement of the U.S. Chamber of Commerce

BY: Dan Lungren
Former California Attorney General and Member of Congress

ON: H.R. ___ "Stop Settlement Slush Funds Act of 2016"

TO: U.S. House of Representatives Committee on Judiciary
Subcommittee on Regulatory Reform, Commercial and Administrative Law

DATE: April 28, 2016

1615 H Street NW | Washington, DC | 20062

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

The U.S. Chamber's Institute for Legal Reform is an affiliate of the Chamber dedicated to making our nation's overall civil legal system simpler, fairer, and faster for all participants.

Good morning. Thank you for the opportunity to appear before the Committee today on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform ("ILR"). The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million businesses 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. ILR is an affiliate of the Chamber dedicated to making our nation's overall civil legal system simpler, fairer, and faster for all participants.
As Attorney General of California, I focused on strong, effective, and fair law enforcement; and most of today's law enforcement officials follow these same principles. And as a Member of Congress and this committee for 18 years, I diligently worked with many of you to enact laws that encouraged that behavior – as well as to ensure that Congress fulfilled its own constitutional duties when making the laws that law enforcement officials carry out.

Like many of you, I have observed with concern an American public who appears to have lost some considerable faith with the present state of our politics and governance. In other words, a healthy skepticism of government – recognized and enshrined in our founding documents – has been replaced by an unhealthy dose of cynicism. There are many reasons for this corrosive development, most too numerous to mention here. Yet, it does establish a context for our discussion today.

I fear that a growing trend in law enforcement is contributing to the erosion of the public's trust that it will receive impartial and fair justice. And it is intruding on core prerogatives of Congress as well.

Let me be clear about my starting point: detecting violations of law and prosecuting and punishing true law-breakers is essential to protecting our fellow citizens, society, democracy, and free-market economy. Playing by the rules is critical, and imposing appropriate sanctions on those who fail to do so is necessary both to punish violations of law and to deter future misconduct.

However, enforcement officials can play this important role only if they satisfy the crucial requirements of fundamental fairness: their decisions must be motivated by the public interest, not politically-motivated self-interest. I am concerned that is not true of all law enforcement decisions today.

We must return to the essential values of fairness and acting in the public interest – the central maxim that must guide *all* enforcement decision-making. I hope that today's hearing will provide an important step toward that goal.

Enforcement officials exercise great power. They decide who to investigate, who to sue civilly, who to prosecute in the criminal courts, and what sanctions to seek. While the discretion of other executive branch employees is constrained by a variety of factors, such as judicial review, each of these determinations made by federal prosecutors and enforcement officials is typically exempt from such oversight.

That is why, as California's Attorney General, I reminded my Deputy Attorneys General and department investigators that they should always keep in mind the possibility that "they were wrong" in their assessment of a case or a defendant. Prosecutors' and investigators' first responsibility is to pursue justice. Without question, the awesome power of the state or federal government is necessary to protect the innocent from those who would do them harm. At the same time, that same power wrongly brought against the innocent is wrong – and overwhelmingly so.

The only option readily available to an enforcement target, whether civil or criminal, is to fight the charges in court – an undertaking that inevitably inflicts substantial monetary and reputational injury, and therefore is not a realistic option for many individuals and corporations, even if they have done nothing wrong. That is why it is critical that this vast discretionary power be guided exclusively by the public interest. And for the reasons discussed below, that principle is under serious threat today.

First, executive branch agencies now use settlements of enforcement actions to fund private parties whose activities further the policy (or in some instances, the personal) goals of agency officials. As a result, non-prosecution agreements and deferred-prosecution agreements increasingly require, or at least strongly encourage, donations to private groups.

This ability to use law enforcement authority to channel funds to favored groups creates a serious threat that the authority to prosecute is being used to further officials' personal or political goals rather than the public interest standard that must govern law enforcement decisions. Furthermore, these decisions are being made outside of the normal appropriations process.

Let's be honest. Does anyone believe that these donations are freely-given, voluntary monetary expressions of support for these organizations? No, they are coerced payments to these entities mandated by officials acting with the full power and majesty of the government. In addition, this is a problem that exists at both the federal and state levels of government.

Here are just a few examples of this "grant" phenomenon:

- In 2012, the Department of Justice (DOJ) forced Gibson Guitars to pay a $50,000 "community service payment" to the National Fish and Wildlife Foundation even though the foundation was not a victim of the alleged crime and had no direct connection to the case. It was simply a non-governmental organization that DOJ employees liked.[1]

- In 2006, the DOJ forced a wastewater plant that had been accused of violating the Clean Water Act to give $1 million to the U.S. Coast Guard Alumni Association.[2] Again, the Association had absolutely no connection to the case and had suffered no harm, direct or indirect.

- This committee is to be commended for your investigation into the contours of DOJ's settlements with our country's largest banks over their mortgage lending practices. These settlements offered banks credit for donations to selected community redevelopment organizations and only opened the door wider for more creative quasi-legislative appropriation decisions by DOJ.[3]

  The Bank of America settlement is most curious. The bank was to set aside $490 million to pay any potential tax liability to be incurred by their customers occasioned by loan modification/forgiveness. That seems logical as the directly affected consumers would be made whole. Yet, with Congress subsequently deciding to continue to extend non-taxable status to these modification "windfalls," there was no damage suffered in this regard. The result was that DOJ caused the money to be "donated" to NeighborWorks America and Interest on Lawyer's Trust Account groups (IOLTAs).

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[1] *See* Paul J. Larkin, "Funding Favored Sons and Daughters: Nonprosecution Agreements and 'Extraordinary Restitution,'" 47 Loy. L. Rev 1, 6-7 (2013).

[2] News Release, U.S. Attorney's Office (D. Conn.), "OMI and U.S. Enter into Deferred Prosecution Agreement" (Feb. 8, 2006), *available at* www.usdoj.gov/usao/ct/press2006/20060208.html.

[3] *See* Letter from Peter J. Kadzik, Ass't Att'y Gen'l, to Bob Goodlatte, Chairman, H. Comm. on the Judiciary, & Jeb Hensarling, Chairman, H. Comm. on Financial Servs. (Jan. 6, 2015); *see also* Statement of Honorable Bob Goodlatte (Feb. 12, 2015), *available at* http://judiciary.house.gov/index.cfm/hearings?Id=54921679-400A-40C3-854D-4B7574364D61&Statement_id=BDEB0AAA-3EF1-482F-A403-8D28CDE00ECF.

- During my last term in Congress, we had very difficult budget choices. In 2011, we voted to eliminate $88 million of the Department of Housing and Urban Development's (HUD) "housing counseling assistance" program. We reinstated about 55 percent of that amount the following year. In the Congress that followed, the appropriations decision was to maintain the funding at that level. However, under the terms of the CitiBank settlement as well as additional provisions of the Bank of America settlement, $150 million worth of mandated donations went to housing non-profits. In a very direct way, the executive branch was able to establish federal funding priorities inconsistent with those set by the Congress.

Now, members of this committee or I might find that some or all of these groups represent noble causes and deserve financial support. Certainly, the U.S. Coast Guard alumni have served our country well and should be honored for that service, and businesses that have run afoul of the law should be punished in a fair and just manner. Yet, those important considerations do not answer the fundamental question: "Who in government should decide where the money goes?"

Allowing law enforcement officials to use coercive government power to reward favored groups is bad enough. But, in a deeper sense, this practice also violates core constitutional principles.

The Constitution provides that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made in Law" by Congress and that "[a]ll Bills for raising Revenue shall originate in the House of Representatives."[4]

James Madison in Federalist Paper No. 51 warned us that a system of checks and balances was necessary to guard against undue concentrations of power within our government and the natural temptation of self-interest by those in government. "Ambition must be made to counteract ambition." While this may result in a less-efficient federal government, Madison reminded us that it is essential "to the preservation of [our] liberty."

The allocation to the People's House of the power to spend money is a critical element of this separation of powers. Indeed, James Madison explained that Congress' "power over the purse may, in fact, be regarded as the most complete and effectual

[4] U.S. Constitution, Art. I, Sect. 7, Cl. 1.

weapon with which any constitution can arm the immediate representatives of the people . . ."[5]

It is not by accident that the first Article of the Constitution is dedicated to the creation of the Congress – not the executive or the judicial branch – and that Congress was given the power of the purse.

Let me highlight two historic examples where Congress acted to guard against perceived encroachments by a President and his appointees on its authority to control spending.

Although he did not begin the practice, President Richard Nixon aggressively impounded funds that Congress had appropriated for programs at amounts with which he disagreed. Over his veto, the Democratically controlled Congress passed the Congressional Budget and Impoundment Control Act of 1974 barring future such impoundments. In the 1980s, the Iran-Contra controversy was tied to the so-called "Boland Amendments," which sought to restrict funds from going to the Contras. Much of the dispute revolved around the question of whether prohibited "funds" were "directed" by the executive branch in contravention of the Congressionally-mandated prohibition.

No matter your position on the underlying policies, it is important to note that in both instances Congress recognized its primary role in the direction of funds by the federal government.

In addition to the separation of powers argument, the late Senator Robert Byrd pointed out that "the power of the purse is more than a procedural device to fence in the Executive; it is also a way of ensuring that spending decisions are made by the more representative and open political institution."[6] The settlement-mandated donation exercise, while sometimes the subject of triumphant press releases, is often hidden from view. This reality has caused the U.S. Senate Committee on Appropriations to include language in their report accompanying the 2017 Commerce and Justice, Science and Related Agencies Appropriations Bill a requirement to report on all third-party donations.

Indeed, the question of transparency in the spending of public funds is of recurrent interest to the Congress. Perhaps this is best exemplified in the bipartisan Federal

[5] Federalist No. 51, at 298 (James Madison) (Ian Shapiro ed., 2009).

[6] Senator Robert C. Byrd, "The Control of the Purse and the Line Item Veto Act," 35 Harv. J. Leg. 297, 312 (1998).

Funding Accountability and Transparency Act signed into law by President George W. Bush in 2006. Unanimously passed by the Senate and House, its original cosponsors were Senators Tom Coburn, Barack Obama, Tom Carper and John McCain. In his floor statement on September 11, 2006, then-Senator Obama praised the bill which created "a user-friendly website to search all Government contracts, grants, earmarks and loans, opening up Federal financial transactions to public scrutiny."[7] He referred to the "veil of secrecy in Washington" regarding federal monies, including grants.[8] He ended with these words: "the American people demand greater transparency and accountability, and it is our honor and privilege – indeed, it is our duty – to provide the tools to help make that possible."[9]

No doubt some will argue that settlement-imposed donations are not federal funds, and therefore, not covered by the various Constitutional provisions. The taxing and spending clauses, in the first instance, deal with a "tax," commonly understood to be "a sum of money demanded by a government for its support or for specific facilities or services, levied upon incomes, property, sales, etc." (A similar definition is found in the Oxford English Dictionary: "a compulsory contribution to state revenue, levied by the government on workers' income and business profits or added to the cost of some goods, services, and transactions.") Settlement-imposed donations to third parties are, by their very nature, compulsory – sums of money demanded by the government for the support of a specific entity. They would not exist in the absence of government legal action.

It is impossible to imagine our founding fathers contemplating a system of government that allows individual government officials to use the considerable power of the federal government to allocate money to causes of their liking, thereby bypassing the lawful congressional appropriations process.

The answer to this persistent problem, at least at the federal level, is fairly straightforward. Congress should enact a simple statute that prohibits the U.S. government from entering into a settlement agreement requiring a defendant to donate to an organization or individual not a party to the litigation. Chairman Goodlatte's "Stop Settlement Slush Funds Act of 2016" would accomplish this goal, and I hope it will be adopted.

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[7] CONGRESSIONAL RECORD (Sept. 11, 2006), at S9297.

[8] *Id.*

[9] *Id.*

Second, law enforcement officials and their offices increasingly have a direct financial stake in the outcome of prosecutions – because they can use financial proceeds to fund their own operations, above and beyond the amounts received from the legislative branch – and, in too many instances, that financial interest appears to be overshadowing the public interest.

At the federal level, the asset forfeiture and equitable sharing programs allow law enforcement agencies to retain a share of forfeiture proceeds. Let me be clear – I was present at the creation of the 1984 iteration of these programs and proudly claim some share of authorship.

But let's review the history: asset forfeiture in the early 1980s was envisioned as a tool to combat wealthy organized crime operations, primarily dealing with the illegal drug trade. At that time, policing agencies across the country were badly outgunned by the drug gangs, and it was more than appropriate to turn the drug cartels "ill-gotten gains" against them. The original rationale for these programs remain and, in my judgment, justify their continued existence. Just this week, the *Washington Post*, in criticizing the excesses of the programs, also recognized that "[t]here are some legitimate reasons for the practice, such as cracking down on sophisticated organized-crime rings, that manage to separate criminals from tainted assets."[10]

At the same time, however, criticisms of how forfeiture works in other contexts are powerful.

Various government and private-sector reports have outlined problems which have developed in these programs – particularly as they have expanded far beyond what was anticipated by those of us who championed them at their inception. Take for example, the case of Mandrel Stuart highlighted by the *Washington Post*. Mr. Stuart was a barbeque restaurant owner pulled over by Fairfax County, Virginia police for having tinted windows and a video playing in his line of sight. According to the article, the police took $17,550 he said he needed to buy restaurant supplies. Mr. Stuart was released without charges, but did not get his money back from the DEA for one year. According to the *Washington Post*, he lost his business in the meantime.

As an original supporter of the programs, I still hold out hope for their utility, but I acknowledge the need for reform. As you know, the DOJ has instituted limits on these programs, but whether those limits are sufficient to resolve the demonstrated

[10] Editorial, "The feds get back into the stealing business," WASHINGTON POST (Apr. 23, 2016), *available at* https://www.washingtonpost.com/opinions/the-feds-get-back-into-the-stealing-business/2016/04/22/813107b0-08a5-11e6-a12f-ea5aed7958dc_story.html.

problems can only be answered by vigorous oversight by this committee and your counterparts in the Senate. While I continue to believe that asset forfeiture provisions are appropriate in organized crime and serious drug cases, Congress should carefully examine whether changes to the program are appropriate, such as potentially requiring funds to go into the federal general fund rather than being available directly to DOJ.

More importantly, there are many other federal programs that create skewed incentives but have not received the same level of scrutiny as the forfeiture program.[11] For example:

- Federal law permits the DOJ to retain for its own use three percent of amounts recovered in many cases for the federal government.[12]

- The Consumer Financial Protection Bureau is permitted to place the proceeds of settlements and judgments into a "Civil Penalty Fund" that is supposed to compensate injured consumers but in fact appears to be retained by the Bureau for its own purposes.[13]

- The Department of Health and Human Services and the DOJ share a "Health Case Fraud and Abuse Control Account" for proceeds of healthcare fraud cases – and can decide for themselves how to use the billions of dollars deposited into the account, without any of the checks and balances of the appropriations process.[14]

- The Environmental Protection Agency also maintains a revolving enforcement trust fund for the proceeds of settlements relating to Superfund clean-up actions, with no congressional oversight of how the funds are spent.[15]

Early in our country's history, tax collectors and customs agents were paid on the basis of the amounts they collected. And prosecutors were paid on a per-conviction

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[11] These programs are discussed in detail in a paper published in March 2015 by the U.S. Chamber's Institute for Legal Reform entitled "Profit Over Principle: How Law Enforcement for Financial Gain Undermines the Public Interest and Congress's Control of Federal Spending" at pages 9-15, *available at* http://www.instituteforlegalreform.com/uploads/sites/1/Enforcement_Slush_Funds_web.pdf.

[12] 28 U.S.C. § 527 note.

[13] *See Profit Over Principle*, *supra*, at pages 9-11.

[14] *Id.* at 11-12.

[15] *Id.* at 14-15.

basis. But "[m]ost U.S. jurisdictions abandoned such payment schemes by the turn of the twentieth century, due in large part to concerns that bounty-based public enforcement would result in the same kind of overzealousness — a failure to exercise appropriate prosecutorial discretion — that we have come to expect from private enforcement. This historical episode, while largely forgotten, served to cement the tradition of fixed salaries for public employees, 'mak[ing] the absence of the profit motive a defining feature of government.'"[16]

Unfortunately, the examples I have discussed demonstrate that the profit motive is returning to government law enforcement decision-making—and eroding Congress's constitutional authority over expenditures.

Congress can and must take back its constitutional authority, by requiring that these settlement proceeds be deposited into the Treasury's general fund and expended only as Congress directs.

Third, these practices have not been limited to the federal government. State enforcement officials, including state attorneys general, have used settlements to fund their own operations and to create new grant programs outside the state legislative process.[17]

And some enforcement officials' have adopted a practice of ceding their authority to self-interested plaintiffs' lawyers – allowing enforcement actions to be brought on a contingency-fee basis, with proceeds shared between the enforcement official's office and the outside contingency fee attorney. For example, the *Wall Street Journal* reported that "[p]laintiffs' law firms have been pitching new consumer-protection lawsuits to state attorneys general" and "[s]ome states have outsourced such litigation to outside counsel."[18] For example, there are numerous examples of Attorneys General using outside contingency-fee lawyers to prosecute securities class actions.[19] As a result,

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[16] Margaret H. Lemos & Max Minzer, "For-Profit Public Enforcement," 127 HARV. L. REV. 853, 862 (2014).

[17] See generally the paper published in March 2015 by the U.S. Chamber's Institute for Legal Reform entitled "Undoing Checks and Balances: State Attorneys General and Settlement Slush Funds" at pages 23-49, *available at* http://www.instituteforlegalreform.com/uploads/sites/1/Enforcement_Slush_Funds_web.pdf.

[18] Peter Loftus, "States Take Drug Makers to Court Over Marketing," WALL STREET JOURNAL (Apr. 23, 2013), at page B3.

[19] U.S. Chamber Institute for Legal Reform, "Unprincipled Prosecution" (Oct. 2014), at page 11, *available at* http://www.instituteforlegalreform.com/uploads/sites/1/unprincipled-prosecution.pdf.

these actions are grounded in significant part in the profit motive rather than the public interest.

The latter practice is precluded at the federal level by Presidential Executive Order No. 13433.[20] But that order could be revoked by a future President, and Congress should consider codifying it.

Finally, the modern 24-hour news cycle has transformed the public information domain and how public officials react. In the midst of the maelstrom of edited and non-edited stories, rumors, and innuendoes, there lies the public official charged with the responsibility of exercising his or her authority "without fear or favor." As pressures mount, how do we ensure that some officials are not acting based upon "fear" of how the public might perceive a decision not to act or to seek a lesser penalty, even when fully justified on the merits, or seeking the "favor" of public applause for a harsh settlement even if the merits counseled a different result?

While there is no substitute for character and rectitude, our founding fathers wisely recognized the frailties of human nature in all of us, including our public officials. In Federalist Paper No. 51, James Madison put it this way: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and the next place oblige it to control itself."

One way to control government in this context is by ensuring that enforcement officials' discretion is appropriately channeled in order to reduce their ability to make unjustified prosecutorial decisions. That means:

- There should be clear rules of the road so that individuals and businesses know what is legal and what is not, and prosecutors cannot impose retroactive liability based on vague standards.

- Defendants should be given a fair chance to defend themselves, rather than being subjected to multiple, overlapping enforcement actions that leave no choice but an unfair and unjust settlement.

- Punishments should fit the offense and prohibit excessive demands that coerce settlements from the innocent.

[20] 72 Fed. Reg. 28441 (May 16, 2007). The Order bars the use of contingent fee counsel unless a statute requires otherwise.

Clear Rules of the Road & Reining in Abuses of Prosecutorial Discretion. The courts have said repeatedly that the target of an enforcement action must have "fair notice" that his or her conduct was unlawful before criminal or civil penalties may be imposed.[21] Increasingly, however, prosecutors rely on novel interpretations of vague statutory language.

This approach has been used to expand beyond any recognition the reach of the Foreign Corrupt Practices Act[22]; the Financial Institutions Reform, Recovery, and Enforcement Act[23]; and many other federal statutes.

For every defendant able and willing to fight such unfair charges there are many who are forced to settle because they cannot afford the financial and reputational injury that result from lengthy litigation with the government.

The consequence: uncertainty about what the law permits and chilling of innovation, because a businesses and individuals cannot anticipate whether or not their behavior might retroactively be declared "unlawful."

Further, we expect our prosecutors to "do justice," rather than rack up victories for the sake of racking up victories. Abuses of prosecutorial discretion are a major impediment to fairness in our justice system. The poster child for abuse of prosecutorial discretion is perhaps the federal government's decision to charge a fisherman for violating the Sarbanes-Oxley "anti-shredding" laws for throwing three fish back into the Gulf of Mexico. As a result, the fisherman, Mr. Yates, faced decades in prison for what should have been a minor offense. The Supreme Court rebuked the federal government for its interpretation of Sarbanes-Oxley, holding that Congress never intended a provision designed to punish those who destroy documents to be used to throw the book at a fisherman for tossing a fish back into the ocean. The Yates case is just one example of this phenomenon.[24]

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[21] *See, e.g.*, Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.") (footnote omitted); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.") (citations omitted).

[22] U.S. Chamber Institute for Legal Reform, "Legal Limbo: Seeking Clarity in How and When the Department of Justice Declines to Prosecute" (Oct. 2012), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/DeclinationsBooklet.pdf.

[23] U.S. Chamber Institute for Legal Reform, "The FIRREA Revival" (Oct. 2014) *available at* http://www.instituteforlegalreform.com/uploads/sites/1/firrea.pdf.

[24] *Yates v. United States*, 135 S. Ct. 1074 (2015).

A Fair Chance to Defend. It is a fundamental principle of the American system of justice that everyone deserves a chance to defend themselves. Abusive law enforcement practices today undermine this basic principle.

The *Economist* recently explained this phenomenon:

> "The formula is simple: find a large company that may (or may not) have done something wrong; threaten its managers with commercial ruin, preferably with criminal charges; force them to use their shareholders' money to pay an enormous fine to drop the charges. . . . Then repeat with another large company."[25]

The key to this practice is that the company is targeted by multiple law enforcement officials – state AGs, the DOJ, other federal agencies, and even local governments. As one state Attorney General explained, "[w]hen threatened by a suit by multiple AGs [or other regulators] most publicly held companies conclude they can't afford the fight."[26] Even if innocent, companies have to settle.

At least some in the DOJ have recognized the unfairness of this "piling on" by multiple law enforcement officials. According to a recent *Financial Times* article, Andrew Weissmann, the chief of the Fraud Section of DOJ's Criminal Division said: "There is a problem with piling up: there is both a fairness issue but it's also in law enforcement's interest to do a better job."[27] Leslie Caldwell, the head of the DOJ's Criminal Division, has also referred to the unfair phenomenon of "regulatory piling on" in domestic enforcement.[28]

We simply cannot tolerate a system in which the innocent are, as a practical matter, unable to defend themselves. Limits on multiple duplicative investigations and

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[25] "The criminalisation of American business," THE ECONOMIST (Aug. 30, 2014), available at http://www.economist.com/news/leaders/21614138- companies-must-be-punished-when-they-dowrong-legal-system-has-become-extortion.

[26] Monisha Bonsai, "State AGs Critical of Some Colleagues' Activism," CNS NEWS (July 7, 2008).

[27] Caroline Binham, "Enforcers concerned about 'piling on' in bank probes," Financial Times (Jan 22, 2016), *available at* http://www.ft.com/intl/cms/s/0/3735ba00-c11c-11e5-846f-79b0e3d20eaf.html#axzz46wc3FE00.

[28] Assistant Attorney General Leslie R. Caldwell, "Remarks at the New York City Bar Association's Fourth Annual White Collar Crime Institute" (May 12, 2015), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-city-bar-0.

prosecutions are essential to preserve fairness in our system of justice – and our overall economy.

Prohibit Excessive Demands that Coerce Settlements. Federal laws set no meaningful limits on the monetary fines that law enforcement officials may seek in civil or criminal enforcement actions. Even if the statute specifies a sanction "per offense," government officials define the "offense" so as to multiply the demand exponentially.

Facing claims in the billions or tens of billions of dollars – and no clear statutory standard for assessing penalties, such as proportionality between the penalty and harm actually inflicted – any rational defendant will settle to avoid the downside risk of a huge monetary penalty. This occurs even if the defendant has strong arguments that he or she did not violate the law.

Clearer standards for setting penalties are essential to ensure that punishment is proportionate to the actual wrongdoing and harm done and that unfair settlements cannot be coerced through the threat of draconian penalties.

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Fairness in the law enforcement process is important because it is cornerstone of our entire system of government. But we also must recognize that prosecution motivated by self-interest, rather than the public interest, imposes other real-world costs. The hundreds of millions of dollars that businesses and individuals must spend to navigate an unfair system—and the billions exacted in unjustified settlements— mean less money to pay employees and higher prices for consumers. Even more important, these practices mean less money to invest in new products and services—including new drugs, or new technologies that have the potential to improve the lives of all of our citizens.

Congress can and must step in to recalibrate our system, and ensure that that the public interest is the only guide for exercising this critical government power.

Thank you for allowing me to testify today on this important topic, and I am happy to answer any questions you may have.

Mr. MARINO. Thank you.
Professor Figley, please.

TESTIMONY OF PAUL F. FIGLEY, ESQ., PROFESSOR, ASSOCIATE DIRECTOR OF LEGAL RHETORIC, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

Mr. FIGLEY. Thank you, Mr. Chairman and Members of the Committee.

Congress' power of the purse and its authority under the appropriations clause to direct where government money will be spent is a key component of our constitutional system of checks and balances.

The authority has roots in the Magna Carta, and it was a substantial factor in the development of constitutional democracy in England. The colonial legislatures leveraged their taxation power into the power of appropriation, laying the groundwork for American independence.

The authors of the Constitution vested the right of appropriation in the legislative branch. They did so, as James Madison explained in the Federalist No. 58, to ensure that government is directly accountable to the people and to provide Congress "a key check on the power of the other branches."

The current practice of allowing government attorneys to negotiate settlements that require other parties to make payments to individuals or entities who are not involved in the underlying dispute or damaged by the defendant's action circumvents the appropriations process and undermines Congress' power of the purse. The practice allows those government lawyers to provide payments to persons or entities without congressional authorization to do so.

The practice creates numerous difficulties. As a practical matter, Federal attorneys are poorly suited to choose which persons or entities should receive a financial windfall. The system is unfair to other potential beneficiaries who did not collect the handout.

The system lacks transparency. What factors determine which group will receive a payment? Who makes that decision? Are political considerations weighed? As the U.S. Attorneys' Manual recognizes, the practice creates "actual or perceived conflicts of interest and other ethical issues." One such issue is the potential for settlement payments to be directed to political allies or to further the political or personal ends of the government attorney.

A second ethical issue is the risk that payments to unrelated third-parties will be strong-armed from defendants who seek to avoid publicity or debarment.

The fallacy of tolerating this practice is reflected in settlement decisions like those requiring private entities to provide a $1 million endowment to the U.S. Coast Guard Academy, a $5 million endowment to the Seton Hall Law School, and a $2.4 billion payment to the National Fish and Wildlife Foundation. Such windfalls should not be bestowed by executive branch attorneys negotiating settlements with anxious defendants. Congress, acting with its power of the purse, has the right to determine which payments should be made.

For these reasons, I support enactment of the Stop Settlement Slush Funds Act of 2016. I encourage the Committee to consider

clarifying the act that the act would apply to settlements in both civil and criminal matters that require private defendants to make donations or payments to persons or entities not involved in the dispute or injured by the defendant's actions.

Thank you.

[The prepared statement of Mr. Figley follows:]

Statement of Paul F. Figley*
Before the Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
United States House of Representatives

April 28, 2016

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

Thank you for providing me this opportunity to share my views on the "Stop Settlement Slush Funds Act of 2016." This bill would prohibit government officials from entering any settlement agreement that "includes a term requiring that any donation be made to any person by any party (other than the United States) to such agreement." § 2 (a). My testimony will address the current practice of government attorneys entering settlements that require another party to make payments to persons or entities that are not parties to the suit or injured by the defendant's conduct. It will explain how this practice is in tension with the Constitution's Appropriation Clause, presents practical problems, raises ethical issues, and is poor policy. Finally, it will offer three suggestions to the language of the "Stop Settlement Slush Funds Act of 2016" that may help it achieve its purposes.

I have some experience with government settlements. Prior to entering academia, I was a career litigator in the Civil Division of the U.S. Department of Justice for over three decades. During my last fifteen years at Justice I served as a Deputy Director in the Torts Branch of the Civil Division. My every day responsibilities at Justice included the evaluation, negotiation, and supervision of tort settlements.

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* Associate Director, Legal Rhetoric Program, American University, Washington College of Law.

Discussion

At least since 1993, Department of Justice attorneys have entered settlements that require other parties to make payments to individuals or entities that were not party to the dispute or harmed by the defendant's actions.[1] Examples include pre-2009 settlements that required defendants to provide free medical care to a state's citizens and an endowment of $1 million to the U.S. Coast Guard Academy.[2] In 2008 the Department generally prohibited settlements that required a criminal defendant "to pay funds to a charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant's criminal conduct."[3] In 2012 its settlement with British Petroleum arising from the Gulf Oil Spill required a company payment of $2.4 billion to the National Fish and Wildlife Foundation.[4] In 2014 the Department entered a settlement with the Bank of America that included $7 billion to be distributed to "consumers and, potentially, certain private nonprofits and state or local governments or programs that provide community development and neighborhood revitalization services . . . ."[5]

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[1] U.S. Gov't Accountability Office, GAO-10-110, Corporate Crime–DOJ Has Taken Steps to Better Track Its Use of Deferred and Non- Prosecution Agreements, but Should Evaluate Effectiveness 8 (2009) [hereinafter GAO-10-110].

[2] U.S. Gov't Accountability Office, GAO-09-636T, Corporate Crime–Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non- Prosecution Agreements 18 (2009) [hereinafter GAO-09-636T].

[3] U.S. Attorneys Manual § 9-16.325 - Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and "Extraordinary Restitution" (noting exceptions); GAO-10-110 at 11.

[4] See Juliet Elperin, "BP Settlement a Boon to Conservation Group," Washington Post (Nov. 16, 2012), https://www.washingtonpost.com/national/health-science/bp-settlement-a-boon-to-conservation-group/2012/11/16/ddcb2790-302b-11e2-a30e-ca76eeec857_story.html.

[5] David H. Carpenter, Congressional Research Service, Legal Principles Associated With Monetary Relief Provided as Part of Financial-Related Legal Settlements & Enforcement Actions 7 (2015).

These settlements challenge Congress' power of the purse. Accordingly, I will begin with that topic.

A. The Appropriations Clause & Separation of Powers

The Constitution vests the power of the purse in Congress. It did so, as James Madison explained in *The Federalist No. 58*, to assure that government is directly accountable to the people and to provide Congress "a key check on the power of the other branches, allowing it to reduce 'all the overgrown prerogatives of the other branches of government.'"[6] The Appropriation Clause provides that "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[7] It means precisely what it says: Congress must pass an appropriation before government money can be spent.[8] The Clause is not limited to money in the Treasury, but also applies to government money derived from fees or other sources.[9] The Clause is a key part of our system of checks and balances. The Executive is dependent upon appropriations from Congress to fund its operations, and "agencies must operate . . . in accordance with the funding levels Congress has permitted . . . ."[10] Problems can arise when the Executive goes outside the appropriations process to fund causes that it deems to be worthwhile. For example, the Iran-Contra affair severely damaged the Reagan

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[6] *See, e.g.*, Principles of Federal Appropriations Law 1–4 (4th ed. 2016) (quoting *The Federalist No. 58* (Madison)).
[7] U.S. Const., art. I, § 9, cl. 7.
[8] *See, e.g.*, Principles of Federal Appropriations Law 1–5 (4th ed. 2016); Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 428 (1990); Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937); Reeside v. Walker, 52 U.S. 272, 291 (1850).
[9] *See, e.g.*, Principles of Federal Appropriations Law 1–6 (4th ed. 2016).
[10] *Id.*

Administration after it provided the Nicaraguan Contras with non-appropriated funds, including $3.8 million from the sale of arms to Iran.[11]

To better understand the proposed bill, it may be worthwhile to briefly examine the origins of the Appropriation Clause.

1. English Antecedents

The Appropriations Clause has roots in Chapter 12 of the Magna Carta.[12] By agreeing that "[n]o scutage nor aid shall be imposed on our kingdom, unless by common counsel of our kingdom,"[13] King John limited the Crown's power to raise revenue and injected the "common counsel" (that is, Parliament) into the process of financing government. But Chapter 12 also harbingered a power struggle that ended, more than 475 years later, with Parliament wresting control of government finance from the Crown. With that control came political supremacy and the foundation for modern constitutional democracy.

In the beginning, Chapter 12 affected only a portion of government finance. Until the eighteenth century, the Crown had two basic sources of revenue. The first was the hereditary revenue, which included rents from Crown lands and other income. Some of this revenue was

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[11] H.R. Rep. No. 100-233, at 9 (1987) (Iran-Contra Investigation Report).

[12] Much of this portion of my testimony is taken from an article I co-authored with Professor Jay Tidmarsh of Notre Dame Law school, Paul Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 Mich. L. Rev. 1207 (2009). Please see that article for a more complete exposition of these points.

[13] William Sharp McKechnie, Magna Carta: A Commentary on the Great Charter of King John 232 (2d ed. 1914). Translated from Latin, Chapter 12 provides in full:

> No scutage nor aid shall be imposed on our kingdom, unless by common counsel of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall not be levied more than a reasonable aid. In like manner it shall be done concerning aids from the city of London.

the Crown's by right; the new monarch inherited it. The remainder of the hereditary revenue was vested upon the King or Queen for life upon accession to the throne. The Crown was expected to "live of its own"—in other words, to use the hereditary revenue to pay for both the expenses of the royal household and the costs of government, including support of the navy.

If an expense could not be met from the hereditary revenue, the Crown needed to rely on the second source of funding: taxes. These were the "aids" that, under the Magna Carta, required Parliament's approval. As a general rule, "taxes were intended as exceptional grants to meet the extraordinary necessities of the crown."[14] These necessities typically involved wars. Although it occasionally appropriated funds only for specific purposes, Parliament rarely sought to control how the King used tax revenues.

Over time, the Crown's hereditary revenue was unable to keep pace with inflation and the rising costs of government. As a result, the Crown began to apply more frequently to Parliament for funding. Taxes that the Crown had previously justified as necessary for an extraordinary circumstance were often applied to meet the ordinary, ongoing expenses of government. In the time of Henry VII (1485–1509), English subjects complained that the government deceptively raised threats of war to obtain parliamentary grants that it used for other purposes. But Henry VII and the subsequent Tudors were generally able to avoid provisions in the grants that appropriated money for specific purposes. By the reign of Elizabeth I (1558–1603), the Crown paid a large percentage of regular, peacetime government costs out of tax receipts.

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[14] J.D. Alsop, *The Theory and Practice of Tudor Taxation*, 97 Eng. Hist. Rev. 1, 2 (1982).

But for its role in granting funds to the Crown, Parliament—the prototype of the modern democratic legislature—might well have ceased to exist. As it was, Parliament met irregularly, convening when the Crown, facing a financial crisis, called it into session. The financial circumstances needed to be dire, for convening Parliament was often an unhappy event for the Crown. Parliament's control over extraordinary grants thus became the source—indeed, the only source—of its power over royal action.

Parliament used this authority to achieve supremacy over the Crown. Under the Stuarts, Parliament effectively used its power over taxes to control one king, James I (1603–1625), and bring down another, Charles I (1625–1649). After Cromwell, and with the acquiescence of Charles II (1660-85), it ended the Crown's feudal sources of hereditary revenue. With the accession of William and Mary (1689–1694 as joint rulers; 1694–1702 for William III as sole ruler) Parliament confirmed its supremacy by limiting much of their revenue to four-year grants, effectively creating a recurring need for them to call Parliament into session. Parliament leveraged its taxation power to gain the power to appropriate. The control of military appropriations effectively passed to Parliament in the 1690s. The Civil Establishment Act of 1782 was a capstone, substantially limiting the Crown's ability to direct non-military expenditures. That act "destroyed another of the few remaining vestiges of an independent executive power in the Crown . . . . The eighteenth-century tension between the conflicting principles of parliamentary supremacy and an independent financial provision for the Crown had been resolved—as it had to be—in favour of parliamentary supremacy."[15]

[15] E.A. Reitan, *The Civil List in Eighteenth-Century British Politics: Parliamentary Supremacy versus the Independence of the Crown*, 9 Hist. J. 318, 337 (1966).

2. Colonial Legislatures & Appropriations

After 1660, English authorities imposed an English model upon colonial governments, with governors, councils, and assemblies taking the roles of the Crown, the House of Lords, and the House of Commons, respectively. By 1700 each colony possessed this tripartite structure of government. The colonists were well aware that this structure mirrored the British constitution. In particular, colonists analogized their legislative bodies to Parliament, with their "lower House[s] possessing powers akin to those won and exercised by the House of Commons."[16] The assemblies also modeled their actions on the House of Commons.

The outcome was essentially the same as that of England, with an even more decisive victory for legislative supremacy. The power and importance of the colonial assemblies increased dramatically over the course of the eighteenth century. Each assembly followed a similar, three-step pattern to preeminence. Beginning from weakness relative to their governors in the seventeenth century, colonial assemblies first obtained the power to tax, to initiate laws, and to sit independently. Next, in the early eighteenth century, they gained the strength to "battle on equal terms with the governors and councils and challenge even the powers in London if necessary."[17] Finally, by 1763, assemblies had achieved "political dominance" within their colonial governments and held "a position to speak for the colonies in the conflict with the imperial government that ensued after 1763."[18]

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[16] John F. Burns, Controversies Between Royal Governors and Their Assemblies in the Northern American Colonies 14 (1923).
[17] Jack P. Greene, The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies 1689–1776, at 4 (1963).
[18] *Id.* at 7.

The path to power was the familiar one that Parliament had blazed in the seventeenth century: control of the fisc. The Crown's position was that the colonies could be taxed only by Parliament or with the consent of a colony's elected house. From the early days of colonial administration, the Crown had granted taxing authority to the assemblies. Parliament slept on whatever taxing power it possessed: it did not impose a tax on the colonies until the until the 1765 Stamp Act, which precipitated the constitutional crisis that fueled the American Revolution.

"Power to tax was the most important possession of the lower houses,"[19] and they soon translated this power into authority in other areas. The assemblies asserted the power to appropriate the tax revenues that they collected. While governors and imperial officials repeatedly requested assemblies to establish a permanent revenue—the equivalent of the hereditary and lifetime revenues of the Crown—their efforts almost universally failed. As a result, governors had no independent capacity to carry out government programs, to pay colonial officials, or to undertake colonial administration.

3. The Constitutional Convention & Appropriations

This history of the Constitutional Convention reveals two matters of importance regarding the Appropriation Clause. First, the Convention never had in mind that the right of appropriation could be exercised by any branch other than the legislature. The only debate (which occurred only after it became apparent that the Senate would not have proportionate representation) was whether the House would have the sole right to originate revenue and appropriation bills. Second, a reading of the debates of the Convention reveals widespread

[19] *Id.* at 51.

agreement that, in the words of Roger Sherman, "money matters" were for the government "the most important of all";[20] or, as Madison put it, the "compleat power of taxation [was] the highest prerogative of supremacy . . . proposed to be vested in the National Govt."[21] Throughout the debates, the delegates regarded the power of the purse to be a matter for the legislative branch.

C. Problems with these Settlements

1. The Appropriations Clause

The practice of government attorneys agreeing to settlements that require another party to make payments to other persons or entities is in tension with the Appropriations Clause. Such payments circumvent the appropriation process by augmenting the Administration's budgets to accomplish ends that it deems desirable.[22] The practice undermines Congress' power of the purse by providing payments to persons or entities without a congressional directive to do so,[23] raising separation of powers issues.[24]

2. Practical Problems

Having Department of Justice attorneys direct settlement payments to third parties raises practical problems. First is the question of the institutional competence to pick

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[20] 1 The Records of the Federal Convention of 1787, at 342 (June 20, 1787) (Max Farrand ed., rev. ed. 1966).
[21] *Id.* at 447 (June 28, 1787).
[22] *See* Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 331 (2009).
[23] Principles of Federal Appropriations Law 6–162-63 (3d ed. 2008) ("[T]he objective of the rule against augmentation of appropriations is to prevent a government agency from undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for that activity.")
[24] *See, e.g.,* GAO-10-110, App. IV (Letter from James C. Duff, Director, Administrative Office of the U.S. Courts (Dec. 17, 2009)).

beneficiaries and payment amounts. The Department of Justice is not well suited to make such allotments. Leaving aside its constitutional infirmity, its attorneys necessarily would decide such things on an *ad hoc* basis and by a method different from a legislature or an administrative agency implementing a program.

Second is the question of fairness among potential beneficiaries. Why does one individual or group receive a payment that might otherwise have gone to another individual or group? How does an individual or group put its name forward to receive such a payment? What criteria does the decision-maker apply?

Third is the question of transparency. How is it decided which individual or group receives payments and which do not? Who makes that decision – the Attorney General, an Assistant Attorney General, or someone else? Is the question discussed with persons outside the Department of Justice? Are political considerations weighed?

3. Ethical problems

A system in which Department of Justice attorneys agree to settlements that require another party to make payments to other persons or entities creates potential ethical problems. Indeed, the Department's U.S. Attorneys Manual recognizes this point: "this practice is restricted because it can create actual or perceived conflicts of interest and/or other ethical issues."[25] Notably, this restriction only applies in criminal matters.[26] One category of conflict of interest is the potential that settlement payments will be directed to political allies or to further political or personal ends. A second potential ethical problem is the risk that government

[25] U.S. Attorneys Manual § 9-16.325 - Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and "Extraordinary Restitution."
[26] *Id.*

attorneys might leverage a potential defendant's desire to avoid publicity or debarment to achieve a payment to another person or entity that is greater than what might be imposed at trial.[27]

Even if it is assumed that no actual ethical violations occur, the system still raises significant problems. Citizens should not worry that an Administration is indirectly providing its allies with slush fund money,[28] or that Department of Justice attorneys are picking winners and losers from among the organizations or causes they support.[29] Persons and organizations should have an equal opportunity to apply for funds under established, public procedures.

4. Sound Policy

On balance, it is not sound policy to have an open-ended system in which government attorneys enter settlements that require another party to make payments to other persons or entities. Of course, it is sound policy to provide restitution to the victims of crime. Likewise, it can be good policy to settle disputes with deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs).[30] A key Department of Justice spokesperson explained that DPAs and NPAs "are beneficial for a variety of reasons"—they can require restitution for

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[27] *See Consumers Shortchanged? Oversight of the Justice Department's Mortgage Lending Settlements: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 46-47 (2015) (colloquy between Rep. Bishop and Geoffrey Graber, Deputy Associate Attorney General).

[28] *See, id.* at 29-35 (statement of Geoffrey Graber, Deputy Associate Attorney General, regarding payments to advocacy organizations associated with President Obama from an unrelated Bank of America settlement).

[29] *See, e.g., Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 117-18 (2009) (statement of Chris Christie, former U.S. Attorney, regarding establishment of a chair at his former law school through an unrelated government settlement).

[30] *See* GAO-10-110 1, 28-29.

victims, quickly gain corporate cooperation, initiate "comprehensive ethics and compliance programs," provide guidance on what conduct is improper and what is a "best practice," and achieve these benefits without "subjecting companies to the collateral consequences of prosecution and conviction."[31] But all of those benefits can be had in DPAs, NPAs, and other settlements without including payments to persons or entities who were not victims of the challenged behavior. Given the Constitutional, practical, and ethical problems endemic to the practice of government attorneys entering settlements that require such payments, Congress should prohibit it.

D. Suggested Changes in the "Stop Settlement Slush Funds Act of 2016"

If enacted in its current form the "Stop Settlement Slush Funds Act of 2016" may not fully achieve its goals. The current draft would apply when a settlement agreement requires "that any **donation** be made to any **person** by any party (other than the United States) to such agreement." § 2 (a) (emphasis added). It also defines "settlement agreement" to mean "a settlement agreement resolving a **civil action** or potential civil action." § 2 (c) (1) (emphasis added).

These passages raise three issues. First, does the bill apply to payments that are not "donations" under some strict, dictionary definitions (*e.g.* "a gift or contribution to a charitable organization"), or is it intended to apply to all payments? The legislation is more likely to meet its goals if the term "payments" were substituted for "donations," or if the definition of "Donation" in § 2 (c) (2) were altered to clarify that a "donation" includes all categories of payments.

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[31] *Id.* App. III at 37-38 (Letter from Edward N. Siskel, Associate Deputy General Counsel, Office of the Deputy Attorney General (Dec. 15, 2009)).

Second, § 2 (a) would apply only when a donation is made "to any person." Does the term "any person" include only individuals, or does it also include corporations or organizations (that might be deemed "persons" for some purposes), and/or tribes, municipalities, states, or other governmental organizations? Again, the legislation is more likely to achieve its purposes if it applies broadly to all mandated payments regardless of the nature of the recipients. Accordingly, the term "person" in § 2 (a) should be amended to "person or entity."

Third, the definition of "Settlement Agreement" in Section 2 (c) (1) would limit the bill to settlements in civil actions or potential civil actions. The problems that arise when government officials enter civil settlements that mandate payments to other entities are also present in criminal cases or potential criminal cases. Indeed, in some ways using the leverage of a potential criminal conviction (or even potential prosecution) to extract payments that exceed sentencing guidelines raises ethical issues not present in the civil litigation context. Accordingly, the definition of "Settlement Agreement" in Section 2 (c) (1) might be changed to state, "The term 'settlement agreement' means a settlement agreement resolving a civil action, a criminal action, a potential civil action, or a potential criminal action."

Thank you for this opportunity to express my views.

Mr. MARINO. Thank you, sir.
Professor Uhlmann?

TESTIMONY OF DAVID M. UHLMANN, ESQ., DIRECTOR, ENVIRONMENTAL LAW AND POLICY PROGRAM, THE UNIVERSITY OF MICHIGAN LAW SCHOOL

Mr. UHLMANN. Thank you, Chairman Marino, Congressman Johnson, and Members of the Subcommittee, for inviting me to testify today.

A case I prosecuted at the Justice Department, where I served for 17 years before becoming a law professor, highlights why third-party payments often are needed to address the harm caused by regulatory violations. The case involved John Morrell & Company, which until the mid-1990's was the largest employer in the State of South Dakota. Morrell operated a slaughterhouse in Sioux Falls that discharged waste into the Big Sioux River.

Under the terms of its Clean Water Act permit, Morrell was required to treat its waste to limit the concentration of ammonia nitrogen, and other pollutants that could harm the river. The permit also required Morrell to test its waste at least three times each week and to report all sampling to EPA and the State of South Dakota. Instead, over a period of more than a decade, Morrell officials engaged in a conspiracy to violate the Clean Water Act, discharging ammonia at levels nearly 40 times those allowed under the law and lying to conceal those violations.

I provide additional details about the case in my written testimony, but suffice it to say that the illegal scheme was so well-known within the company that the senior vice president in charge of the Sioux Falls facility repeatedly asked, "Who's going to jail this month?" when he signed the falsified discharge monitoring reports.

The Justice Department prosecuted Morrell under the Clean Water Act but could not prove the extent of the harm to the river because Morrell had concealed its violations for years.

With the approval of the Federal district court, the Morrell plea agreement created the Big Sioux River Environmental Trust Fund to support cleanup efforts on the river and to restore recreational opportunities for communities harmed by the company's misconduct. Morrell paid a $2 million criminal fine and $1 million in restitution and community service to the Big Sioux River Environmental Trust Fund.

While Morrell was a criminal case, it is instructive about the shortcomings of the proposed legislation. Environmental violations cause significant harm to our communities. In some cases, the harm can be addressed by restitution to individuals, which the proposed legislation would not disturb. In the overwhelming majority of cases, however, the harm is generalized. Air is polluted; water is contaminated. Everyone in the community suffers, and third-party payments are the only remedies. These are not minor violations but serious breaches of the rule of law that cause real harm and have real consequences.

I have three concerns about the Stop Settlement Slush Funds Act of 2016.

First, the bill would undermine the Justice Department's ability to hold corporations responsible for the harm caused by violations

of our environmental laws but also our civil rights laws, our consumer protection laws, food and drug laws, and antitrust laws. The bill prohibits only donations but it never defines that term, which could be construed by courts to apply to all third-party payments. In addition, while the bill exempts payments for actual harm, it does not state that actual harm includes generalized harm like what occurred in Morrell.

Second, the bill's focus on civil settlements rests on a faulty premise, namely that generalized harm occurs in criminal cases but not in civil cases. There's no principled reason why corporations should be required to remediate the harm they cause in criminal cases but not required to do so in civil cases. If harm only could be addressed in criminal cases, it would encourage law enforcement personnel to pursue criminal prosecution in matters that might otherwise be resolved by civil settlements, which would risk overcriminalization of regulatory violations.

Third, Congress is simply not able to legislate to address all harm that occurs in our communities every time a regulatory violation occurs. No one disputes that Congress has the power of the purse. And for that reason, the Miscellaneous Receipts Act and the Antideficiency Act impose significant limits on third-party payments in both plea agreements and civil settlements. But corporations who engage in wrongdoing, not the general public, should be responsible for addressing the harm caused by their violations.

I share the Subcommittee's desire to ensure that all third-party payments serve the public interest and law enforcement objectives. Law enforcement is a sacred trust, and officials who have the honor of representing the people of the United States must serve the common good and not their personal interests.

In my view, third-party payments must be negotiated separately from criminal or civil penalties, must address the harm caused by violations, and cannot augment Federal agency programs. I also might impose a limit on the percentage of funds that could be devoted to these payments. But those terms are nowhere to be found in the proposed legislation.

Thank you again for inviting me to testify, and I'd be pleased to answer your questions.

[The prepared statement of Mr. Uhlmann follows:*]

***Note:** Supplemental material submitted with this statement is not printed in this record but is on file with the Committee, and can also be accessed at: *http://docs.house.gov/meetings/JU/JU05/20160428/104872/HHRG-114-JU05-Wstate-UhlmannD-20160428-SD001.pdf.*

TESTIMONY OF

DAVID M. UHLMANN

JEFFREY F. LISS PROFESSOR FROM PRACTICE
DIRECTOR, ENVIRONMENTAL LAW AND POLICY PROGRAM
UNIVERSITY OF MICHIGAN LAW SCHOOL

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL,
AND ANTITRUST LAW

THE ESSENTIAL ROLE OF COMMUNITY SERVICE IN ADDRESSING THE HARM CAUSED BY ENVIRONMENTAL CRIMES AND OTHER REGULATORY OFFENSES

APRIL 28, 2016

Thank you Chairman Marino, Congressman Johnson, and Members of the Subcommittee for holding today's hearing and for inviting me to testify.

My name is David Uhlmann. I am the Jeffrey F. Liss Professor from Practice and the Director of the Environmental Law and Policy Program at the University of Michigan Law School. My research, scholarship, and advocacy focuses on corporate misconduct and criminal and civil enforcement under the environmental laws, including cases ranging from the Gulf oil spill and the Upper Big Branch mine disaster to the Volkswagen debacle and the Flint drinking water crisis. I lead the Environmental Crimes Project at Michigan, which is an ongoing empirical study involving nearly 200 law students that collects data on all matters investigated by the Environmental Protection Agency that have resulted in criminal charges for pollution violations between 2005 and 2014. We will update the database next year to include 2015-16.

Prior to joining the Michigan faculty in July 2007, I served for 17 years in the United States Department of Justice, the last seven as Chief of the Environmental Crimes Section (ECS). As ECS Chief from 2000 to 2007, I was responsible for approving all indictments and plea agreements in matters prosecuted by the 40 attorneys assigned to our office, who handled cases jointly with Assistant United States Attorneys throughout the country. Before becoming the ECS Chief in June 2000, I served as an Assistant Section Chief, a Senior Trial Attorney, and a Trial Attorney. A copy of my *curriculum vitae* is attached as Exhibit A to this testimony.

As ECS Chief, I chaired the Justice Department's Environmental Crimes Policy Committee, which set national policies for the prosecution of environmental crime, and I served on the Environmental Issues Subcommittee of the Attorney General's Advisory Committee, which set priorities for the prosecution of environmental crimes as well as civil enforcement under the environmental laws. In addition, I was responsible for coordinating parallel

proceedings (contemporaneous criminal and civil cases based on the same violations) with the Chief of the Environmental Enforcement Section at the Justice Department.

During my tenure at the Justice Department, ECS prosecuted hundreds of criminal cases involving misconduct by corporations that ranged in size from large Fortune 500 companies and mid-size companies to smaller companies and sole proprietorships. In some of those cases there were identifiable victims that qualified for restitution under federal law. In the overwhelming majority of cases, however, the harm from the misconduct was more generalized, which led United States Attorneys in both Republican and Democratic administrations to seek funding for third-party programs that would help address the significant harm caused by the offenses.

I understand that the focus of today's hearing is on civil cases and the question of whether third-party payments other than restitution are appropriate as part of civil settlements. I believe that my experiences with similar issues in criminal cases may inform your approach to civil settlements. In both criminal and civil cases, harm to our communities often occurs that cannot be addressed by restitution. In such cases, third-party payments may be appropriate, as long as government attorneys ensure that such payments are made in accordance with the governing law.

My view is that clear rules are helpful regarding the circumstances where third-party payments are authorized in both criminal and civil settlements, much like those the Justice Department developed for environmental crimes when I was ECS Chief in December 2000 (which were updated in January 2009), as well as those that EPA developed for Supplemental Environmental Projects (SEPs) in 1998 (which were updated in March 2015). I would respectfully suggest, however, that the "Stop Settlements Slush Fund Act of 2016" proposal would not provide greater clarity and instead goes too far. The proposed legislation could preclude third-party payments even in cases when there is a nexus to the underlying violation and third-party payments are the best way for defendants to redress the harm caused by their conduct.

In my testimony this morning, I will briefly describe my experience with third-party community service payments and the circumstances where they are appropriate in both criminal and civil cases. I then will address efforts that began during my tenure at the Justice Department to establish policy guidelines for third-party payments to ensure that they met legal requirements, advanced the purposes of criminal sentencing, and avoided any potential conflicts of interest. I will conclude by explaining why a sweeping prohibition of third-party payments in civil settlements is undesirable and why it would be more appropriate for Congress to focus instead on providing clear guidance about when third party payments are authorized.

1. **Community Service Payments in Environmental Crimes Address Generalized Harm Caused by Violations and Help Communities Recover from Corporate Misconduct**

In 1996, I was one of the lead prosecutors in *United States v. John Morrell and Company et al.* in the District of South Dakota. Morrell, which was one of the largest employers in the State of South Dakota, operated a slaughterhouse in Sioux Falls that discharged its waste into the Big Sioux River. Under the terms of its Clean Water Act permit, Morrell was required to treat its waste to limit the concentration of ammonia nitrogen as well as other chemicals that could harm aquatic life in the river. The permit also required Morrell to test its waste at least three times each week to ensure that the facility was complying with its permit discharge limits.

Instead, over a period of several years, Morrell officials engaged in a conspiracy to violate the Clean Water Act, discharging ammonia at levels nearly 40 times more than allowed under the company's permit. Morrell concealed those violations from EPA and the State of South Dakota, first by selective sampling (taking more than three samples each week and reporting only the best results), then by what employees called the "flow game" (holding back waste on days that they sampled), and eventually by falsifying their monthly discharge monitoring reports (literally moving the decimal point to report one tenth or one hundredth of actual discharge amounts). The illegal scheme was well-known within the company; the senior vice president in charge of the Sioux Falls facility asked "who's going to jail this month" when he signed the monthly reports.

The Justice Department prosecuted Morrell and four senior officials within the company for conspiracy to violate the Clean Water Act, monitoring violations, discharge violations, and falsifications of reports to EPA and the State of South Dakota. In February 1996, Morrell agreed to plead guilty. In our discussions about a plea agreement, the United States Attorney wanted to include terms that would require Morrell to address the environmental harm caused by its misconduct, even though it was not possible for EPA or the State of South Dakota to monetize the ecological harm to the Big Sioux River. For its part, Morrell was anxious to make amends to the community by providing funding that would support pollution reduction in the Big Sioux River and promote its future use for fishing and recreational activities.

With the approval of the federal district court, the Morrell plea agreement created the Big Sioux River Environmental Trust Fund to support cleanup efforts on the river and restore recreational opportunities for communities harmed by the company's misconduct. Morrell paid a $2 million criminal fine and $1 million in restitution and community service to the trust fund. Later, when all four Morrell officials were convicted, the court ordered each of the individual defendants to pay restitution and community service to the trust fund as part of their sentences. The defendants also were sentenced to jail time, community confinement, probation, and fines.

In the years that followed, the Justice Department followed the approach of the Morrell cases whenever there was indeterminate harm to the environment or public health, to ensure that criminal defendants remedied the harm caused by their conduct. In a number of asbestos cases, where construction workers, homeless people, and undocumented immigrants were exposed to deadly carcinogens, defendants were required as part of their sentences to provide funding for long-term health care monitoring, which was necessary because the harmful effects of asbestos take 20-30 years to become apparent. The health care monitoring funds established by these cases were operated by third-party community-based organizations where the crimes occurred.

In a number of vessel pollution cases, where unlawful pollution occurred on the high seas with aggregate discharges of oil every year that exceeded the amount spilled by the Exxon Valdez, the Justice Department required corporate defendants to pay community service to Congressionally-chartered foundations, such as the National Fish and Wildlife Foundation. The purpose of these community service payments was to address the harm caused by the vessel pollution, under the authority provided by United States Sentencing Guidelines § 8B1.3.

Perhaps the most significant environmental case involving community service payments to third parties was the 2012 prosecution of BP for its role in the Gulf oil spill. BP agreed to pay $4 billion to resolve the criminal charges against the company—by far the largest sum ever imposed for environmental crime. That sum included $1.256 billion in criminal fines, $2.394 billion to the National Fish and Wildlife Foundation for projects to address the catastrophic harm to the Gulf of Mexico ecosystem that occurred because of BP's misconduct, and $350 million to the National Academy of Sciences to help prevent similar spills in the future.

While I share the concern expressed by some members of the Subcommittee that criminal fines typically should be larger than third-party community service payments, the Gulf oil spill was a unique environmental catastrophe. I support the Justice Department's efforts to ensure that the criminal sanctions imposed against BP would help address the catastrophic harm BP caused. In my view, the size of the Gulf oil spill community service payments do not set a precedent for future cases, which will be governed by relevant Justice Department policies that I describe next.

2. Justice Department Policies That Limit Third-Party Community Service Payments

During the late 1990s, as terms of community service became more widely sought by environmental prosecutors, the Justice Department decided that it should develop policies to ensure that any third-party payments met the requirements of federal law, advanced the purposes of criminal sentencing law, and did not create conflicts of interests. In consultation with the

Office of Legal Counsel at the Justice Department, ECS developed extensive policies regarding the appropriate use of what was then termed "supplemental sentencing" in environmental cases. I approved the policy in December 2000 and distributed it to all 93 United States Attorney's Offices. A copy of the December 2000 policy is attached as Exhibit B to my testimony.

Under the December 2000 policy, criminal fines must be paid to the Crime Victims Fund, as required by federal law, and cannot be diverted to community service payments. That term is essential so that any community service payments comply with the Miscellaneous Receipts Act. In addition, the policy requires a nexus between the violation and the community service:

> There must be a clear nexus between the supplemental sentence and the criminal violation to help ensure that any harm or threatened harm to victims or the environment is addressed. In considering the harm caused by the offense and the remedy proposed by the supplemental sentence, both a geographical and an environmental medium nexus should be considered.

Exhibit B at A-4. The policy also stipulated that federal agencies could not be involved in the administration of third-party funds in order to comply with the Anti-Deficiency Act.

During my tenure as ECS Chief, I approved scores of plea agreements that included community service terms, because that was the best way to ensure that the generalized harm that often occurs in environmental crimes was addressed by the defendant. In each of those cases, ECS prosecutors ensured that (1) no funds were diverted from the Crime Victims Fund; (2) there was a strong nexus between the criminal conduct and the community service; and (3) any third-party payments were not administered by any federal government agencies.

With experience over time, two additional terms emerged for community service payments, at least in cases handled by ECS that required my approval. First, we concluded that in most cases ECS should limit community service to 25 percent of the total value of the settlement and never should exceed 33 percent of the total value of the settlement. We reached this conclusion because criminal penalties should be the largest component of any criminal settlement, to emphasize the criminal nature of the misconduct and ensure appropriate punishment. We did so after several United States Attorneys entered plea agreements where community service payments equaled or exceeded fine payments, which might be inconsistent with the goals of federal criminal sentencing as set forth by United States Code Section 3553.

Second, we concluded that in most cases community service payments should be made to one of the Congressionally-chartered foundations that were authorized by Congress to receive

such payments. We reached this conclusion after a number of United States Attorneys included community service payments to public interest groups or other charities in their communities. While we had no reason to question the bona fides of those organizations, we were concerned about the potential appearance of a conflict of interest or favoritism toward non-profit groups.

Both of these additional requirements were included in an updated version of the ECS guidance document, which was issued in January 2009 by the Assistant Attorney General for the Environment and Natural Resources Division and is attached as Exhibit C to my testimony. The January 2009 policy stresses the need to negotiate criminal fines and community service payments separately, so that there is no diversion of money from the Crime Victims Fund, which would be a violation of the Miscellaneous Receipts Act. The January 2009 policy carries forward the emphasis on the need for a clear nexus between the environmental violation and the proposed community service payment. The January 2009 policy also formalizes the 25 percent limit on community service payments, except in extraordinary circumstances.

It merits emphasis that current Justice Department policy largely limits the use of third-party community service payments to environmental crimes, unless otherwise authorized by statute. The relevant provisions of the United States Attorney's Manual (USAM) states:

> Plea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendant to pay funds to a charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant's criminal conduct.

USAM § 9-16.325. That section of the USAM contains a cross-reference to other portions of the USAM that authorize community service in environmental cases and reference the 2009 policy:

> Environmental crimes often can result in widespread degradation of the environment and threaten the health and safety of entire communities. In such circumstances, community service may be used in conjunction with traditional criminal sentencing options, provided that the community service comports with applicable law and furthers the purposes of sentencing set forth in 18 U.S.C. § 3553.

USAM § 5.11-115(B). I would suggest that the 2000 and 2009 ECS policy statements and the USAM provisions I have cited above provide guidance for how the Subcommittee might approach third-party community service payments more generally, with the caveat that I do not

think environmental crimes are the only criminal violations that can create the kind of widespread harm that would warrant corporate community service. Similar harms could occur in criminal cases brought under consumer protection laws and in fraud cases—and generalized harm also occurs often in civil cases brought under the environmental laws and other statutes.

3. The Proposed Legislation Sweeps Too Far and Would Compound the Harm Suffered in Communities Where Regulatory Violations Have Occurred

I have reviewed the proposed "Stop Settlement Slush Funds Act of 2016" and would respectfully submit that it is far too sweeping and would compound the harm already suffered by communities where regulatory violations have occurred by making it more difficult for the Justice Department and regulatory agencies to ensure that generalized harm is addressed.

While the proposed legislation does not apply to criminal cases, it fails to adequately address the fact that generalized harm arises in civil cases under the environmental laws, just as it does in criminal cases under the environmental laws. Indeed, generalized harm also occurs in civil cases brought under consumer protection, antitrust, civil rights, and civil fraud laws. In my view, the Justice Department and regulatory agencies must remain able to address the problem of generalized harm in civil cases, just as they are authorized to do for environmental crimes.

There is no principled reason why companies should be required to address generalized harm in criminal cases but not required to address generalized harm if the government declines criminal prosecution in favor of civil enforcement. If regulatory violations result in harm to the environment and our communities, the government should have the ability to require defendants to address that harm, regardless of whether the government elects criminal or civil enforcement. To proceed differently would risk unintended over-criminalization of regulatory violations.

The proposed legislation, as currently drafted, could be construed to preclude all third-party payments in settlement agreements, other than restitution to identifiable victims. If that unfortunate result occurred, it would curtail EPA's highly successful SEPs program, which addresses the generalized harm caused by civil violations of the environmental laws. Like the Justice Department policies on community service, EPA has established SEP policies that include nexus requirements, impose limits on the organizations that can receive payments, and contain rules regarding offsets to comply with the Miscellaneous Receipts Act. Pursuant to these policies, SEPs have been widely used to restore damaged ecosystems, replaced destroyed marshlands, and support community health organizations. These valuable settlement terms should not be undermined by Congress. EPA's 2015 SEP policy is attached as Exhibit D.

Because the proposed legislation contains no definition of "donation," courts interpreting the legislation could conclude that it precludes third-party payments as part of civil settlement agreements, other than restitution, even in cases of generalized harm to the environment or consumers. The proposed legislation contains an exclusion for payments that "provide restitution for or otherwise remedy the actual harm (including to the environment) directly and proximately caused by the alleged conduct of the party, that is the basis for the settlement agreement." The ambiguous wording of this exclusion, however, could lead courts to conclude that restitution or remediation is only allowed in cases involving identifiable victims. In this way too, the proposed legislation could hamper the government's ability to address generalized harm.

To protect the government's ability to address generalized harm in settlement agreements, the proposed legislation would need to include a definition of what donations would be covered, as well as language that makes clear that actual harm includes generalized harm. In addition, the legislation would need to make clear that it does not impose limitations on long-standing programs that address generalized harm, like EPA's highly-effective SEP program. Even with these changes, however, the proposed legislation would be inferior to Congressional action that makes clear when third-party payments can occur in civil settlements. It is far preferable to make clear what is allowed by Congress than to impose limits that make legal authorities unclear.

I would recommend that any Congressional action focus on codifying the positive features of existing Justice Department and EPA policies. It would be reasonable to require a nexus between any third party payments and the violations that are addressed by settlement agreements. It also would be reasonable to insist that third party payments are negotiated separately from criminal fines or civil penalties and do not create conflicts of interest. And it might be reasonable to impose caps on third-party payments and to make clear that third-party payments cannot be used to fund programs that Congress has determined should be de-funded. Unfortunately, the proposed legislation includes none of these salutary terms.

Conclusion

I understand the Subcommittee's concern that third-party payments as part of settlement agreements could be made in ways that creates the appearance of conflicts of interest, as well as the view of at least some members of the Subcommittee that the Justice Department and regulatory agencies are encroaching on legislative authority. In my view, those concerns should be addressed, if at all, by legislation that makes clear when third-party payments are allowed, not by a law that could preclude third-party payments even when they serve essential functions.

It is not possible for Congress to legislate every time a regulatory violation occurs that causes generalized harm to the environment or an American community. Congress can and should rely on the Justice Department and regulatory agencies to ensure that companies who commit regulatory violations make appropriate payments to remedy the harm they have caused. We should not limit the discretion of the Executive Branch to ensure the faithful administration of the law and to provide necessary relief to communities where corporate wrongdoing occurs.

Thank you again for the opportunity to testify before you today.

Mr. MARINO. Thank you.

I will now recognize myself for my 5 minutes of questioning.

First of all, it's a pleasure to be talking with brother prosecutors. I do want to make clear that we kept the bill as narrow or simple as possible because we wanted to hear what you had to say as far as, perhaps, expanding on issues. And just through your opening statements, I can see areas where we need to expand civil, criminal—do we say "funds," you know, instead of "donations" and explanations.

But, as a prosecutor, I would like to first ask, there's been some concern about this curtailing prosecutorial authority. And, as a prosecutor, as far as discretion is concerned, we all know that there are multiple ways to resolve a case. So how would this not resolve a case? Why do you think it would prevent—if you do—why do you think it would prevent a prosecutor's discretion in moving forward with a case?

And I'd ask Congressman Lungren if you could address that, and each one of you, please.

Mr. LUNGREN. Well, in answer, I would say I don't think it unnecessarily restricts prosecutors. As I understand the way the bill stands now, it prohibits mandatory donations but not redress to individuals as affected.

One of the arguments I see that has been made is that in criminal cases this has been allowed. But certain criminal statutes have very specific authorities to do this, and you have to say, why would the Congress give them specific authority if in fact they have general authority? I think it's because Congress looked at those specific cases to say, in these matters, we can allow a more generalized redress.

And the third point I would make is this. If, in fact, the harm has been done to the public and is so diffuse that you can't identify those who are the proximate sufferers of it, if you can prove in court, as a legal matter, that damage has been done but it is diffuse, then the money ought to go to the Federal Government, and the Federal Government ought to decide through the regular appropriation process how those funds ought to be expended.

Look, it's a natural thing. As attorney general, I liked the great flexibility I had, but I remember the largest case we did, I think, was the famous tobacco case. California got the largest amount of money from that, but, as I recall, I was not able to direct those funds under the California constitution. They went into the general fund. I would've liked to have. I thought I had a superior idea as to where they should go. Unfortunately, the California constitution said otherwise.

I think, similarly, the U.S. Constitution, as Senator Byrd explained in his statement that I have in my statement, it is the most representative and the most open of our branches.

Mr. MARINO. Okay. Thank you.

Professor Figley?

Mr. FIGLEY. I think Congressman Lungren's last point is exactly right. If there has been general harm, money can go into the general Treasury, and Congress can decide the best places to spend it, as opposed to having any government—any Department of Justice official make that determination.

Mr. MARINO. Thank you.

Professor Uhlmann?

Mr. UHLMANN. So Congress has already determined that criminal penalties go to the Crime Victims Fund, civil penalties go to the civil Judgment Fund. So the idea that additional moneys that might be paid as part of either plea agreements or civil settlements is somehow going to revert back to the Federal Treasury for Congress to then reappropriate is a complete misnomer. It would require changing how all criminal penalties are directed by Congress. It would require changing how all civil settlements are directed.

But it also misses a broader point, which is Congress has also has said that restitution to victims takes priority over all penalties in the criminal system. And as I've already discussed and as we can certainly discuss at greater length, it is simply not always possible to identify individual victims to meet the requirements of Federal law. The environmental example is the easiest one, but the same concerns arise in other regulatory schemes.

And so, to your question, Mr. Chairman, we would deprive prosecutors and civil enforcement attorneys of their ability to address the generalized harm that occurs in these cases. So we'd get half a loaf in every case. We'd get criminal penalties or civil fines. We'd get individualized restitution. We couldn't address the harm to our communities.

And there are hundreds, if not thousands, of these violations every year. Congress is not going to be able to legislate for each one of them. And so this is, I think, the best way—you know, clear rules about what is allowed and what isn't allowed in these third-party payments is the best way to proceed, not by prohibiting them, as this legislation would do.

Mr. MARINO. Okay. I'm going to take some liberties here, if my colleagues don't mind. We don't have a full panel here.

You do understand that if a specific victim can be identified that prosecutors have the authority to address that issue and recoup funds for those specific individuals. But if a specific entity cannot be identified or if there is collateral damage, I still have an issue with an agency—and, thinking as a prosecutor, as we do, that discretion or that authority is very powerful and good in 99.9 percent of the cases. But Congress does appropriate. And I err on the side of the Constitution, the fact that, okay, those funds must go to the Treasury, but I don't have a problem with discussing and expanding on the ability of Justice or EPA requesting from Congress additional funds because of X, Y, and Z. We still have to appropriate, and the appropriation process for the last 20 or 30 years is not what it was designed to be in the Constitution under all Administrations.

So that's my problem with that, Professor. And you look like you want to respond to something, so please go ahead.

Mr. UHLMANN. Yeah, no, I mean, I think it's a great question. And I appreciate the Chairman's concern here. Two thoughts.

One, you know, a great example of a case that's sort of happening right now is Volkswagen. Everybody's familiar with the Volkswagen debacle. Volkswagen had defeat devices on its—a lot of its cars that allowed them to evade the requirements in the United States under the Clean Air Act.

There are a lot of victims, and there are a lot of consumers who were defrauded. And I don't see anything in the proposed legislation that would prevent those individual victims from being compensated by Volkswagen.

Mr. MARINO. Please bear in mind, this is just exactly why we're having this hearing.

Mr. UHLMANN. Right. Right. Absolutely.

Mr. MARINO. Okay.

Mr. UHLMANN. But I think that even the skeletal, sort of trimmed-down version of the bill that we had before, that we've started with, preserves the restitution for those individual car owners.

Mr. MARINO. Yeah.

Mr. UHLMANN. But what about the rest of us? I mean, Volkswagen's conduct—you know, some news reports have suggested that hundreds of people will die because of the nitrogen oxide that Volkswagen cars emitted into the environment. How do we address that harm?

Mr. MARINO. I don't dispute that with you. But I believe that's Congress' responsibility.

Mr. UHLMANN. Well, but is Congress going to—so for each of these cases? Are we going to have the Volkswagen Harm Act? Are we going to have the Exxon Harm Act? The BP Harm Act? I mean, you see——

Mr. MARINO. No. We're going to go through the appropriation process by which any department or agency requests money for its original budget.

Mr. UHLMANN. Of course. And EPA—I'm not sure how well their budgets are faring in this Congress, but EPA does have—you know, makes a budget request every year to address air pollution.

Mr. MARINO. Sure.

Mr. UHLMANN. But my point is, you know, how do we address the air pollution caused by Volkswagen, or the harm to the Gulf of Mexico ecosystem caused by BP. The whole idea of these payments is they allow, not the taxpayer, but the company involved to pay for the harm that they did in cases where harm is not identifiable to individuals.

Mr. MARINO. And this isn't the time or place to discuss the extent of the damage. I mean, that's for another hearing. But I have used way over my time. I——

Mr. LUNGREN. Mr. Chairman, could I just respond a little bit?

Mr. MARINO. As long as my colleagues agree.

Go ahead.

Mr. LUNGREN. And the answer—I think we've given an answer to the question. The question is, how do we remediate that damage that was done? As trained lawyers, we prove it.

It seems to me the agency or the Justice Department makes the allegation that this amount of extra pollution has been crated, that would seem to me to be an evidence of the damages to be paid or additional damages to be paid. Whoever is the appropriate executive branch agency comes to the Congress, makes the case that this additional impact on the environment has occurred, this amount of money has been extracted from the perpetrator, and we believe

that using this amount of money or a portion of it to respond to it is appropriate. And then Congress makes the decision.

Mr. MARINO. Yeah.

Mr. LUNGREN. The other thing is, as I understand, in the bill, you allow specifically remediation of environmental damage——

Mr. MARINO. Yes.

Mr. LUNGREN [continuing]. But it has to be proven. It has to be proven. Let's not forget that. We're talking about proving it.

And, again, if the impact is so diffuse but you can still get a sum of money for it, run it through the appropriation process, where Congress, if it does its job properly, ought to be able to respond in appropriate fashion.

Mr. MARINO. All right.

Professor, do you——

Mr. FIGLEY. Very briefly.

The complexity of the problem—somebody has caused a general, diffuse difficulty for the American people—can't be resolved by deciding that this particular university or environmental organization should receive money as opposed to this one.

Mr. MARINO. Yeah.

Mr. FIGLEY. If that decision is going to be made, it is much better that it be made through the appropriations process than by a Department of Justice official.

Mr. MARINO. Good point.

I now beg forgiveness from my colleagues and recognize the Ranking Member of the Subcommittee, my friend, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

I can't resist asking Professor Uhlmann to offer the response that I see he's burning to make.

Mr. UHLMANN. I have such a good poker face.

No, I agree with Professor Figley. I mean, this notion of direct—you know, it's a famous case now. It involves the current Governor of New Jersey. I won't name him, but, you know, when he was U.S. attorney, funds were directed to his law school. And that shouldn't happen. And I think everybody agrees that have shouldn't happened. I don't know, I even think the Governor of New Jersey might agree that was a mistake, in hindsight.

But it's not the case, as Professor Figley suggests, that environmental prosecutors, my former colleagues, are handing out money to their favorite environmental charities. The practice at the Justice Department, codified now—I mean, made clear in two separate policy documents—first, one that was issued over my signature in December of 2000 and then another that was issued in the Bush administration by Assistant Attorney General Ron Tenpas—require that the funds only go to organization that Congress has already identified as organizations that can receive this type of funding.

So I think it's important to sort of describe what's really going on here and recognize that the funds that we're talking about—the funds in the Gibson Guitar case that Congressman Lungren has talked about went to an organization so it could address the harm caused by illegal logging operations. Congress had designated that organization, established that organization, to receive this type of funding.

It's not going to everybody's favorite environmental groups; it is not going to law schools. But I agree with both of my colleagues on the panel that it shouldn't be going to those organizations, and I'd have no objection to Congress saying that can't happen.

Mr. JOHNSON. Well, tell me now, if relief must be a direct, point-to-point remediation of harms, how do you directly remedy the damage of an oil spill wherein the damage—or whereby the damage is to all of the birds along the shore? So, in other words, a bunch of oily birds, how do you directly remedy the harm done to those birds?

Yes?

Mr. LUNGREN. I think you do what we've done in the past, which is require the companies responsible to pay for the remediation.

Mr. JOHNSON. Well——

Mr. LUNGREN. It doesn't stop them from hiring——

Mr. JOHNSON. How would——

Mr. LUNGREN. It doesn't stop them from hiring organizations——

Mr. JOHNSON. How would you do that?

Mr. LUNGREN [continuing]. Who know how to do that.

Mr. JOHNSON. How would the company actually remediate the harm to all of the birds?

Mr. LUNGREN. Well, as they've done in the past. They hire groups that actually go out and do it. I don't see any problem with that. I will say this, though.

Mr. JOHNSON. Well, isn't that a donation?

Mr. LUNGREN. There's no problem with that, as long as it's specifically to—no. If it—if you look at the language of the bill, that is not a donation. It is a service that is rendered as——

Mr. JOHNSON. Well, you would make——

Mr. LUNGREN [continuing]. A result of the remediation. So in that sense, that is not a donation, as I understand the terms of the bill as written.

Mr. JOHNSON. But the order, pursuant to the litigation, would direct a—would be to an entity to actually remediate——

Mr. LUNGREN. Right.

Mr. JOHNSON [continuing]. The harm.

Mr. LUNGREN. That would be a service. As I understand the language of the bill, that would be allowed. That would not be considered a donation. That's made an exception to the definition of donation. I do know this.

Mr. JOHNSON. What's the difference?

Mr. LUNGREN. The difference is, that's the way the law was written.

Mr. JOHNSON. Well——

Mr. LUNGREN. Secondly, I would say this. I have not been able to see any improvement in the wastewater, anywhere that I have been, as a result of a million dollar donation to the U.S. Coast Guard Alumni Association.

Mr. JOHNSON. Well, now, I mean, you take one particular example and try to make it the norm. And I would—I would suggest that that's not the norm. Same way the Governor of New Jersey directing funding to his alma mater, it's an anomaly, and we don't want to throw the baby out with the bathwater here.

What do you say to that, Professor Uhlmann?

Mr. UHLMANN. Well, that expression, I think, captures the whole problem here. I mean, there is no question that there is—there are circumstances where this authority could be abused, and we've come up with some isolated examples of where it might have been in the past.

I mean, I don't want to be on record saying that, you know, the payment to the Coast Guard, which I'm not familiar with all the details about, or even the Seton Hall donation was an abuse of authority, but they could be. And I think limits on the authority in that way could be helpful. I do think they are already provided by existing policy, so I'm not sure that there's something to add here for Congress.

But look, I think clear rules of the road, which is one of the suggestions that Congressman Lungren made, are always helpful. I think clarifying what is and is not acceptable about third-party payments could be helpful. But this misnomer that somehow third-party payments are a way that people are self-dealing, are pursuing partisan agendas, are engaging in conflict—you know, creating conflicts of interest, I mean, it's not the Justice Department I served in. And I served there for 17 years in both Democratic and Republican administrations. And I think it's unfair to describe the government in that way or suggest that that's what's happening in these cases.

These are real harms that don't have identifiable victims that the government is trying to address, as it is obligated to do so, to do justice in its cases.

Mr. JOHNSON. Thank you, Professor. In your written testimony, you observe that the practical effect of H.R. 5063 may be to generate more criminal enforcement of environmental cases.

Could the Justice Department have brought the *Morrell* case you cite in your written testimony as a civil case, and what other types of cases might also be brought in criminal instead of civil actions as a result of H.R. 5063?

Mr. UHLMANN. Well, *Morrell*, very definitely, could have been either a criminal or civil case. I think the evidence that we were able to amass about statements like who's going to jail this month, there was another—there was a document that actually said the detailed violations, and the cover memo said this—this document has been destroyed at the plant and should be destroyed by you after reading it. So my fellow former prosecutors will understand why we got pretty excited about that as a criminal case.

But the reality, under the environmental laws and under most of our public health and safety laws, is that prosecutors enjoy enormous discretion about whether any particular violation is going to be criminal or civil. And so, you know, I've written about a lot and focused a lot about the need to exercise that discretion in an appropriate way to limit criminal enforcement to the most egregious violations.

But look, in the close calls, and there are a lot of close calls that we ask the Justice Department to make and that we trust them to make properly, you know, if they feel like they can redress the harm to the communities if they bring a criminal case but can't do so in a civil case, it's going to tip the balance toward criminal en-

forcement. At least in some cases it otherwise might be left for civil enforcement, and that's the concern I was raising.

Mr. JOHNSON. Thank you.

And with that, I'll yield back, Mr. Chairman.

Mr. MARINO. You know, this—we are all attorneys up here. I don't know if that's a good thing or a bad thing, but this is just actually one of the most interesting discussions that I have had the privilege of chairing since I've been here.

And the Chair now recognizes another prosecutor from the State of Texas, a former U.S. Attorney, Congressman Ratcliffe.

Mr. RATCLIFFE. Thank you, Mr. Chairman.

I thank the witnesses for being here today.

You know, I've been grateful over the last several months to have the opportunity to participate in something called the "Article I Project." It's a network of House and Senate Members focused on reclaiming, as unnecessary as that may seem, reclaiming the Article I powers of Congress and limiting the ever-expanding executive branch.

And I think this hearing, I agree with you, Mr. Chairman, very interesting, and it really underscores the critical need for Congress to reassert the separation of powers. In this case, it seems to me especially so in response to what appears to be really an outrageous overreach by the Administration and disregard for Congress' constitutional power of the purse.

This Department of Justice scheme of funneling money to activist groups, some of those groups where Congress has specifically denied funding, Federal funding, is especially troubling, as a former prosecutor and someone that's worked closely with the Department of Justice. And, you know, equally troubling is the fact that the Department of Justice, not only have they been less than forthcoming, it seems, in response to this Committee's investigation, but essentially have doubled down on a practice that would appear to ignore the Constitution and lacks transparency with regard to the appropriations process that allows the American people to hold their government accountable, and instead, here we see money that should go to the U.S. Treasury going to DOJ selected winners and losers. In fact, DOJ picking winners and losers from groups that stand to gain from these settlements, and in some cases, who have actually lobbied DOJ to receive them.

So beyond the constitutional concern, I'm troubled by a lack of transparency and a host of ethical issues that this scheme would present. And the idea that a Department of Justice official can direct immense sums of money to a pet organization or political allies with zero accountability is something that I would think would trouble all of us, Republicans and Democrats.

So let me start out, Congressman Lungren, great to see you again back here on the Hill. You talked about this grant phenomenon in your testimony at both the State and Federal level. I know you've seen it as the attorney general in California, these grants being these, to quote you, coerced payments to entities that are mandated by officials acting with the full power and majesty of the government.

Let me ask you this. First of all, do you think that this scheme that the Department of Justice, my words, has doubled down on,

do you think it violates the Constitution, number one? And secondly, would you—depending on your answer, would you elaborate on why you think the allocation to Congress of the power to spend Federal funds is critical to the separation of powers that I talked about?

Mr. LUNGREN. Well, first of all, thank you very much, a fellow Notre Dame Domer. I appreciate that.

I have been concerned, over the years I was in Congress, at the failure of Congress to assert itself appropriately. And when you study the Constitution, the Constitutional Convention, and the arguments made in the Federalist Papers, it is very clear that they felt that the power to extract funds and to spend funds on the part of the government was one of the potentials for tyranny. And I'm not suggesting we're involved in tyranny, but it is an essential bedrock principle that the Founding Fathers talked about.

They made a conscious decision, I think, to make Congress Article I. The first thing they thought about when setting up the government was the most representative branch of the government. Then they also felt that it was important, between the Senate and the House, that the House be given primary responsibilities in these matters, even though I think we forfeit that right in some of the legislative legerdemain that takes place where we send a bill over to the other side, they take everything out except the title, and then they send it back so that the revenue bill didn't start in the House, essentially.

But they did that because they knew that the Members of the House had to go before the people more often than anybody else, and that, therefore, if the average citizen—if the citizenry felt that there was a violation of that trust in that most important area, they could respond. To the extent that gets placed in a gray area, and I think this is—look, if you're talking about a couple of dollars here and there, all right. But Senator Everett Dirksen once said a billion dollars here, a billion dollars there, pretty soon you're talking about real money.

Now, as I understand it, we're talking about a billion dollars in just the time that the Congress had the temerity to ask the Justice Department what they were doing. That doesn't sound to me like an olive branch to the House of Representatives.

And the last point I would make is this. I happen to applaud what Professor Uhlmann did at the Justice Department. I think you were moving in the right direction. But despite his best efforts, you still had, in 2006, that million dollars going to the Coast Guard Alumni Association on a matter of the environment.

Madison said it best. He talked about if—if men were angels, we wouldn't need government. But men are not angels, so we need government. But then he said: Once you decide those who are in the government—in the government, you have to figure out how to govern the govern. And the answer he gave, as I mention in my paper is, you pit ambition against ambition.

In one sense you pit one branch of government against another. That's what we do. And one of the ways you do that is you give primacy to the House of Representatives for spending matters. It is not neat. It is not pretty. It is not the most efficient way of doing things, but that is the genius of our Founding Fathers that they

thought, as Justice Scalia said many times: The greatest protection for our civil liberties and against their invasion was the construct of government that we set up.

And I think that's lost in today's debate, and Congress has got to be one of those branches of government that understands their responsibility, understands their role, and understands the limits of all branches of government.

I'm sorry it was a long-winded answer. It gave me a chance to——

Mr. RATCLIFFE. No, I enjoyed your answer. Thanks, Congressman.

And my time has expired, but if the Chairman would beg my indulgence. I have one quick question I really want to ask Professor Figley because we were both at the Department of Justice. I'm not sure if we were there at the same time.

But I'm curious about your experience with respect to the mandatory payments to nonvictim third-parties. More importantly, how has this practice evolved in recent years, and most particularly, in your opinion, what do you think is the driving force behind this?

Mr. FIGLEY. I never had anything to do with it when I was at Justice. I mainly defended tort cases, big ones, but tort cases.

My concern here is that we saw, as our mission in life, protecting the Judgment Fund and protecting the people's money. Here, I think the practice gets away from that.

Professor Uhlmann talked about the Gulf Oil spill and the money there. There's a $2.4 billion grant to one particular environmental organization, and it may be a perfectly good one, but I think it would have been much better to have had all of the environmental organizations interested in receiving a $2.4 billion grant, apply for it and go through procedures where there would be transparency and clarity about where the money was going and why it was going to that particular entity.

Mr. RATCLIFFE. I appreciate your response.

And I appreciate the Chairman's indulgence. With that, I yield back.

Mr. MARINO. The Chair now recognizes the Ranking Member of the full Judiciary Committee, another attorney, Congressman Conyers.

Mr. CONYERS. Thank you, Chairman Marino.

I welcome all the witnesses, of course.

Our former colleague witness here today argued that enforcement—agency enforcement decisions must be motivated by the public interest and not politically motivated self-interest.

And so, Professor Uhlmann, what guidance, what laws currently exist to promote the public interest in settlement agreements, in your view?

Mr. UHLMANN. Well, I absolutely agree with former Congressman Lungren that that is the role of law enforcement. And, of course, all the laws that are within the purview of this Committee are laws that are designed to promote the public interest, protect the public from the—from a whole host of potential harms.

Congress already passed the Miscellaneous Receipts Act, which ensures that funds that are—have been directed by Congress can't be redirected by agencies. Congress already passed the

Antideficiency Act, which ensures that these sort of third-party payments that we're talking about can't be used to augment agency budgets. The agencies can't have a role in administering the funds.

Congress already designated certain organizations to receive payments like those we're talking about. In fact, like the payment in the Gulf Oil spill that Professor Figley is talking about, this notion that somehow all the environmental groups should have lined up and petitioned the Justice Department for funding, I mean, respectfully, you know, that would give me far more concern than what the Justice Department did.

They made sure that the money went to an organization that Congress already established in the public interest. And I happen to share the concern about the size of that payment, but it went, as it should have, to an organization that Congress determined should receive these funds. And then, as I indicate in my testimony, there are a number of policy statements that the Justice Department and the various regulatory agencies have developed to do just what you're talking about, Congressman Conyers.

You know, I suppose those could be codified by Congress, but they do exist in each of the various—at the Justice Department in each of the various regulatory agencies.

Mr. CONYERS. Did anyone want to add to this question?

Mr. FIGLEY. If I might, Congressman.

Mr. CONYERS. Yes, Mr. Figley.

Mr. FIGLEY. I think that presents a false choice. We have $2.4 billion. Is it for Justice to decide to give it to this organization or to set up a way for different organizations to apply to the Department of Justice for the $2.4 billion? Neither of those is the answer.

The answer is, put the money back in the Treasury, let Congress decide how the money will be utilized, and if there is to be a grant program, it should be administered through the appropriations process.

Mr. CONYERS. Uh-huh. Mr. Chairman Emeritus.

Mr. LUNGREN. See, I'm bothered by the example of the Housing and Urban Development's Housing Counseling Assistance Program. My last year here—last term here in Congress, we voted on some very tough budgets, as you know. We had to eliminate that, we thought, that 1 year, $88 million. The next year we came back, my very last year in the Congress, we came back with a budget that granted, I think it was 55 percent of that total, and then we maintained it at that level. That's what we thought in terms of our budget priorities. And yet if you look at the Citibank settlement as well as provisions in the Bank of America settlement, $150 million worth of mandated donations went to those housing nonprofits, which essentially reversed the decision of Congress.

Now, you might say, and we might agree, that Housing Counseling Assistance is an appropriate program, but it seems to me if Congress, looking at all the priorities out there, made the decision that it could only be funded at half of what it had been before, then that money should be——

Mr. CONYERS. Okay.

Mr. LUNGREN [continuing]. That additional money ought to be determined by Congress, not by HUD.

Mr. CONYERS. All right. Let me close with this final question about Mr. Figley's recommendation that H.R. 5063 apply to criminal settlement agreements.

Professor Uhlmann, what would—affect would that have on criminal enforcement cases?

Mr. UHLMANN. You know, if this type of language also applied in criminal cases, it would just shut down the Justice Department's ability to address a lot of the harm that's caused by criminal violations of our public health and safety laws. And it would give corporations a free pass for the harm they caused.

Now, Congressman Lungren suggested, you know, go prove it in court. But so much of the kind of harm to communities, harm to society that we're talking about is not possible to prove, certainly not beyond a reasonable doubt, and even—even by clear and convincing evidence, where it is not possible to monetize. And it's those companies, not the American taxpayers, who should be addressing that harm.

And so it's particularly important to have this authority in criminal cases because if our criminal authorities are being exercised properly, those are the worst violations that cause the most harm. And the companies who engage in that misconduct should be held accountable.

And I worry if the Committee were to accept Professor Figley's recommendation, it would just make a potentially bad bill worse.

Mr. CONYERS. I think you're probably right.

I know we could continue this discussion, but my time has expired, and I thank you all for this very important hearing.

Mr. MARINO. I do have one more question I'd like to throw out to all three of you gentlemen, but I'm starting to get flashes back of law school when we talk about the proximate cause in Cardozo and Palsgraf, and the whole nine yards. I mean, when—that can go forever.

But, Professor Uhlmann, there's no question that I support the fact that Justice, the agency, can see that those that are directly injured receive the funds to compensate and to even go further than compensating. But let's talk a second about the banking settlements, which trouble me.

Mandatory donations that did not conform to EPA guidelines that you cite with respect to the amount of credit given for donations. There's credit given. Lack of oversight. There's lack of oversight in all this. That's probably in addition to the issue concerning Congress controlling the purse strings. That's the next thing that really bothers me, lack of oversight, where is it going and why.

Augmenting agency funds by reinstating funding, Congress specifically cut. So what say you?

Mr. UHLMANN. You know, I think the Chairman's concerns are reasonable. I mean, I understand where you're coming from.

Mr. MARINO. Thank you.

Mr. UHLMANN. And I think, you know, in the area where I work, which wasn't banking, there are pretty clear rules of the road that are governing how the Justice Department and EPA exercise its authority.

If that needs to be done across the government to ensure that other sectors have similar rules, then that should be done. Whether

the best way to do it is legislation or whether the best way to do it is policy statements, I'd, you know, defer to the Committee about, but—or the Subcommittee about.

But I would say this. If the Subcommittee were to legislate—I mean, I think it's far better to legislate through positive rules that say these are the things you're allowed to do, and certainly then to add, and these are the things you're not allowed to do.

If there are things that we think are good—and I think there's actually a lot that we would agree is good. I think we—we don't want—in fact, I think your opening statement, or perhaps it was the full Committee's Chairman's opening statement, recognized that there can be generalized harm, and companies should be on the hook for that if they break the law.

You know, we should be—you know, we shouldn't lose sight of the fact that companies that break the law get a significant advantage, competitive advantage against other companies who follow the law. And so, you know, they're properly punished when they break the law, and if they cause harm, they should compensate the communities that have been harmed for doing so.

And so, you know, I—I mean, I certainly felt as we—this sort of all grew up when I was at Justice, and I did feel at times like we were kind of in an open—open field where there was the potential for the kinds of things that the Chairman's described happening. And so I really wanted rules. And I even might have thought at some—at some point that maybe Congress should write those rules. But Congress wasn't writing them, so wewrote them.

And we tried to be—wetried to be principled, notwithstanding the fact that that one case happened on my watch. Although it was a case brought—I now know which case Congressman Lungren was talking about. It was brought by the U.S. attorney in Connecticut.

Mr. LUNGREN. Oh.

Mr. UHLMANN. My office was not involved. I think it was a deferred prosecution agreement. We didn't do those. But, you know, the bottom line is there's so much good here and so much—well, there's so much bad that happens that we need to address, and I think it's good to address that. We want the government to address that.

We're not taking money away from the taxpayers. We're not taking away the money that this Congress—and every Congress has the Article I authority to appropriate. We are saying corporations should pay for the harm they cause. And we don't want—and I would—I think it would be a shame if there was legislation that let companies off the hook and prevented the government from being able to address those harms.

Mr. FIGLEY. Mr. Chairman.

Mr. MARINO. Processor Figley, would you like to respond? You don't have to, but if you'd like to.

Mr. FIGLEY. Well, very briefly. Nobody's saying let corporations off the hook. The question is, when you get money from them, who should decide where that money goes? And that's something that I don't think the Department of Justice should be in the business of doing.

And I—I have the highest opinion of the Department of Justice and the attorneys that work there. It is a bulwark of inertia in the

very best direction. Throughout the Department, people do what they think is right. They don't try to serve their own purposes. But it shouldn't be the business of the Department of Justice to dole out money, particularly grants of billions of dollars.

Mr. MARINO. Okay.

Mr. LUNGREN. Mr. Chairman, I——

Mr. MARINO. Professor.

Mr. LUNGREN. I have the greatest respect for Professor Uhlmann. I really do think he did very good things in the Department leading in the right direction. Two of his responses cause me pause, however.

In the one case, he said if this bill were to pass, there would be a tendency, perhaps, for officials of the Justice Department to move cases from civil side to criminal side. But then in response now to if it applied to the criminal side, it would be, we couldn't go forward because you have to prove guilt beyond a reasonable doubt.

I think the dilemma lies in what do we believe about proving cases? As prosecutors, we all know—and in California, I was responsible for the ultimate cases, the death penalty cases. We all know, in our gut, people that were guilty that were never successfully prosecuted. Why? Because we couldn't prove beyond a reasonable doubt.

Mr. MARINO. Sure.

Mr. LUNGREN. That's the way the system works.

And for some reason, to be hung up on the fact that, man, if you have to go to court, you've got to prove these cases and we've got to prove what the dimensions of the harm are bother me. That's what we do. That's part of the requirement in our system, and we don't catch all the malefactors that way, and we don't punish all the harm that has been done because the system is set up that to protect the innocent, we accept those things.

So I would like us to have more proof regarding these things. And then with respect to the money, the only reason these monies are given is because of the power and the majesty of the government. I used to remind my prosecutors, you know, always keep in the back of your mind you could be wrong. Because if, in fact, you have someone who is guilty, you should bring the power and the majesty of the government against him, but if you haven't, think how unfair that is to an individual.

And so there's a certain sense of humility that we have to maintain in all this. And I do believe, and I firmly believe this, with the people that work with me at the California Department of Justice and with those that I know at the U.S. Department of Justice, they are good people. They are trying to do the right thing, but sometimes even good people have to have guidelines that—of restraint, and the Constitution gives us that, and maybe we ought to look at the Constitution occasionally.

Mr. MARINO. Well, gentlemen, this has been an incredible discussion. I have the utmost confidence and faith in the frontline prosecutors. It's just if we learn to keep the politics, not pointing the finger at anybody, out of this, might just sleep better at night knowing that with the amount of prosecutors that we have, not only at Justice but at the State and local levels. And I certainly appreciate what you've contributed today.

Yielding now to the gentleman for further questions.

Mr. JOHNSON. Thank you, Mr. Chairman. And I associate myself with the remarks that you are in the process of making about our dear friends here.

But I would like to ask Professor Figley, since you served in the civil division of the Justice Department, have you had any experience showing that unlawful conduct was the direct and proximate cause of an injury, direct and proximate cause? I mean, that's a standard that does not currently exist in civil enforcement actions. Is that correct?

Mr. FIGLEY. I fought against that in a number of cases brought against the government. Occasionally, we would bring big suits, and I had million dollar settlements in a case where a corporate officer parked a car in high, dry grass in a national park and caused a huge forest fire, and another case where there was a government-owned irradiation facility where a capsule holding radioactivity cracked and it contaminated the whole facility, and it was worth millions of dollars. And there, we'd have to prove it up or show——

Mr. JOHNSON. Have to prove proximate cause.

Mr. FIGLEY. Yes. Did the defendant's act cause in fact what happened, and was it connected close enough in time and space—and you talk about Palsgraf—and what seems reasonable to people making hard political choices, that it's close enough to establish liability?

And in those two cases, we were able to convince the defense attorneys that we had the goods. Your car starts a forest fire because of the catalytic converter, there's not much question. And there wasn't much question with the cracked capsule. So we were able to prove our cases and accomplish a settlement.

Mr. JOHNSON. With direct and proximate cause being a new standard that is proposed by this legislation, what—I mean, so proximate cause is not the same as direct proximate—direct proximate cause, is it? That's kind of like a heightened standard. There is just absolutely no deviation between points, causation.

Mr. FIGLEY. When we talk about causation and negligence, there's two parts. First is cause in fact.

Mr. JOHNSON. Right.

Mr. FIGLEY. Did what you do, if you hadn't done it, it wouldn't have happened. So if you were speeding down the New Jersey Turnpike going 40 miles over the speed limit, and when you got to Maryland, you drove cautiously, and you hit a little old lady walking across the street, your action of speeding through New Jersey for 2 hours was a cause in fact of your hitting the little old lady, because she wouldn't have been in the street if you'd gotten there later.

Now, the question about liability then turns on, is there proximate cause? Is this close enough in time and space that the law will say, yes, there should be liability? Or is it too far removed? And most courts would say speeding in New Jersey 4 hours ago is too far removed to impose liability. But both—to establish liability, you have to prove both parts. And I don't see a difference between direct cause and cause in fact, which is what I was talking about.

Mr. JOHNSON. Well, yeah, I mean, if that same person speeding hit—ran into a—ran up on a curb and hit a ladder upon which someone was washing windows, and then that person fell off the ladder and went through the windshield of a car, I guess—I mean, a direct and proximate cause——

Mr. FIGLEY. There's clearly direct cause. Now, whether you're going to have proximate cause and liability is the harder question.

Mr. JOHNSON. I guess I'm trying to—I'm trying to come up with a scenario where you may not have a direct cause, but you do have causation from—that was proximately caused. You do have a damage that was proximately caused as opposed to directly caused. And I'm just curious as to why the language "direct and proximate cause" appears in this legislation, and I wonder what effect the requirement of having to prove direct and proximate cause would have on secondary remediation of unlawful conduct.

Mr. FIGLEY. I would see the proximate cause part being a limitation so that if there's a direct cause, there also has to be a proximate cause. But the direct cause is the easy one. It wouldn't have happened but for this thing going on, there would not be a direct cause.

Mr. JOHNSON. It's definitely a heightened requirement of proof. Is that correct, Professor Uhlmann?

Mr. UHLMANN. Of course, I teach criminal law and not tort law, but the—I mean, I think Professor Figley is right that there are two separate causation concepts that govern both criminal law and tort law. I mean, causation is an issue in the criminal law as well, and so there has to be actual cause in fact. There has to be proximate cause.

This term "direct" does come out of—I'm not sure where it comes from. So, you know, we're not—the Chair said we're not in markup. If we were, I would suggest that a better term would be "actual" rather than "direct," which is, I think, the correct term from tort law.

Although, frankly, and I think this is what Professor Figley was suggesting, something—proximate cause by itself would be sufficient because you can't—something can't be the proximate cause without also being a cause in fact. Something could be a cause in fact without being the proximate cause. So we tend to focus on proximate cause, although it does need to be linked in the chain of causation to be proximate—to proximately cause something.

Mr. FIGLEY. In some States, the elements of negligence are listed as duty, breach of duty, proximate cause, and damages. In other States, they're listed as duty, breach of duty, cause in fact, proximate cause, and damages. So as with so many things, it varies with State law.

Mr. JOHNSON. Well, thank you. And I will conclude by saying that, Professor Lungren, you've missed your calling. I think you should be on the academic side also. But thank you all.

Mr. MARINO. Thank you. I think, in closing, I can shed some light on direct and proximate cause that's referred—that's specifically delineated in the Crime Victims' Act, Title 18, USC section 3771(c) and—in general, the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.

So I mean, we make a lot of—I tell you, what you folks did for me today, tonight I'm going to have nightmares about law school exams, okay, with proximately and related and direct and how far do we go from, as my friend's example of the speeding car hits a ladder, the guy falls off the ladder through the windshield, the guy in the car hits somebody else, destroys this.

Mr. UHLMANN. Kind of like a law school hypothetical, isn't it?

Mr. MARINO. I don't even want to even think about it.

Mr. LUNDGREN. That was in Mad, Mad, Mad World.

Mr. MARINO. Yeah. Thank you so very much. This concludes today's hearing.

I can't tell you how much that we have enjoyed this discussion. Please do not hesitate, if you care to, to send us recommendations, additions, deletions. This is how good law is made. We congressmen, as soon as we get elected, we think we're taller, smarter, and better looking, but this is how good law is made when we reach out to everyone who has a dog in the hunt and the expertise of people like you so we don't have to go back. And we can't anticipate everything, but I think my colleague will agree with me, having discussions like this just is the right thing to do.

So without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record. This hearing is now adjourned, and thank you very much.

[Whereupon, at 11:40 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Material submitted by the Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Georgia, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

MEMORANDUM April 26, 2016

From: David H. Carpenter, Legislative Attorney, 7-9118
Edward C. Liu, Legislative Attorney, 7-9166

Subject: **Monetary Relief to Third Parties as Part of Federal Legal Settlements**

This memorandum is designed to be distributed to multiple congressional offices.

In the wake of the recent housing and financial crises, the United States Department of Justice (DOJ) and other federal regulators have entered into numerous legal settlements with and enforcement actions[1] against financial institutions for alleged unlawful foreclosure practices and violations of securities laws, among other legal theories. These settlements and enforcement actions have resulted in financial institutions paying tens of billions of dollars in cash penalties, restitution, and other forms of relief to state and federal parties and programs. Many of these settlement agreements also require financial institutions to provide monetary relief to individual consumers and other private actors. This memorandum provides an overview of when terms of settlements that require private parties to provide monetary relief to non-federal actors are consistent with federal appropriations laws as applied in prior decisions of the Comptroller General, who is statutorily authorized to issue nonbinding legal opinions regarding "the availability and use of appropriated funds" by federal agencies.[2]

Legal Framework

Federal agencies with enforcement powers typically have tremendous flexibility to craft the terms of legal settlements with entities for alleged misbehavior.[3] The terms of a legal settlement that are negotiated between the parties[4] might be affected by myriad factors, such as the estimated additional costs (financial, reputational, etc.) of litigation, estimated time it would take to complete litigation, and uncertainty of success or failure if the matter is litigated. The terms of a settlement also will be impacted by the scope of a particular regulator's authority and the maximum relief available by law for the specific alleged behavior. In some instances, multiple state and federal entities will have jurisdiction over the same or

[1] For simplicity purposes, this memorandum refers to all legal settlements, consent agreements, and similar mutually agreed upon administrative actions as "settlements."

[2] GAO-16-463SP, 1 *Principles of Federal Appropriations Law*, Gov't Accountability Office 1-12.

[3] This is a form of enforcement discretion. For background on enforcement discretion, *see* CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey. The discretion is not limitless. *See infra* "Relevant Comptroller General Opinions" section.

[4] Parties to a legal settlement often will seek court approval of the agreement for various reasons, including to ensure their terms are enforceable by contempt of court. *See* Sec. and Exchange Comm'n v. Citigroup Global Markets, Inc., 752 F.3d 285, 290 - 91 (2nd Cir. 2014).

related alleged misconduct, and these parties might coordinate settlement negotiations. Possible relief could take numerous legal forms, such as civil money penalties, civil forfeiture, or restitution to harmed investors, consumers, or public programs. To whom such relief will be paid and remitted and for what purpose, depends on the precise details of the settlement terms, what legal form the relief takes, and the statutory authorities governing how an agency or program may use monies it receives.

In particular, the "miscellaneous receipts statute"[5] establishes the general rule of law that when a federal agency collects money, those funds *typically* must be remitted to the U.S. Treasury's general fund as "miscellaneous receipts." The miscellaneous receipts statute is one major component of the general prohibition on governmental agencies augmenting their "appropriations from outside sources without specific statutory authority."[6] The statute states, in relevant part:

> ... an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.[7]

Once money is remitted to the general fund in any form (e.g., individual income tax payment, civil money penalty, etc.), it "can not [*sic*] be withdrawn except in consequence of [an] appropriation made by law."[8] The miscellaneous receipts statute provides a means "by which Congress retains control of the public purse under the separation of powers doctrine."[9]

While the miscellaneous receipts statute is the general rule, there are a number of exceptions to this rule. For example, there are instances in which agencies can permissibly enter into legal settlements that require private parties to distribute monetary relief directly to other private parties or to state or local governmental entities.[10] Under certain circumstances, the Comptroller General has determined that such payments are not "for the Government"[11] for purposes of the miscellaneous receipts statute, and thus are outside "the statutory mosaic Congress has enacted to implement its constitutional power of the purse."[12] However, past Comptroller General Opinions have indicated that there are statutory limitations on a federal agency's authority to direct a private party to provide monetary compensation to nongovernmental parties in the context of a settlement. Four specific opinions, which are discussed below, illustrate the point.

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[5] 31 U.S.C. §3302(b).

[6] GAO-06-382SP, 2 *Principles of Federal Appropriations Law*, Gov't Accountability Office 6-162. Other statutory components of the general concept against augmenting appropriations are 31 U.S.C. §1301(a), which "restrict[s] the use of appropriated funds to their intended purposes" and 18 U.S.C. §209, "which prohibits the payment of, contribution to, or supplementation of the salary of a government officer or employee as compensation for his or her official duties from any source other than the government of the United States." GAO-06-382SP, 2 *Principles of Federal Appropriations Law*, Gov't Accountability Office 6-163.

[7] 31 U.S.C. §3302(b).

[8] 2 Comp. Gen. 599, 600 (1923); *see also* U.S. Const. art. I, §9, cl. 7. To be clear, money from a particular source that is remitted to the general fund is not *physically* segregated in a particular vault or account to be later used for a particular purpose. The individual accounts held by Treasury are for *accounting* purposes.

[9] GAO-06-382SP, 2 *Principles of Federal Appropriations Law*, Gov't Accountability Office 6-169.

[10] GAO-06-382SP, 2 *Principles of Federal Appropriations Law*, Gov't Accountability Office 6-177- 6-183.

[11] 31 U.S.C. §3302(b).

[12] GAO-06-382SP, 2 *Principles of Federal Appropriations Law*, Gov't Accountability Office 6-177- 6-183 (quoting GAO Decision B-322531, at 4, Mar. 30, 2012).

Relevant Comptroller General Opinions

Commodity Futures Trading Commission – Donations Under Settlement Agreement, B-210210, (Comp. Gen. Sept. 14, 1983).

This Opinion addressed whether the Commodity Futures Trading Commission (CFTC) had the statutory authority to require a violator of the Commodity Exchange Act (CEA) to, as part of a settlement agreement, agree to reduce the amount of a civil penalty assessed by the amount of money that the violator donated to an educational institution. In support of this proposed settlement policy, the CFTC explained that such donations would further a separate CFTC statutory function of "establish[ing] and maintain[ing] research and information programs to ... assist in the development of education, and other information materials regarding futures trading."

The Comptroller General determined that the CFTC's "settlement authority should be limited to statutorily authorized prosecutorial objectives: correction or termination of a condition or practice, punishment, and deterrence." The settlement policy proposed by the CFTC, in the Comptroller's opinion, did not have a nexus to the CFTC's prosecution objectives because "the charged party would donate funds to an educational institution that has no relationship to the violation and that has suffered no injury from the violation." Without a nexus to a prosecutorial objective, such an educational donation could only be viewed as a penalty, and pursuant to the miscellaneous receipts statute, any penalties the CFTC assesses for violations of the CEA must be remitted to the Treasury's General Fund.

Nuclear Regulatory Commission Authority to Mitigate Civil Penalties, B-238419, (Comp. Gen. Oct. 9, 1990).

In 1990, the General Counsel for the Nuclear Regulatory Commission (NRC) sought the Comptroller General's opinion as to whether the NRC had statutory authority to, in lieu of assessing civil penalties, allow violators of certain licensing requirements under the Atomic Energy Act to fund research projects that promote nuclear safety.[13] Typically, the NRC would remit civil penalties to the Treasury's General Fund in accordance with the miscellaneous receipts statute.

The Comptroller General concluded that the NRC did not have the statutory authority to mitigate civil penalties as it proposed. Citing the 1983 opinion involving the CFTC, the Comptroller General determined that funding nuclear safety projects did not further the NRC's prosecutorial objectives for violations of licensing requirements under the Atomic Energy Act. "Under the NRC's proposal, a violator would contribute funds to an institution that, in all likelihood, has no relationship to the violation and has suffered no injury from the violation." The Comptroller General believed that the NRC's proposal would circumvent the miscellaneous receipts statute and result in an augmentation of its appropriations by diverting civil penalties to fund an unrelated statutory mandate—promoting nuclear safety research—while sidestepping the traditional appropriations process.

[13] The NRC proposed three different scenarios: accepting donations equivalent to what would otherwise be assessed as a civil penalty to: (1) the NRC Office of Research, which provides grants to nonprofits to research nuclear safety issues; (2) a nonprofit that has been awarded a grant for nuclear safety projects by the NRC Office of Research; or (3) a nonprofit chosen by the violator for the purpose of funding a nuclear safety research project.

Environment/Energy Natural Resources Air Pollution Administration Settlement Authority, B-247155 (Comp. Gen. July 7, 1992).

In 1980, the Environmental Protection Agency (EPA) established an "alternative payment" policy in which it would agree to accept payments for various air pollution-related public advocacy or education campaigns in place of civil money penalties for violations of a section of the Clean Air Act involving "tampering with emissions control devices." In December of 1991, Representative John Dingell, Chairman of the Subcommittee on Oversight and Investigations for the House Committee on Energy and Commerce, requested the Comptroller General's opinion as to whether the EPA held statutory authority to implement the "alternative payment" policy.

The EPA argued that the alternative payment policy was permissible under its authority to "compromise, or remit, with or without conditions" civil penalties assessed for violations of the Clean Air Act, as well as through its statutory authority "to improve knowledge of the short- and long-term effects of air pollution on welfare" and to provide and further "training relating to the causes, effects, extent, prevention, and control of air pollution." The Comptroller General disagreed, finding no substantive difference between the case at hand and the statutory authorities and civil penalty mitigation proposals at the heart of its opinions involving the CFTC and NRC. In the view of the Comptroller General, the EPA's alternative payment policy would result in funding public advocacy campaigns with no prosecutorial nexus to the alleged violations of law and would augment the EPA's appropriations outside of the typical legislative appropriations process in contravention of the EPA's statutory authority.

Office of Federal Housing Enterprise Oversight—Settlement Agreement with Freddie Mac, B-306860 (Comp. Gen. Feb. 28, 2006).

This Comptroller General Opinion involved a 2005 settlement agreement between the Federal Home Loan Mortgage Corporation (Freddie Mac) and its regulator at the time,[14] the Office of Federal Housing Enterprise Oversight (OFHEO). In 2003, OFHEO issued a notice of charges against Freddie Mac and certain of its executives for alleged violations of statutory restrictions on executive compensation. In September 2005, OFHEO agreed to drop all of the charges against Freddie Mac if the company agreed to pay up to $1 million for a third-party hired by OFHEO to reformat various Freddie Mac documents.

OFHEO requested a decision from the Comptroller General prior to finalizing its agreement. The Comptroller General determined that this settlement agreement was within OFHEO's statutory authority. In contrast to the issues discussed in the CFTC, NRC, and EPA opinions, the Comptroller General reasoned that the document reformatting agreement had a nexus to OFHEO's prosecutorial objectives because it would be useful to OFHEO's pursuit of charges against Freddie Mac's former executives. Additionally, the $1 million payment was not an augmentation of OFHEO's appropriations in the view of the Comptroller General because "Freddie Mac is not defraying an obligation of OFHEO's, but is fulfilling Freddie Mac's obligation as agreed to in settling the charges brought against it by OFHEO."

Conclusion

These Comptroller General opinions indicate that there must be a clear nexus between any settlement payments to non-federal actors and the prosecutorial objectives of the federal party that entered into the settlement. Whether or not a particular settlement term furthers a prosecutorial objective could be contingent upon the alleged wrongdoing underpinning the settlement agreement, the scope of the federal

[14] Pursuant to the Housing and Economic Recovery Act of 2008, P.L. 110-289, OFHEO was eliminated, and a new agency, the Federal Housing Finance Agency, was established to supervise Freddie Mac and certain other government-sponsored enterprises.

actor's enforcement authority, and the purpose and permissible uses of the monetary relief in question, among other factors.

Prepared Statement of Joel A. Mintz, Professor of Law, Nova Southeastern University College of Law

My name is Joel A. Mintz. I am a Professor of Law at Nova Southeastern University College of Law, where I have taught Environmental Law and related subjects since 1982. Prior to that, for six years, I was an attorney and chief attorney with the U.S. Environmental Protection Agency (EPA) in Chicago and Washington, D.C. I have written or co-written three books and numerous law review articles regarding environmental enforcement, which is the major focus of my academic research.

I am submitting this statement in respectful opposition to the bill titled "Stop Settlement Slush Funds Act of 2016." I believe that this bill, if enacted will severely undercut an immensely valuable environmental and public health protection program, EPA's Supplemental Environmental Program (SEP). It will also interfere unduly with the discretion presently afforded to (and needed by) federal agencies and prosecutors.

A Supplemental Environmental Program (SEP) is defined in EPA's March, 2015 policy on the subject as "an environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action." According to the Agency, "SEPs are projects or activities that go beyond what could be legally required in order for the defendant to return to compliance, and secure environmental benefits in addition to those achieved by compliance with applicable laws." Their primary purpose is to encourage and obtain environmental and public health benefits that may not otherwise have occurred in the settlement of an enforcement action. They advance worthy and important goals, including (among others) protecting children's health, preventing pollution, securing the development of innovative pollution control technologies, and ensuring environmental justice.

The *Random House Dictionary of the English Language* defines the phrase "slush fund" as "a sum of money used for illicit or corrupt political purposes, as for buying influence or votes, bribing public officials, or the like." The SEPs permitted by EPA cannot be fairly considered slush funds in any sense. Instead they are limited and prudent exercises of enforcement discretion that benefit the Agency, regulated parties, and local communities alike.

To be acceptable to EPA, all proponents of SEPs projects must establish a "substantial nexus," i.e. a relationship between the alleged violation and the project proposed. For that reason, SEPs are generally carried out at the site where the violation occurred, at a different site within the same ecosystem, or within the same immediate geographic area. Moreover, to ensure that SEP funds are not used improperly, EPA has established—and enforced—strict limitations on how those funds may be spent.

Thus, for example, SEP monies may not be used in support of general public educational or public environmental awareness projects; as contributions to environmental research at a college or university; as cash donations to community groups, environmental organizations, state local or federal governmental entities or any third parties; to support beneficial projects unrelated to environmental protection; and in conjunction with projects to be undertaken with federal financial assistance. Similarly, SEPs may not provide additional resources to support any specific activities performed by EPA employees or contractors, or for any activity for which EPA receives a specific appropriation. SEPs may also not provide funds to perform work done on any federal property, or for any project performed by a federal agency other than EPA.

To the best of my knowledge, these limitations are taken seriously by EPA when they assess the acceptability of SEP proposals. They establish appropriate, realistic, and effective prohibitions of illicit or corrupt implementation of SEPs in individual case settlements.

At the same time, EPA's judicious approach to SEPs prevents the possibility that violators will be permitted to benefit too greatly from the performance of a SEP. Thus, the Agency's SEPs Policy does not alter the obligation of an environmental violator to remedy its violations expeditiously. Nor does it excuse violators from their obligation to pay penalties that recoup the economic benefit that a violator has gained from noncompliance with the law, along with "gravity-based" penalties reflecting the environmental harm caused by the violation. The money from both types of financial penalties must be remitted directly to the United States Treasury.

Notably, SEPs can create "win-win" scenarios for all parties involved, including regulators, regulated companies, and local communities. SEPs demonstrate EPA's willingness to cooperate with the regulated community, and they create a more flexible regulatory climate. SEPs also benefit environmental violators by reducing some of the civil penalties those parties would otherwise have to pay. They help re-

pair corporate public images that would otherwise be further harmed by negative environmental publicity; and they promote settlements, allowing businesses to avoid the costs and risks of litigation. Finally, SEPs increase the likelihood that communities forced to bear the burden of environmental degradation will benefit directly from enforcement actions against violators.

Regrettably, the proposed Stop Settlement Sludge Funds Act appears likely to prohibit many of the important benefits now provided by EPA's SEPs program. The bill's definition of the term "donation" specifically excludes "any payment by a party to provide restitution for or otherwise remedy the actual harm (including to the environment), directly and proximately caused by the alleged conduct of the party that is the basis for the settlement agreement." This exception is too narrowly drawn to allow for numerous beneficial uses of SEP monies. Thus, for example, the bill would appear to ban the following entirely legitimate, appropriate uses of SEP funds that are currently permitted by EPA:

1) Pollution prevention projects that improve plant procedures and technologies, and/or operation and maintenance practices, that will prevent additional pollution at its source;

2) Environmental restoration projects including activities that protect local ecosystems from actual or potential harm resulting from the violation;

3) Facility assessments and audits, including investigations of local environmental quality, environmental compliance audits, and investigations into opportunities to reduce the use, production and generation of toxic materials;

4) Programs that promote environmental compliance by promoting training or technical support to other members of the regulated community; and

5) Projects that provide technical assistance or equipment to a responsible state or local emergency response entity for purposes of emergency planning or preparedness.

Each of these types of programs provide important protections of human health and the environment in communities that have been harmed by environmental violations. However, because they are unlikely to be construed as redressing "actual (environmental) harm, directly and proximately caused" by the alleged violator, the bill before this committee would prohibit every one of them.

My other objection to the proposed Stop Settlement Slush Funds Act is more broad. In my view, this bill inappropriately reduces the discretion that federal agencies and prosecutors need to do their jobs in a fair and effective fashion. In its decision in the landmark case of *Heckler v. Chaney,* 470 U.S. 821 (1985), the U.S. Supreme Court took note of the importance of leaving decisions to prosecute or not prosecute in the hands of administrative agency personnel and prosecutors. The Court noted that "an agency decision not to enforce involves a complicated balancing of a number of factors that are peculiarly within its expertise. . . .The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.* at 831–832.

This same rationale clearly applies to the terms of the settlement agreements that a federal agency or prosecutor chooses to enter into. Such settlements involve numerous complicated technical issues as well as important judgments respecting the use of limited prosecutorial resources. Their terms are best left in the hands of expert agencies and prosecutors, rather than dictated by Congress or the federal courts.

In sum, the bill before you will harm the interests of Americans who have been the victims of unlawful pollution by arbitrarily and unreasonably limiting many of the benefits those people may now receive through SEP settlement agreements. This bill will discourage settlement of environmental enforcement cases and place greater burdens on regulated firms and regulators alike. It will inhibit the advancement of technology and the restoration of damaged natural resources. It will also unwisely intrude on the discretion of federal agencies and prosecutors. For these reasons, with respect, I recommend that you vote against this bill.

Response to Questions for the Record from David M. Uhlmann, Esq., Director, Environmental Law and Policy Program, The University of Michigan Law School

Responses from David M. Uhlmann to Questions Submitted for the Record from Representative John Conyers, Jr. and Representative Henry C. "Hank" Johnson, Jr.

1. As amended, H.R. 5063 prohibits third-party payments that do not directly remediate an actual harm directly and proximately caused by the party making the payment.

a. What is a "payment" within the meaning of the bill?

H.R. 5063 does not define the term "payment" (or the term "donation"), which is a shortcoming that could lead courts to construe both terms more broadly than Congress intends and in ways that would hinder the government's ability to seek compensation from companies that cause harm.

As I stated in my written testimony, courts interpreting the legislation could conclude that it precludes any sort of third-party payments as part of civil settlement agreements, even in cases of generalized harm to the environment or consumers or defrauded markets.

The proposed legislation contains an exception for "a payment that provides restitution for or otherwise directly remedies an actual harm (including to the environment) directly and proximately caused by the party making the payment. . . ." The wording of this exception, however, could lead courts to conclude that restitution or remediation is only allowed in cases involving identifiable victims and not in the frequent cases where generalized harm occurs.

To protect the government's ability to address generalized harm in settlement agreements, the proposed legislation must make clear that actual harm includes generalized harm. In addition, the legislation should make clear that it does not impose limitations on long-standing programs that address generalized harm, like EPA's laudatory Supplemental Environmental Projects.

b. Does it only apply to monetary funds, or does it apply more broadly to any transfer of assets, property, or other forms of consideration?

H.R. 5063 does not define the term "payment" (or the term "donation"), which will leave courts guessing about whether its terms apply only to monetary funds or whether they apply more broadly to the transfer of assets, property, or other forms of consideration. This is another way that the ambiguous wording of H.R. 5063 could sow confusion for courts reviewing its terms.

2. As amended, H.R. 5063 includes an exception for third-party payments "for services rendered in connection with the case."

a. In your view, how broad is this exception?

H.R. 5063 does not define the term "payments" or the terms "services rendered in connection with the case," which will leave government enforcement attorneys and reviewing courts guessing about the meaning of this exception. It is not possible to know based on the proposed language whether this is a broad exception or a narrow exception because it is not defined.

b. Does it apply to payments to third parties to implement a settlement agreement, such as workplace training programs or monitoring, or does it only apply to payments for services rendered in connection to a civil complaint, such as attorney's fees?

H.R. 5063 does not define the term "payments" or the terms "services rendered in connection with the case," which will leave government enforcement attorneys and reviewing courts guessing about the meaning of this exception. As a result, the exception could extend to workplace training programs or monitoring, which often are needed to address the generalized harm caused by regulatory violations. Or the exception could be limited to attorney's fees. It is not possible to know based on the proposed language what is covered by this exception.

3. Do you have any other concerns relating to H.R. 5063 as adopted by the Committee?

I continue to believe that H.R. 5063 would compound the harm suffered by communities where regulatory violations have occurred. A better approach, as my written testimony suggests, would be to propose legislation that makes clear when third-party payments can occur in criminal and civil settlements and establishes appropriate limits for those payments.

For example, it would be reasonable to require a nexus between any third party payments and the violations that are addressed by settlement agreements. It also would be reasonable to insist that third party payments are negotiated separately from criminal fines or civil penalties and are not made to organizations that the government administers or in circumstances that could create conflicts of interest. And it would be reasonable to impose caps on third-party payments and to make clear what organizations are allowed to receive third-party payments.

It is not possible for Congress to legislate every time a regulatory violation occurs that causes generalized harm to the environment or an American community. Congress can and should rely on the Justice Department and regulatory agencies to ensure that companies provide compensation to remedy the harm caused by their violations. Congress should not limit the discretion of the Executive Branch to ensure the faithful administration of the law and to provide necessary relief to communities where corporate wrongdoing occurs.

114TH CONGRESS
2D SESSION

H. R. 5063

To limit donations made pursuant to settlement agreements to which the United States is a party, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 26, 2016

Mr. GOODLATTE (for himself, Mr. PETERSON, Mr. MARINO, Mr. SENSENBRENNER, Mr. SMITH of Texas, Mr. ISSA, Mr. KING of Iowa, Mr. FRANKS of Arizona, Mr. GOHMERT, Mr. CHAFFETZ, Mr. LABRADOR, Mr. FARENTHOLD, Mr. COLLINS of Georgia, Mrs. MIMI WALTERS of California, Mr. BUCK, Mr. RATCLIFFE, Mr. TROTT, Mr. BISHOP of Michigan, and Mr. DUFFY) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To limit donations made pursuant to settlement agreements to which the United States is a party, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Stop Settlement Slush Funds Act of 2016".

SEC. 2. LIMITATION ON DONATIONS MADE PURSUANT TO SETTLEMENT AGREEMENTS TO WHICH THE UNITED STATES IS A PARTY.

(a) LIMITATION ON REQUIRED DONATIONS.—An official or agent of the Government may not enter into a settlement agreement on behalf of the United States, or enforce such a settlement agreement, if that agreement includes a term requiring that any donation be made to any person by any party (other than the United States) to such agreement.

(b) PENALTY.—Any official or agent of the Government who violates subsection (a), shall be subject to the same penalties that would apply in the case of a violation of section 3302 of title 31, United States Code.

(c) DEFINITIONS.—In this section:

(1) SETTLEMENT AGREEMENT.—The term "settlement agreement" means a settlement agreement resolving a civil action or potential civil action.

(2) DONATION.—The term "donation" does not include any payment by a party to provide restitution for or otherwise remedy the actual harm (including to the environment), directly and proximately caused by the alleged conduct of the party, that is the basis for the settlement agreement.

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