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**Hearing Before
The United States House of Representatives
Committee on Financial Services
Subcommittee on Oversight and Investigations:**

**“Settling the Question: Did Bank Settlement Agreements Subvert
Congressional Appropriations Powers?”**

May 19th, 2016

**Prepared Statement
of**

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Mr. Chairman, Ranking Member Green, Members of the Committee: I thank you for the opportunity to express my views about these bank settlements and whether they circumvent Congress’s appropriations powers.

The Appropriations Clause in Constitutional Context

The Constitution provides: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”¹ This is not a mere technical provision but rather a fundamental element of constitutional structure.

It sounds, first, in democracy, reflecting the deep constitutional principle that the power of the purse should be vested in the most representative branch. Every dollar appropriated from the Treasury may represent a dollar of taxes, and so this principle applies to both taxing and spending. Indeed, the taxing and spending powers are the first ones granted to Congress in Article I, section 8, and the first runs directly into the second: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”² Taxing and spending are the twin powers of the purse, and “[t]he legislature . . . commands the purse.”³ Moreover, the House of Representatives is vested with a special role over revenues: “All Bills for raising Revenue shall originate in the House of Representatives”⁴ And the reason is clear: House Members are “more

¹ U.S. CONST. art. I, § 9, cl. 7.

² *Id.* art. I, § 8, cl. 1.

³ THE FEDERALIST NO. 78 (Alexander Hamilton).

⁴ U.S. CONST. art. I, § 7, cl. 1.

immediately the representatives of the people, and it was a maxim that the people ought to hold the purse-strings.”⁵

The structural role of the Appropriations Clause sounds not only in democracy but also in separation of powers. Short of impeachment, the power of the purse is Congress’s most potent check on executive overreach. If the President could draw money from the Treasury without an appropriation—or otherwise evade the Appropriations Clause—power would shift decisively from Congress to the Executive, and the careful constitutional separation of powers would be thrown into disequilibrium. So, as Alexander Hamilton explained, the Executive Branch is limited to “application and disbursement of the public moneys *in conformity to the general appropriations of the legislature*.”⁶

The Framers placed great stock in the appropriations power as a check on the Executive Branch, because, in Great Britain, it had proven so effective for restraining the king. As James Madison explained:

The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This 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 every grievance, and for carrying into effect every just and salutary measure.⁷

To see just how essential is this check on executive power, consider some of the other major congressional checks on executive power, and how they have fared in the current Administration. As a general matter, the President cannot appoint principal officers without the advice and consent of the Senate.⁸ But, as the Supreme Court

⁵ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 233 (Max Ferrand ed., Yale Univ. Press 1911) (June 13, 1787) (statement of Elbridge Gerry).

⁶ THE FEDERALIST NO. 72 (Alexander Hamilton) (emphasis added).

⁷ THE FEDERALIST NO. 58 (James Madison).

⁸ U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as

unanimously held, President Obama violated this provision by attempting recess appointments when the Senate itself said that it was not in recess.⁹ As a general matter, the President cannot wage war without a congressional authorization to use military force.¹⁰ Yet this President has waged war against ISIS for almost two years without one.¹¹ Treaties require the advice and consent of the Senate,¹² yet this President has entered into the most consequential international agreement in recent memory without going through the treaty process.¹³ The President is obliged to “take Care that the Laws

they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

⁹ See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); see also Nicholas Quinn Rosenkranz, *Linda Greenhouse and Noel Canning*, THE VOLOKH CONSPIRACY (Sept. 7, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/07/linda-greenhouse-on-noel-canning/>.

¹⁰ See U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”); see also War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2012) (requiring the President to report to Congress the introduction of armed forces into hostilities, and to terminate the use of armed forces if Congress does not authorize such use within sixty days).

¹¹ See, e.g., Bruce Ackerman, *The War Against ISIS Is Unconstitutional*, LAWFARE (May 5, 2016, 2:10 PM), <https://www.lawfareblog.com/war-against-isis-unconstitutional>; Jack Goldsmith, *Obama’s Breathtaking Expansion of a President’s Power to Make War*, TIME (Sept. 11, 2014), <http://time.com/3326689/obama-isis-war-powers-bush/> (“[Future historians] will puzzle over how Barack Obama the prudent war-powers constitutionalist transformed into a matchless war-powers unilateralist. And they will wonder why he claimed to ‘welcome congressional support’ for his new military initiative against the Islamic State but did not insist on it in order to ensure clear political and legal legitimacy for the tough battle that promised to consume his last two years in office and define his presidency. . . . [Obama’s] announcement that he will expand the use of military force against the Islamic State without the need for new congressional consent marks his latest adventure in unilateralism and cements an astonishing legacy of expanding presidential war powers. . . . The President’s gambit is, at bottom, presidential unilateralism masquerading as implausible statutory interpretation.”).

¹² U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).

¹³ See, e.g., Charles Krauthammer, *How Obama Swindled Americans on Iran*, NATIONAL REVIEW (Sept. 10, 2015, 8:00 PM), <http://www.nationalreview.com/article/423845/how-obama-swindled-americans-iran-charles-krauthammer> (“As a matter of constitutional decency, the president should have submitted [the Iran deal] to Congress first. And submitted it as a treaty. Which it obviously is. No international agreement in a generation matches this one in strategic significance and geopolitical gravity.”); David B. Rivkin Jr. & Lee A. Casey, *The Lawless Underpinnings of the Iran Nuclear Deal*, THE WALL STREET JOURNAL (July 26, 2015, 6:32 PM), <http://www.wsj.com/articles/the-lawless-underpinnings-of-the-iran-nuclear-deal-1437949928>.

be faithfully executed,”¹⁴ but I have testified before the House Judiciary Committee that President Obama has flouted his obligation to enforce the immigration laws,¹⁵ and Texas just last month presented the same argument to the Supreme Court.¹⁶

It is in this context that the Appropriations Clause question arises. A willful President may evade many of the constitutional checks on his power. But Congress’s appropriations power is the ultimate backstop. The constitutional rule is clear, and explicit, and absolute: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”¹⁷ Everything that government does costs money, and so the power of the purse should successfully constrain the executive branch even if all else fails. Moreover, all negotiations between the President and Congress—even those that have nothing to do with appropriations—happen in the shadow of this fundamental power. “Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions.”¹⁸ At the end of the day, the President knows that Congress holds the purse strings, and every choice he makes is implicitly informed by this crucial structural fact.

Alas, a determined President may flout this provision too. Just last week, District Judge Rosemary M. Collyer of the U.S. District Court for the District of Columbia found that the Administration has paid billions of dollars to insurance companies under ObamaCare without an appropriation from Congress. She held, in no uncertain terms, that making these payments “without an appropriation . . . violates the Constitution.”¹⁹

Bank Settlement Payments To “Community Development” Organizations

Under these circumstances, then, it is fair to view certain provisions of these bank settlements with a skeptical eye. The provisions at issue provide for payments from the banks to various third-party organizations that were neither parties to the case nor victims of the alleged wrongdoing.²⁰ Many of these “community development” organizations seem to have only a tenuous connection to the gravamen of the complaint against the banks. Yet the banks are to make payments directly to these organizations—payments that presumably could have been directed to the U.S. Treasury instead.

¹⁴ U.S. CONST. art. II, § 3.

¹⁵ See *The President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 26–32 (2013) (testimony and prepared statement of Nicholas Quinn Rosenkranz, Professor of Law, Georgetown University Law Center and Senior Fellow in Constitutional Studies, Cato Institute).

¹⁶ See *United States v. Texas*, No. 15-674 (S. Ct. argued Apr. 18, 2016).

¹⁷ U.S. CONST. art. I, § 9, cl. 7.

¹⁸ THE FEDERALIST NO. 30 (Alexander Hamilton).

¹⁹ *House of Representatives v. Burwell*, No. 14-1967, 2016 WL 2750934, at *7 (D.D.C. May 12, 2016).

²⁰ See, e.g., *Holder Cut Left-Wing Groups in on \$17 Bil BoA Deal*, INVESTOR’S BUSINESS DAILY (Aug. 27, 2014, 6:43 PM), <http://www.investors.com/politics/editorials/holders-bank-of-america-settlement-includes-payoffs-to-democrat-groups/>.

These payments admittedly do not violate the literal terms of the Appropriations Clause. The Clause provides: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”²¹ Under the settlement provisions at issue, funds are paid directly from the banks to the third-party organizations. These funds were never actually in the Treasury, and so they are not literally “drawn from the Treasury” under the Appropriations Clause.

But if these provisions do not literally *violate* the Appropriations Clause, it is certainly fair to say that they *circumvent* the Clause. If the banks had paid this money to the United States—which is, after all, the plaintiff in these cases—then the money would have gone into the Treasury. And if, subsequently, the President or the Attorney General favored using this money to subsidize various “community development” organizations, they would have had to request an appropriation from Congress; doling out such money “without an appropriation . . . violates the Constitution,”²² as the President was reminded just last week. By providing for direct payment from the banks to the organizations, these settlement provisions evade the Appropriations Clause and cut Congress out of the loop.

Another way to put the point is that these settlement provisions embody two implicit decisions. The first is the value of the government’s claims against the banks: the predicted damages at trial, discounted by the odds of a verdict for the government. The responsibility to make this judgment inheres in the Attorney General’s litigation authority,²³ and it is well within the expertise of the Department of Justice. The second implicit decision is the best possible *use* of these funds—whether to subsidize insurance companies under ObamaCare,²⁴ to subsidize various “community development” organizations, to pay down the \$19,000,000,000,000 national debt, or to do any number of other things. This second decision is paradigmatically legislative, and it is exactly the sort of decision that the Appropriations Clause reserves to Congress. If the funds were first paid into the Treasury and then appropriated out again, these two decisions would be separated: the Attorney General would make the first and Congress would make the second. But by providing for direct payment from the banks to third-party organizations, the Administration effectively combined these two decisions and arrogated them both to itself.

Again, the structural role of the Appropriations Clause sounds in democracy (ensuring that spending decisions are made by the most representative branch) and in separation of powers (as a fundamental backstop against an overreaching executive branch). These settlement provisions evade the Appropriations Clause and thus subvert

²¹ U.S. CONST. art. I, § 9, cl. 7.

²² *House of Representatives*, 2016 WL 2750934, at *7.

²³ See 28 U.S.C. § 516 (2012) (granting the Attorney General authority over “the conduct of litigation” for the United States); *Compromise of Claims Under Sections 3469 and 3229 of the Revised Statutes—Power of the Attorney General in Matters of Compromise*, 38 Op. Att’y Gen. 98 (1934).

²⁴ *Cf. House of Representatives*, 2016 WL 2750934.

these structural principles.

Settlement Payments Contingent on Subsequent Acts of Congress

Finally, it should be noted that at least one of these settlement provisions includes an additional problematic feature. Under the Bank of America Settlement Agreement, certain funds are designated for “the payment of consumer tax liability as a result of consumer relief”²⁵ unless and until, inter alia, “any extension to the Mortgage Forgiveness Debt Relief Act of 2007 or its equivalent becomes effective through the end of 2015,”²⁶ at which point remaining designated funds would go to NeighborWorks America and IOLTA.²⁷ This provision is doubly problematic, because it is *contingent on a future Act of Congress*, and it thus has the pernicious effect of changing the political calculus for extending the Act.

The altered incentives would affect different actors in different ways. Taxpayers who would otherwise stand to gain from extension of the Act are made indifferent to it, because their taxes will be paid by Bank of America in any case. Conversely, IOLTA, which might otherwise have no particular interest in the Mortgage Debt Relief Act, suddenly stands to gain tens of millions of dollars from its extension. And for Congress itself, an appropriation that is ostensibly for taxpayer relief is partially converted, in effect, into an appropriation for IOLTA and NeighborWorks.

Quite apart from the evasion of the Appropriations Clause, it is arguably a violation of the separation of powers for the Executive Branch to attach either a “tax” or a “bonus” to a legislative act in this way. To see the point, imagine a settlement provision that required the Bank of America to pay an additional \$100 million to NeighborWorks if the Senate fails to confirm Merrick Garland to the U.S. Supreme Court. Presumably, the President cannot impose this sort of “tax” on an exclusive Senate prerogative, any more than Congress can “tax” presidential pardons.²⁸ Above and beyond the Appropriations Clause problem, a settlement payment that is contingent on a future Act of Congress would seem to run afoul of this separation-of-powers principle.

Conclusion

²⁵ *Settlement Agreement Between Bank of America and the United States*, DEP’T OF JUSTICE, <https://www.justice.gov/iso/opa/resources/3392014829141150385241.pdf> (last visited May 19, 2016).

²⁶ *Settlement Agreement Between Bank of America and the United States: Annex 3*, DEP’T OF JUSTICE, <https://www.justice.gov/iso/opa/resources/4922014829141329620708.pdf> (last visited May 19, 2016).

²⁷ *See id.*

²⁸ *See United States v. Klein*, 80 U.S. 128, 147–48 (1871) (“It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit. . . . Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law.”).

In short, these settlement provisions do not violate the literal terms of the Appropriations Clause, but they clearly circumvent its text and subvert its function, thus undermining the separation of powers. Congress has often found it necessary to protect against circumventions of this Clause, and it has done so with landmark legislation like the Antideficiency Act²⁹ and the Miscellaneous Receipts Act.³⁰ The novel innovation in these settlement agreements likewise necessitates a legislative response. I would support legislation along the lines of the proposed Stop Settlement Slush Funds Act of 2016, and I would be happy to work with the Committee to further refine this bill.

²⁹ The Antideficiency Act, Pub. L. No. 97–258, 96 Stat. 923 (1982).

³⁰ 31 U.S.C. § 3302(b) (2012).