Improper Third-Party Payments in U.S. Government Litigation Settlements

Authored by:

John Allison

James Conde

Charles Cooper

Elliot Gaiser

C. Boyden Gray

Adam Gustafson

Jason Johnston

Cleta Mitchell

John Shu

Annie Donaldson Talley

George Terwilliger

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Introduction

Imagine that (1) the U.S. Department of Justice ("DOJ") in a "Democratic Socialist" administration sued the largest publicly traded oil companies in the world, *a.k.a.* "Big Oil," alleging securities law violations over global warming; (2) the DOJ settled with Big Oil for $100 billion; (3) as part of that settlement, the DOJ mandated that Big Oil pay $50 billion to the U.S. Treasury, $25 billion to the Freedom Road Socialist Organization, and $25 billion to the Earth Liberation Front; (4) in actuality, the DOJ reduced Big Oil's total amount of fines because of the money paid to those organizations.

Now imagine that (1) the DOJ in a Republican administration sued the largest publicly traded Silicon Valley companies in the world, *a.k.a.* "Big Tech," alleging Title VII sex discrimination violations;[1] (2) the DOJ settled with Big Tech for $100 billion; (3) the DOJ mandated that Big Tech pay $50 billion to the U.S. Treasury, $25 billion to the National Rifle Association, and $25 billion to the Colcom Foundation; (4) in actuality, the DOJ reduced Big Tech's total amount of fines because of the money paid to those organizations.

These hypotheticals should trouble everyone, especially because something very similar actually happened. This paper outlines the moral, legal, and constitutional problems of executive agencies forcing litigants who settle their cases to pay monies to unrelated, politically-allied third parties as part of the settlements. Further research is needed to uncover the details of such politically-motivated settlement third-party disbursements. Future government settlement monetary disbursements must comport with the Constitution and the law, be specific and transparent, be rare, and truly remedy harm and benefit actual victims.

I. The Recent History of Federal Third-Party Payments

A. The Executive Branch forced settling defendants to pay settlement monies directly to unrelated third parties who were politically allied with the Executive Branch in new and improper ways, thus circumventing the Treasury and Congress.

The Obama administration, primarily the DOJ, negotiated settlements which required the settling defendants to pay "donations" to hundreds of its favored, politically-friendly third parties such as, for example, the National Council of La Raza, the National Fish & Wildlife Foundation, and the National Community Reinvestment Coalition.[2] These third parties were not parties to the litigations nor victims of the alleged misbehavior. Moreover, the Obama DOJ offered to reduce the overall settlement monetary amount depending on how much the charged/settling party paid to the favored third parties, calling the quid pro quo reduction an "enhanced credit."[3] In fact, for every dollar the

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1 *See, e.g.*, Maya Kosoff, *Silicon Valley's Sexual-Harassment Crisis Keeps Getting Worse,* Vanity Fair (Sept. 12, 2017), *available at* https://tinyurl.com/y7zv3po3; and Zoë Corbyn, *Why Sexism Is Rife In Silicon Valley*, The Guardian (Mar. 17, 2018), *available at* https://tinyurl.com/yco2xyqm.

2 *See, e.g.,* Ian Tuttle, *Good Riddance To The Obama DOJ's Scandalous Settlement 'Slush Fund' Policy,* National Review (June 7, 2017), *available at* https://tinyurl.com/wel5p6n; and Jessica Karmasek, *Judiciary Chair Claims Internal Docs Reveal Obama DOJ 'Slush Fund,'* Forbes (Oct. 24, 2017), *available at* https://tinyurl.com/yclhnozs.

3 *Id.*

banks "donated," they received two dollars credited towards their settlement reductions.[4] Worse, these third-party political allies successfully lobbied the Obama DOJ for settlement monies, and the Obama DOJ also made sure that organizations which were not aligned with the administration's political preferences, such as the Pacific Legal Foundation, did not receive nor secondarily benefit from these monies.[5] As Bob LeClair, head of the Hawaii Legal Aid Foundation and Executive Director of the Hawaii Justice Foundation, wrote in an email, "I would be willing to have us build a statue [to Obama DOJ Associate Attorney General Tony West] and then we could bow down to this statue each day after we get our $200,000+."[6]

The Environmental Protection Agency ("EPA"), Department of Housing and Urban Development ("HUD"), and the Department of the Interior ("Interior"), in addition to the DOJ, are examples of other agencies in the Obama administration which participated in the improper practice of forcing settling litigants to pay settlement monies to unrelated, politically-allied third parties. These agencies routinely violated their own internal guidelines.[7] For example, the EPA's guidelines state that settlements: (a) cannot be inconsistent with any underlying statute, (b) must have a nexus with the violations, (c) cannot be managed or controlled by the agency, (d) must have its scope and type defined before the agreement is signed, i.e. the defendant cannot agree to a sum of money or projects to be determined later, and (e) cannot be used to perform an activity for which Congress specifically appropriated funds.[8] The guidelines do not specifically define "nexus."[9]

The problem was so bad that the House Judiciary Committee, at the end of 2014, demanded that the Obama DOJ turn over documents regarding its settlements with the six largest U.S. banks over their mortgage-backed securities failures which contributed to the 2008-2009 financial crisis. The Obama administration fined these banks a total of $109.96 billion; $38.99 billion of that went to Fannie Mae, Freddie Mac, and other federal housing-related entities, and $14.49 billion went to the Treasury Department.[10] Hundreds of millions went to things like warm-water equestrian washing stations, propping up underfunded state pension funds, and a "Real Housewives of New Jersey" cast member.[11] The specifics as to how the money was allocated, spent, and who decided the allocation remain unknown and perhaps unknowable.

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4 Sean Higgins, *Obama's Big Bank Slush Fund*, WASHINGTON EXAMINER (Jan. 18, 2016), *available at*: https://tinyurl.com/ybn99vxd.

5 *Id.*

6 U.S. Congress, House Judiciary Committee, H. Rept. 114-694, *available at* https://www.congress.gov/114/crpt/hrpt694/CRPT-114hrpt694.pdf.

7 Faith Christine Vander Voort, an Interior spokesperson under Secretary Ryan Zinke, said that since 2008, companies had paid $152 million in compensatory mitigation to the Bureau of Land Management and "approved third parties." Publicly available information does not show which settlements included such third-party payments and which parties the Obama administration considered "approved." Vander Voort's statement raises the concern that the third-party payments were not voluntary and that Interior potentially directed how, where, and to whom the settlement funds were disbursed. Nichola Groom, Diane Craft, *U.S. To Stop Taking Payments From Drillers, Miners For Damage To Public Land,* REUTERS (Jul. 24, 2018), available at: https://tinyurl.com/ybspzfbk.

8 Steven A. Herman Memorandum (Apr. 10, 1998); *Final Supplemental Environmental Project Policy*, ENVIRONMENTAL PROTECTION AGENCY (1998), *available at* https://www.epa.gov/sites/production/files/2018-10/documents/fnlsup-hermn-memtab1.pdf.

9 *Id.*

10 Christina Rexrode and Emily Glazer, *Big Banks Paid $110 Billion in Mortgage-Related Fines. Where Did the Money Go?* THE WALL STREET JOURNAL (Mar. 9, 2016), *available at* https://www.wsj.com/articles/big-banks-paid-110-billionin-mortgage-related-fines-where-did-the-money-go-1457557442.

11 *Id.*

The Obama DOJ ignored the committee's document demand. In February 2015, committee chairman Bob Goodlatte (R-VA) emphasized that he was serious about obtaining the documents and stated his concern that the Obama DOJ "may be systematically subverting Congress's budget authority by using settlements to funnel money to activist groups."[12] Congressman Goodlatte retired in December 2018.

Attorney General Jeff Sessions issued a June 7, 2017 memo prohibiting the DOJ from directing or requiring settlement payments to non-governmental third parties that were "neither victims nor parties to the lawsuits," thus ending the Obama administration's practices.[13] Sessions said that "[w]hen the federal government settles a case against a corporate wrongdoer, any settlement funds should go first to the victims and then to the American people – not to bankroll third-party special interest groups or the political friends of whoever is in power."[14] Sessions' memo did not appear to be controlling over the EPA, HUD, Interior, or any other agency.

B. Politically-friendly third-party groups aggressively and successfully lobbied for settlement money disbursements.

Congressional investigations revealed that certain organizations which were neither parties to the litigation nor victims of the alleged misbehavior, but politically friendly with and supportive of the Obama administration, repeatedly and successfully lobbied their friends in the Obama DOJ for monetary disbursements from the mortgage-backed securities settlement.[15] For example, in November 2013, the Leadership Conference on Civil and Human Rights ("LCCHR")[16] emailed Principal Deputy Associate Attorney General Elizabeth G. Taylor, urging that the JPMorgan Chase Settlement include "significant equity capital or grant funds to promote" community restoration.[17] The JPMorgan Chase Consumer Relief Annex then included a section devoted to "[f]unds donated to capitalize community equity restoration funds."[18]

LCCHR worked with Virginians Organized for Interfaith Community Engagement ("VOICE") and Metro Industrial Areas Foundation ("Metro-IAF"), who emailed the DOJ Legislative Affairs Office, usually Assistant Attorney General Peter Kadzik, to take credit for the third-party payment

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12 Devlin Barrett, *Lawmaker Warns Obama Administration On Bank-Settlement Funds; Republicans Express Concern Some Settlement Money Funneled To Left-Leaning Groups,* The Wall Street Journal (Feb. 12, 2015), *available at* https://tinyurl.com/taaawbo.

13 Attorney General Jeff Sessions, *Memorandum For All Component Heads And United States Attorneys: Prohibition On Settlement Payments To Third Parties,* Office Of The Attorney General, U.S. Department of Justice (June 7, 2017), *available at* https://www.justice.gov/opa/press-release/file/971826/download.

14 U.S. Department of Justice Office of Public Affairs, *Attorney General Jeff Sessions Ends Third Party Settlement Practice,* Press Release No. 17-613 (June 7, 2017), *available at* https://tinyurl.com/taqk3nf.

15 *Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax, and Environment and Natural Resources Divisions and the U.S. Trustee Program*, Hearing before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, 113th Congress (May 19, 2015), *available at* https://tinyurl.com/vyfaxhk; and *Consumers Shortchanged? Oversight of the Justice Department's Mortgage Lending Settlements,* Hearing before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee of the Judiciary, 113th Congress (Feb. 12, 2015), *available at* https://tinyurl.com/wtcgjzx.

16 Vanita Gupta, the LCCHR's President and CEO, served as Assistant Attorney General of the Civil Rights Division in the Obama DOJ. Former LCCHR executive vice president and COO Seema Nanda is currently the Democratic National Committee's CEO. Nanda served as Deputy Solicitor and Chief of Staff in the Obama Labor Department.

17 LCCHR email to Elizabeth G. Taylor (Nov. 8, 2013).

18 The JPMorgan Chase Consumer Relief Annex, *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/mortgage_settlement/jpm-annex-2.pdf

provision.[19] They noted that they had worked with "Federal officials, and other allies to get 'grants' … included as one way JPMorgan can fulfill its consumer relief obligations.'[20] They requested a meeting with then-Associate Attorney General Tony West[21] to "make the case that the Department of Justice should make grants to capitalize community equity restoration funds **mandatory** in all future settlements" (emphasis added).[22] VOICE and Metro-IAF lobbied West and the DOJ to offer the banks "enhanced credit" towards their settlement liabilities for making such mandatory "donations."[23] VOICE staff members met with Taylor in March 2014, who hosted the meeting on West's behalf.[24, 25]

The Obama DOJ personnel did exactly as its politically-allied third parties lobbied them to do. For example, the Obama DOJ's 2014 settlement agreements with Citi and Bank of America included government-coerced "donations"[26] to politically-allied community groups and offered double credit

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19 DOJ Inspector General Michael Horowitz, an Obama appointee, stated in his 2018 report that Kadzik demonstrated "poor judgment" in failing to recognize appearances of a conflict of interest or properly recuse himself from investigations related to former Secretary of State and presidential candidate Clinton during the 2016 presidential campaign. Horowitz found that Kadzik asked Clinton campaign spokesman Brian Fallon in April 2015 for a job for his son while **Kadzik was involved in discussions about Clinton-related matters while working on those matters for the DOJ**.

A few weeks later, Kadzik emailed his longtime friend John Podesta, Clinton campaign chairman John Podesta, whom Kadzik represented during the 1998 Independent Counsel investigation into President Bill Clinton. The email was titled "heads up," and its purpose was to give Podesta a warning about non-public information potentially damaging to the Hillary Clinton campaign. The Horowitz Report further stated that Kadzik's "willingness to do so [email Podesta non-public information] raised a reasonable question about his ability to act impartially on Clinton-related matters in connection with his official duties." Although DOJ recused Kadzik from Clinton campaign issues, the Horowitz report found that Kadzik "failed to strictly adhere to this recusal" and forwarded several Clinton-related emails within the department anyway. *See, e.g.,* Adam Shaw, *IG Report: DOJ Official Sought Clinton Campaign Job For Son, Then Shared Case Info With Podesta,* FOX NEWS (June 14, 2018), *available at* https://tinyurl.com/wl2unnr.

20 Email from Martin Trimble to Peter Kadzik (Feb. 15, 2014) available at: https://www.congress.gov/115/crec/2017/10/24/CREC-2017-10-24-pt1-PgH8107.pdf

21 West currently is Uber's general counsel. He is Sen. Kamala Harris's (D-CA) brother-in-law.

22 Email from Martin Trimble to Peter Kadzik (Feb. 15, 2014) available at: https://www.congress.gov/115/crec/2017/10/24/CREC-2017-10-24-pt1-PgH8107.pdf. *See also,* Sean Higgins, *Obama's Big Bank Slush Fund*, WASHINGTON EXAMINER (Jan. 18, 2016) *available at* https://www.washingtonexaminer.com/obamas-big-bank-slush-fund, and Congressman Bob Goodlatte, Jeb Hensarling, Tom Marino, and Sean Duffy, LETTER TO ATTORNEY GENERAL LORETTA E. LYNCH (May 14, 2015), *available at* https://republicans-judiciary.house.gov/wp-content/uploads/2016/02/051415-BG-JH-TM-SD-Letter-to-AG-Lynch.pdf.

23 Jessica Karmasek, *Judiciary Chair Claims Internal Docs Reveal Obama DOJ 'Slush Fund,'* Forbes (Oct. 24, 2017), *available at* https://tinyurl.com/yclhnozs.

24 Email from Elizabeth G. Taylor to Tony West (March 4, 2014) *available at*: https://www.congress.gov/115/crec/2017/10/24/CREC-2017-10-24-pt1-PgH8107.pdf

25 Taylor currently is the executive director of the National Health Law Program, a "nonprofit dedicated to protecting and advancing the health rights of low income and underserved individuals."

26 The very idea of "mandatory donations" or "required donations" is oxymoronic and Orwellian because it is commonly known that donations and gifts are voluntarily, and not given under pressure, threat, or force of law. For example, Merriam-Webster's defines "donation" (noun) as the act or an instance of donating, such as (a) the making of a gift, especially to a charitable institution; (b) a free contribution. In fact, "donation's" etymology includes the Latin root "*donum,*" or gift. In turn, Merriam-Webster's relevant definition of "gift" (noun) is "something **voluntarily** transferred by one person to another without compensation (emphasis added)." *See,* DICTIONARY BY MERRIAM-WEBSTER*, available at https://www.merriam-webster.com/dictionary/gift and https://www.merriam-webster.com/dictionary/donation.*

for donations above the required total minimums.[27] The Obama DOJ had settled with JPMorgan Chase in November 2013; VOICE openly bragged that it had "worked with Sen. Mark Warner (D-Va.), federal officials and other allies to include an option in the settlement for the bank to fulfill this obligation through grants to capitalize community equity restoration funds," and that "Attorney General Eric Holder and Deputy Attorney General Tony West [sic] must make capitalizing a $5 billion National Community Equity Restoration Fund **mandatory** under all future settlements" (emphasis added).[28] In its 2015 annual report, VOICE stated that Metro-IAF and VOICE celebrated with Senator Mark Warner the fact that it had "secured" $1.5 million from Bank of America and $1 million from JPMorgan Chase for its "Equity Restoration Fund."[29] The Obama administration coerced the big banks to pay "donations" to third parties who were unrelated to the litigations. The payments were not based on the third parties' direct harm or "need," but rather their active, aggressive, direct, and unreported lobbying of their political friends in the Obama administration. That lobbying apparently paid off, as they received significant monies from the settlement agreements to which they were neither injured parties nor litigants.

C. Years before the bank settlements, Congress passed and President Obama signed into law a budget which specifically did not fund some of these third-party groups and projects.

A letter from Congressman Bob Goodlatte, Chairman of the House Judiciary Committee, and Jeb Hensarling, Chairman of the House Financial Services Committee, to Attorney General Loretta Lynch explains that in 2011 "Congress specifically cut funding to the Department of Housing and Urban Development" for organizations such as VOICE, Metro-IAF, the National Council of La Raza, *et al*.[30] President Obama signed that budget into law in November 2011. According to HUD, its FY2010 "Housing Counseling Grantees" totaled $72,934,505.71.[31] Thus, the 114th Congress was concerned that the Obama DOJ was trying to unconstitutionally do an end-run around the budget that Congress passed and President Obama signed into law in order to fund its political allies. As of this writing, the DOJ, HUD, Interior, and the EPA have not revealed whether they arranged for these defunded organizations and projects to receive funds from federal agency settlements.

D. DOJ parsed the settlements' language in order to intentionally exclude conservative groups as beneficiaries.

Geoffrey Graber, Deputy Associate Attorney General and Director of the RMBS Working Group of the Financial Fraud Enforcement Task Force, claimed in his February 12, 2015 testimony before Congress that, "The Department did not want to be in the business of picking and choosing which

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[27] Sean Higgins, *Obama's Big Bank Slush Fund*, Washington Examiner (Jan. 18, 2016) *available at*, https://www.washingtonexaminer.com/obamas-big-bank-slush-fund.

[28] Rev. Clyde Ellis, Rev. Keith Savage, and Fr. Gerry Creedon, *Big Banks Must Clean Up Their Mess,* THE HILL (June 16, 2014), *available at* https://tinyurl.com/v4te8lj. The authors are clergy leaders in VOICE.

[29] VOICE 2015 Annual Report, p.21, *available at* http://www.voice-iaf.org/sites/default/files/VOICE-2015-Annual-Report.pdf.

[30] Congressmen Bob Goodlatte, Jeb Hensarling, Tom Marino, and Sean Duffy, LETTER TO ATTORNEY GENERAL LORETTA E. LYNCH (May 14, 2015), *available at* https://republicans-judiciary.house.gov/wp-content/uploads/2016/02/051415-BG-JH-TM-SD-Letter-to-AG-Lynch.pdf.

[31] U.S. Dep't of Housing & Urban Development, *Nat'l & Regional Intermediary housing Counseling Grantees For Fiscal Year 2010, Version 11.0.0.0* (Dec. 13, 2010) *available at* https://www.hud.gov/sites/documents/RECOMMENDED_AWARDS.PDF.

organization may or may not receive any funding under the agreement."[32, 33] The DOJ may not have wanted to pick and choose, but it certainly did. Internal DOJ emails reveal that the DOJ carefully wrote settlements that directed settlement payments to third parties which the DOJ selected.

For example, in an August 15, 2014 email, Maame Frimpong in the Office of the Assistant Attorney General wrote that one example of the consumer relief items that should be included in Citibank's settlement was "donations to categories of entities we have specified (as opposed to what the bank might normally choose to donate to)."[34]

Frimpong said in the same email: "[W]e are requiring the bank to change its behavior and at the very least, choose actions we prefer among various options . . . . This in itself is valuable because we are pushing them to focus their activities on . . . areas of relief of most concern to us . . . ."[35]

Additional emails reveal that the DOJ directed the money to politically-friendly liberal groups and not conservative ones. In determining the language to include in the settlements, an unidentified DOJ attorney told Frimpong that the Department's "[c]oncerns include: a) not allowing Citi to pick a statewide intermediary like the Pacific Legal Foundation (does conservative property-rights free legal services)."[36, 37]

E. Which third parties received funding and how they used the funding is unknown.

After a federal agency enters into a settlement that requires a defendant to pay third parties, it is often very difficult or impossible to discover the identity of the third-party beneficiaries and the amounts they received. (*See, e.g.,* Table 2 in Appendix). Some of the mortgage settlements had monitors who were assigned to track and assess the compliance of the banks with the settlement requirements. However, the monitors did not publicly report which third-party organizations the company defendants chose to pay, how much money they received, or how the recipients spent the money. It is unknown as to whether the monitors even collected or recorded this information.

In 2016, the GAO reviewed "the collection and use of funds from financial institutions for mortgage-related violations."[38] The GAO study, however, reported only that the settlements included payments to third parties and that the monitors reported that they had satisfied their obligations.[39]

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32 *Consumers Shortchanged? Oversight of the Justice Department's Mortgage Lending Settlements,* Hearing before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee of the Judiciary, 113th Congress (Feb. 12, 2015) *available at* https://tinyurl.com/wtcgjzx.

33 On October 19, 2015, Graber joined the Washington, D.C. office of Cohen Milstein, a large plaintiffs' firm with offices on the Atlantic Seaboard. COHEN MILSTEIN, https://tinyurl.com/wlxlp7k (last visited March 12, 2020).

34 Email from Maame Frimpong to Ellen Canale (August 15, 2014).

35 *Id.*

36 Email to Maame Frimpong (July 9, 2014).

37 On November 17, 2015, Governor Jerry Brown named Frimpong to serve as a California Superior Court judge in Los Angeles. From 2001 – 2002 Frimpong clerked for Judge Stephen Reinhardt, U.S. Court of Appeals for the 9th Circuit, who died in March 2018. Frimpong did not sign the February 2020 open letter that dozens of his former law clerks signed regarding his alleged sexual harassment and behavior that was "sexist, workplace bullying, or mistreatment" of his law clerks. *See*, *e.g*., Mark Sherman, *Former Law Clerk Alleges Harassment By Late Prominent Judge*, ASSOCIATED PRESS NEWS (Feb. 13, 2020), *available at* https://tinyurl.com/yx6zzll9; and *Reinhardt Clerk Letter Press Release, available at* https://tinyurl.com/w7tucq6 (last visited March 12, 2020).

38 *Penalty and Settlement Payments for Mortgage-Related Violations in Selected Cases*, GAO-17-11R (Nov. 10, 2016), *available at* https://www.gao.gov/assets/690/680960.pdf

39 *Id.*

As a result, there is a significant lack of information about the destination and use of settlement funds that the Obama administration designated for third parties in mortgage-related and other settlements. (*See* Figure 1 in Appendix). For the sake of transparency in governance, federal agencies should establish institutional requirements and mechanisms for tracking these third-party payments, so that the public can discover where settlements monies went or are going, and how they were or are used.

II. Executive Branch Agencies Used "Mandatory Donations" to Unrelated Third Parties to Usurp Congress's Power and Violate Separation of Powers

The Constitution's Appropriations Clause states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[40] This clause clearly grants Congress exclusive authority to make appropriations. The Framers gave Congress the exclusive power of the purse to ensure that the branch which controls spending is the one most closely connected and most often answerable to the people.[41]

Whenever an executive branch agency forces a defendant against whom the agency is litigating to pay politically-allied or "approved" third parties via settlements or mitigation plans, that is the executive branch unconstitutionally violating Congress's exclusive power of the purse and basic separation of powers. This is even more so where Congress expressly declines to fund organizations or programs in a budget that the President signed into law, **and the executive branch agency uses these third-party payments to re-fund them**. In fact, any government official who spends public money without Congressional authorization and appropriation violates the Constitution.[42]

The Obama DOJ argued that forcing defendants to pay settlement monies to unrelated third parties did not violate the Constitution because those monies went directly from, for example, Citibank to the National Council of La Raza, and thus were never under the Treasury's control. This ignores the Appropriations Clause's plain text, meaning, and purpose, runs afoul of the Miscellaneous Receipts Act (MRA), and upsets the delicate separation of powers balance.

For example, Professor Nicholas Rosenkranz's 2016 congressional testimony explained that executive agency settlements involve two decisions: the value of the government's claims against the charged party or parties, and where those funds are to be used. The first decision is the only one that is within the purview of the executive agency's power; the second is a decision reserved for Congress. In order to be constitutional, federal settlement proceeds first should be paid into the Treasury and then Congress appropriates those funds.[43] Executive branch agencies that, without

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40 U.S. Const. art. I, § 9, cl. 7.

41 Members of the U.S. House of Representatives are elected to two-year terms.

42 The Miscellaneous Receipts Act ("MRA"), 31 U.S.C. §3302(b), enforces this prohibition; the statute requires government officials to deposit all public funds into the Treasury.

43 *Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax, and Environment and Natural Resources Divisions and the U.S. Trustee Program*, Hearing before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Committee on the Judiciary (May 19, 2016) (Prepared Statement by Nicholas Rosenkranz), *available at* https://www.cato.org/publications/testimony/settling-question-did-bank-settlement-agreements-subvert-congressional.

Congressional authorization and appropriation, pick and choose which parties receive money means that they unconstitutionally arrogated for themselves Congress's exclusive power of the purse.

Moreover, the U.S. Supreme Court articulated an "established rule" that "the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."[44]

Alexander Hamilton, in Federalist Paper No. 72, stated that the "executive department" is responsible for, among other things, "the application and disbursement of the public moneys in conformity to the general appropriations of the legislature."[45] James Madison, in Federalist Paper No. 58, wrote that Congress's "power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of ever grievance, and for carrying into effect ever just and salutary measure."[46]

Previous administrations have tried to force settling defendants to pay third parties directly. For example, the Carter administration's DOJ Office of Legal Counsel determined that the absence of a direct payment to Interior did not shield the settlement proceeds from the Miscellaneous Receipts Act, and thus money from outside sources had to be directly deposited into the Treasury.[47] In 1992, the Government Accountability Office ("GAO") concluded that the EPA had no authority to "allow alleged violators to fund public awareness and other projects relating to automobile air pollution in exchange for reductions of the civil penalties assessed against them."[48] In 1993, after the EPA ignored the GAO's conclusion, the GAO issued another opinion reasserting that the EPA was misusing its discretionary authority. It also rejected the EPA's flawed argument that the settlements involving supplemental projects did not violate the MRA. As the Comptroller General of the United States said, "[a]llowing alleged violators to make payments to an institution other than the federal government for purposes of engaging in supplemental projects, in lieu of penalties paid to the Treasury, circumvents [the MRA]."[49]

Additionally, these unconstitutional third-party payments reasonably could be considered a type of self-dealing because government officials, whether career or political appointee, play an important role in choosing the recipients. For example, prosecutors face temptation to put forth and accept settlement proposals which divert funds in a way that furthers either the individual prosecutor's or the administration's overall political or social goals, which are unrelated to the case at hand or its alleged harms.[50] The lack of sunshine and transparency surrounding these settlements only furthers the public's shattered confidence in the fair and even-handed administration of justice.

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44 *United States v. MacCollom*, 426 U.S. 317 (1976) (Rehnquist, J.)

45 Alexander Hamilton, Federalist Paper No. 72.

46 James Madison, Federalist Paper No. 58.

47 *In re: Stuart Transportation Company* "[T]he fact that no cash actually touches the palm of a federal official is irrelevant for the purposes of [the MRA], if a federal agency could have accepted possession and retains the discretion to direct the use of the money." 4B Op. Office of Legal Counsel 684 (1980).

48 Declarations of the Comptroller Gen., B-247155 (July 7, 1992), 1992 WL 726317 *1.

49 Declarations of the Comptroller Gen., B-247155.2 (1993), 1993 WL 798227 *2.

50 See, *e.g.*, Carol Morello and Carol D. Leonnig, *Chris Christie's Long Record Of Pushing Boundaries, Sparking Controversy*, The Washington Post (Feb. 10, 2014) *available at* https://www.washingtonpost.com/local/chris-christies-long-record-of-pushing-boundaries-sparking-controversy/2014/02/10/50111ed4-8db1-11e3-98ab-fe5228217bd1_story.html.

The settling defendants, often businesses, eagerly accept settlements that include "mandatory donations" to unrelated third parties, and sometimes will even offer them during settlement negotiations with the DOJ. They do this not out of remorse or reparation, but because they know that they could take advantage of the "two dollars of credit for each dollar 'donated'" trick that the Obama DOJ used, and also because businesses know that the Internal Revenue Code permits them to deduct these "donations" as business expenses or charitable donations, which they cannot do with actual fines.[51]

Sadly, the executive branch repeatedly ordered settling parties to directly pay monies to unrelated third parties over the past many years, most aggressively during the Obama administration. Appendix 1 shows that the government has ordered billions of dollars in third-party payments. Many of these payments are wrongly shrouded in secrecy. Transparency would reveal that some of the payments violate the government's own rules or are otherwise improper, and transparency would show from where the funds came, to whom the funds went, and which person(s) actually ordered and executed the settlement agreements.

A. Monies from settlements paid to unrelated third parties must be transparently accounted for and fully disclosed.

The Obama administration's "mandatory donation" payments to unrelated, politically-allied third parties also violates the "Statement and Account" portion of the Appropriations Clause because they were not published nor made public until Congress investigated.

The "Statement and Account" portion, which George Mason added during the final days of the Constitutional Convention, requires the government to regularly publish an accounting of all public funds. Thus, the entire clause ensures Congress's ability to check executive power, prevent the misuse of taxpayer funds, and protect voters' ability to hold elected officials in both the legislative and executive branches accountable for their spending. As Justice Joseph Story wrote:

> "The power to control and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation . . . . [A]nd to make their [Congress's] responsibility complete and perfect, a regular account of the receipts and expenditures is required to be published, that the people may know, what money is expended, for what purposes, and by what authority."[52]

Thus, forced payments of settlement monies to unrelated third parties is offensive to the Constitution because the Executive Branch often, perhaps always, does not automatically disclose the payments and recipients to Congress and the public. This is true regardless of whether one considers pre-conviction or pre-consent decree monies Treasury funds.

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[51] *See* 26 U.S.C. §§ 162(f), 262; 26 C.F.R. § 1.162-21, 1.262-1; *see also* Gretchen Morgenson, *Paying The Price, But Often Deducting It*, N.Y. TIMES (Jan. 12, 2013), *available at* https://www.nytimes.com/2013/01/13/business/paying-the-price-in-settlements-but-often-deducting-it.html.

[52] Justice Joseph Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES, CONTAINING A BRIEF COMMENTARY ON EVERY CLAUSE, EXPLAINING THE TRUE NATURE, REASONS, AND OBJECTS THEREOF: DESIGNED FOR THE USE OF SCHOOL LIBRARIES AND GENERAL READERS: WITH AN APPENDIX CONTAINING IMPORTANT PUBLIC DOCUMENTS, ILLUSTRATIVE OF THE CONSTITUTION, § 227, pp. 144-145 (1840).

Even today executive branch agencies disagree where the line is that distinguishes proper and improper third-party payments. For example, the Comptroller General, an independent official that monitors the use of public funds, repeatedly has considered whether agencies may direct payments to "supplemental projects" that are ancillary to the injury which instigated the litigation. The Comptroller General has said that agencies may *not* use their "prosecutorial authority" to pursue "enforcement scheme[s] involving supplemental projects that go beyond remedying the violation in order to carry out other statutory goals of the agency."[53] The DOJ, EPA, HUD, Interior, and other agencies that enter into such questionable settlement agreements take a broader view of executive power. Even then they conflict with each other.

For example, the U.S. Attorneys' Manual, which was in use from 1997 – September 2018 and thus during both terms of the Obama administration, states in § 9-16.325 that, except for certain very limited circumstances:

> "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. Such payments have sometimes been referred to as 'extraordinary restitution.' This is a misnomer, however, as restitution is intended to restore the victim's losses caused by the criminal conduct, not to provide funds to an unrelated third party."[54]

The current Justice Manual, § 9-16.325, states that:

> "Department attorneys may not enter into any agreement on the behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute. There are only three limited exceptions to this policy. First, the policy does not apply to an otherwise lawful payment or loan that provides restitution to a victim or that otherwise directly remedies the harm that is sought to be redressed, including, for example, harm to the environment or from official corruption. Second, the policy does not apply to payments for legal or other professional services rendered in connection with the case. Third, the policy does not apply to payments expressly authorized by statute, including restitution or forfeiture."[55]

The lack of basic facts and even minimal transparency regarding the Obama administration's "mandatory donations" to unrelated, politically-allied third parties is a significant legal and public policy issue. The Congress and the American public have the right to know about these settlements and have full access to facts about them, and about any in the future.

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[53] Declarations of the Comptroller Gen., B-247155.2 (1993), 1993 WL 798227, at *2.

[54] U.S. Attorneys' Manual, § 9-16.325, Plea Agreements, Deferred Prosecution Agreements, and Extraordinary Restitution (1997).

[55] U.S. Justice Manual, § 9-16.325, Prohibition On Settlement Payments To Third Parties (Jan. 2020).

III. Conclusion

Executive agencies violate Article I of the Constitution whenever they coerce and/or compel defendants to pay third parties without congressional approval. More research into the funds' beneficiaries and use is needed. The Congress and the American public have a right to know about the existence, extent, use, and impacts of such "mandatory donation" third-party payments. In the future, damages should go directly to victims directly harmed in the case, and any other payments should be made to the Treasury, not to unrelated third-party organizations for political benefit at the direction of unelected government agencies.

Appendix

Table 1 **(Mortgage-Related Settlements)**

Year	Federal Agency	Case	Company	Settlement Amount	Amount for TPPs	Mandatory TPPs	TPPs Incentivized	Approved List of TPPs	Projects Defined in Agreement
2003	SEC	Global settlement involving separate actions against 10 investment firms. https://www.sec.gov/news/press/2003-54.htm	Bear Stearns, Citigroup, et. al	$1.4 billion	$512.5 million	Yes: $432.5 million for independent research; $80 million to fund and promote investor education	No	No list, but gives criteria	Yes
2013	DOJ/ FHFA/ FDIC/ NCUA	Global settlement involving various actions. https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement	JPMorgan Chase	$13 billion	$4 billion for Consumer Relief**	No	No	No	No
2014	DOJ/ FHFA/ FDIC/ SEC/ HUD	Global settlement, lead case *United States v. Bank of America Corp.*, et al., No. 13-cv-446-MOC (W.D.N.C., filed Aug. 20, 2014). https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading	Bank of America	$16.65 billion	$7 billion for Consumer Relief**	Yes: $30 million min. to IOLTAs; $20 million min. to HUD approved agencies	Yes: $2 credit for every $1 and 115% early incentive credit https://www.judicialwatch.org/wp-content/uploads/2014/08/Annex-2-to-DOJ-BofA-Settlement.pdf	Yes	No
2014	DOJ/ HUD/ CFPB	*United States v. Suntrust Mortgage*, No. 14-cv-01028-RMC (D.D.C, filed Sept. 30, 2014).	SunTrust	$968 million	$500 million	*	*	*	No
2014	DOJ	https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-nearly-1-billion-agreement-suntrust	Citi	$7 billion	$2.5 billion for Consumer Relief**	Yes: $25 million min. to CDFIs; $15 million min. to IOLTAs; $10 million min. to HUD approved orgs	Yes: $2 credit for every $1 and 115% early incentive credit https://www.justice.gov/opa/file/831121/download	Yes	No
2017	DOJ/ NCUA	Global settlement agreement. https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-72-billion-misleading-investors-its-sale-residential-mortgage-backed	Deutsche Bank	$7.2 billion		No	Yes: $3.75 credit for every $1 for financing affordable housing; 115% early incentive credit https://www.justice.gov/opa/press-release/file/927281/download	No, but gives criteria	No

*Text of settlement agreement was not publicly available, so it could not be determined if payments to third parties were incentivized or if an approved list of groups was provided.

***Table 2* (Non-Mortgage-Related Settlements)**

Year	Federal Agency	Case	Company	Settlement Amount	Amount for TPPs	Mandatory TPPs	TPPs Incentivized	Approved List of TPPs	Projects Defined in Agreement
2006	DOJ/ NRC	Deferred prosecution agreement. https://www.justice.gov/archive/opa/pr/2006/January/06_enrd_029.html	FirstEnergy Nuclear Operating Co	$28 million	$4.3 million	*	*	*	Yes
2011	DOJ/ DOL/ MSHA	Non-prosecution agreement. http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/alphanatural.pdf; https://www.justice.gov/opa/pr/alpha-natural-resources-inc-and-department-justice-reach-209-million-agreement-related-upper	Alpha Natural Resources	$209 million	$48 million (to fund research and development projects to improve health and safety	Yes	No	No list, but must be approved by WV U.S. Attny's Office	No
2012	DOJ/ DOI	Deferred prosecution. https://www.justice.gov/opa/pr/gibson-guitar-corp-agrees-resolve-investigation-lacey-act-violations	Gibson Guitar	$350,000	$50,000 to National Fish and Wildlife Foundation	Yes	No	No	Yes
2016	DOJ/ EPA	*United States v. Harley-Davidson, Inc.*, No, 16-cv-01687 (D.D.C., filed Aug. 18, 2016). https://www.eenews.net/assets/2016/08/18/document_gw_03.pdf	Harley Davidson	$15 million	$3 million to American Lung Association	Yes	No	No	Yes

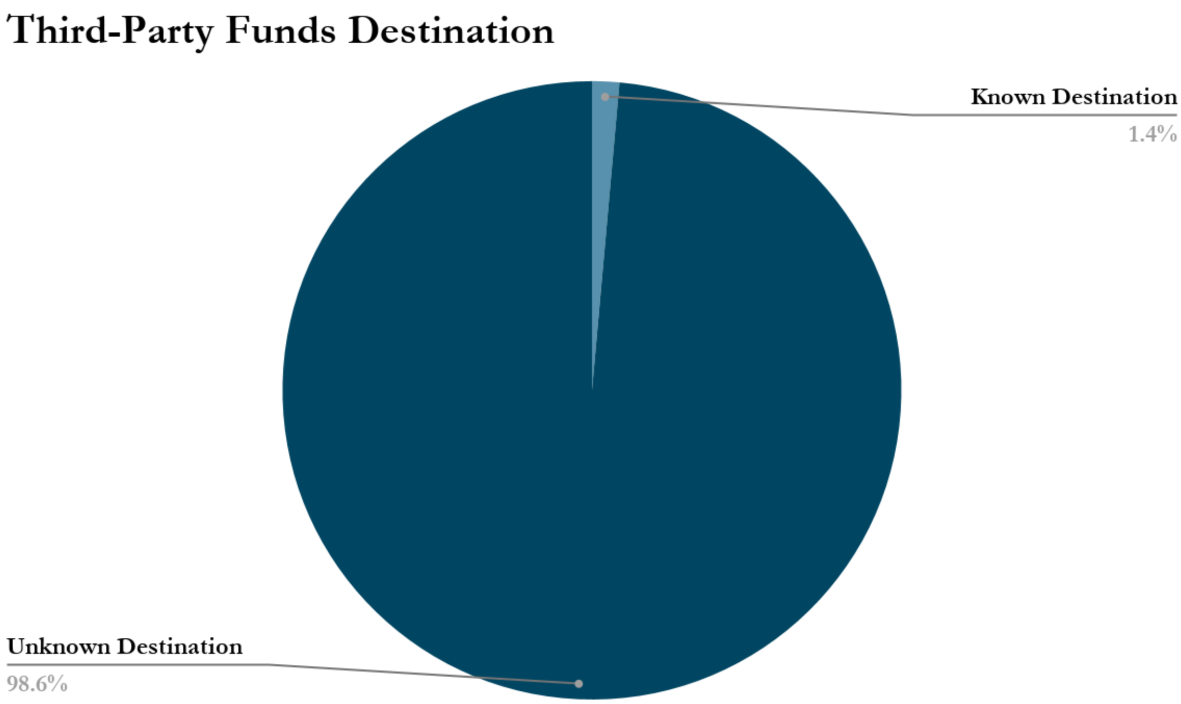
*Text of settlement agreement was not publicly available, so it could not be determined if payments to third parties were incentivized or if an approved list of groups wasprovided.

Table 3 **(Third-Party Beneficiaries of Settlements)**

Company	**Mortgage-Related Settlements**					**Non-Mortgage-Related Settlements**			
	Bear Stearns, Citigroup, et. al	**JPMorgan**	**Bank of America**	**SunTrust**	**CITI**	**First Energy Nuclear Group**	**Alpha Natural Resources**	**Gibson Guitar**	**Harley Davidson**
Settlement Year	2003	2013	2014	2014	2014	2006	2011	2012	2016
Agency	SEC	DOJ	DOJ	DOJ	DOJ	DOJ	DOJ	DOJ/DOI	DOJ/EPA
Settlement Amount	$1.4 billion	$13 billion	$16.65 billion	$302 million	$7 billion	$23.7 million	$209 million	$350,000	$12 million
TPP Amount	$512.5 million	Up to $4 billion	Up to $7 billion and at least $50 million	$500 million	Up to $2.5 billion and at least $50 million	$4.3 million	$48 million	$50,000	$3 million
TP #1		VOICE	VOICE			Ottawa Nat'l Wildlife Refuge		Nat'l Fish and Wildlife Foundation	American Lung Association
Amount		$1 million	$1 million			$1.35 million		$50,000	$3 million
Use						$800,000 for wetlands restoration; $550,000 for Visitor Center Improvements			Replacing conventional wood-burning stoves with clean-burning options
TP #2						Ottawa Emergency Management Agency			
Amount						$500,000			
Use									
TP #3						Univ. of Toledo College of Engineering			
Amount						$500,000			
Use						Energy-efficient technology research			
TP #4						Cuyahoga Valley Nat'l Park			
Amount						$1 million			
Use						Extending Towpath trail			
TPP #5						Habitat for Humanity, Northern Ohio			
Amount						$1 million			
Use						Construction of energy-efficient homes			
Unaccounted TPP Money	**$512.5 million**	**Up to $3.9 billion**	**At least $49 million and up to $6.9 billion**	**$500 million**	**At least $50 million and up to $2.5 billion**	**$0**	**$48 million**	**$0**	**$0**

**Not all consumer relief is directed to third parties; some consumer relief goes directly to victims. Payments to victims are not considered third-party payments.

Figure 1



Using the lower bound of the mandated settlement amounts and excluding from the total any settlement amounts where it was unclear if any money went to third parties, the total money directed to third parties was $668 million. We have been able to determine the destination of $9.5 million of the funds: 1.4% of the total.