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

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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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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]

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[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.

[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.