Federalism & Separation of Powers

The Justice Department's Third-Party Payment Practice, the Antideficiency Act, and Legal Ethics

By Paul J. Larkin, Jr.

Note from the Editor:

This article argues that the Justice Department's practice of distributing settlement funds to third parties is illegal and unethical under the U.S. Constitution and federal law.

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• Written Testimony of Prof. David K. Min, Before the Subcommittee on Oversight and Investigations of the United States House of Representatives Committee on Financial Services, *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?*, (May 19, 2016), *available at* http://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-dmin-20160519.pdf.

• Testimony of Prof. David M. Uhlmann, 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), *available at* https://www.law.umich.edu/newsandinfo/Documents/Uhlmann_Testimony_Community_Service_Environmental_Crimes.pdf.

About the Author:

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Over the last two presidential administrations, the Department of Justice has directed settling parties to pay some settlement money, not into the U.S. Treasury, but to a third party who was not a party to the suit or a victim of a crime or a tort. Those directives raise several important legal issues because the practice is tantamount to the Department distributing funds that are the property of the United States. The practice has gone largely unnoticed for years, but recently has come under scrutiny by journalists,[1] commentators,[2] and the House of Representatives.[3]

The amount of money at stake is considerable. For example, in 2014 the Justice Department entered into a $17 billion settlement with Bank of America to resolve claims that it had engaged in various mortgage abuses. The third-party payments also raise very troubling problems of cronyism. According to Investor's Business Daily, "[r]adical Democrat activist groups stand to collect millions from Attorney General Eric Holder's record $17 billion deal to settle alleged mortgage abuse charges against Bank of America."[4] How? "Buried in the fine print of the deal, which includes $7 billion in soft-dollar consumer relief, are a raft of political payoffs to Obama constituency groups. In effect, the government has

1 *See* Sean Higgins, *Obama's Big Bank Slush Fund*, Wash. Examiner (Jan. 18, 2016), http://www.washingtonexaminer.com/obamas-big-bank-slush-fund/article/2580431; Kimberley Strassel, *Justice's Liberal Slush Fund*, Wall Street Journal (Dec. 3, 2015), *available at* http://www.wsj.com/articles/justices-liberal-slush-fund-1449188273; Editorial, *Holder Cut Left-Wing Groups In on $17 Bil. BofA Deal*, Investor's Business Daily, (Aug. 27, 2014), *available at* http://news.investors.com/ibd-editorials/082714-715046-holders-bank-of-america-settlement-includes-payoffs-to-democrat-groups.htm?p=full.

2 *See, e.g.*, Paul J. Larkin, Jr., *Funding Favored Sons and Daughters: Nonprosecution Agreements and "Extraordinary Restitution" in Environmental Criminal Cases*, 47 Loyola L.A. L. Rev. 1 (2014); Paul J. Larkin, Jr., *The Problematic Use of Nonprosecution and Deferred Prosecution Agreements to Benefit Third Parties*, The Heritage Foundation, Legal Memorandum No. 141 (Oct. 23, 2014), http://www.heritage.org/research/reports/2014/10/the-problematic-use-of-nonprosecution-and-deferred-prosecution-agreements-to-benefit-third-parties; *cf.* Todd David Pearson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. Rev. 327, 332-33 (2009).

3 *See, e.g.*, *Settling the Question: Did the Bank Settlement Agreements Subvert Congressional Appropriations Power?*, Hearing before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services, 114th Cong. (2016); *Hearing on H.R. 5063: The "Stop Settlement Slush Fund Act of 2016*," Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 114th Cong. (2016); *Hearing: "Consumers Shortchanged? Oversight of the Justice Department's Mortgage Settlements*, Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 114th Cong. (2015).

4 Editorial, *supra* note 1. The settlement agreement with Bank of America resolved one pending case and numerous other investigations that the Justice Department has pursued into alleged mortgage fraud that have not resulted in criminal charges or civil complaints. *See* Bank of America Settlement Agreement (signed Aug. 18-20, 2014), *available at* http://www.justice.gov/iso/opa/resources/9622014821111642417595.pdf.

ordered the nation's largest bank to create a massive slush fund for Democrat special interests."[5]

The Justice Department (DOJ or Department) acknowledges that the settlement agreements require that what it has termed "donations" be paid to third parties.[6] The Department also appears to confess that those third parties are not victims of the banks' wrongdoing. As the Department noted in its January 6, 2015, letter to Chairmen Bob Goodlatte and Jeb Hensarling, "the consumer relief provisions in the Bank of America and Citigroup settlements [the Housing Settlement Cases]" require those banks to make "donations to certain categories of community development funds, legal aid organizations, and housing counseling agencies[.]"[7] The Department, however, did not identify any express statutory authority to disburse federal funds to those private parties. Instead, the government defends those requirements on the ground that they are reasonable because the amount at issue is "a much smaller commitment" than what the banks must pay to the federal government, because the "donations are calibrated to provide assistance to those consumers and communities most in need of help," and because "the banks are responsible for choosing specific recipients of consumer relief funds."[8]

The short answer to those defenses, however, is that the Constitution requires express statutory authority to make such disbursements, and the relevant statutes, far from authorizing this practice, expressly prohibit it. The result is that the Department's practice is improper and unlawful for three reasons: (1) it subverts Congress' authority under the Appropriations Clause, (2) it is an end run around two acts of Congress—the Miscellaneous Receipts Act[9] and the Antideficiency Act[10]—that implement the Appropriations Clause, and (3) it violates accepted principles of ethics. Congress has considered prohibiting this practice by legislation. It tried to do so last year via an appropriations rider offered by Representative Bob Goodlatte that ultimately failed. Rep. Goodlatte has reintroduced his rider as a stand-alone bill that the House Judiciary Committee recently passed and sent to the floor. That bill could help bring this practice to an end.

I. The Federal Appropriations Process

The federal appropriations process involves a combination of constitutional provisions, federal statutes, and congressional practices. Article I of the Constitution addresses not only how the federal government may make a "Law,"[11] but also how it may disburse funds.[12] The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[13] To prevent either the Congress or the President from looking the other way on any financial matter, the Statement and Accounts Clause requires that "a regular Statement and Accounts of the Receipts and Expenditures of all public Money shall be published from time to time."[14]

Two statutes implement the Appropriations Clause: the Miscellaneous Receipts Act and the Antideficiency Act. The former requires government officials to deposit all funds that they receive into the U.S. Treasury so that they are subject to the appropriations process.[15] The latter statute provides that the government may spend only the money appropriated by Congress and only for the purposes it has specified.[16] In fact, it is a federal offense for a government officer to spend money in excess of the sum that Congress has appropriated.[17] Together with the Appropriations Clause, those statutes, to paraphrase Yale Law School Professor Kate Stith, generate "two governing principles."[18] One is the "*Principle of the Public Fisc*," under which "[a]ll funds belonging to the United States—received from whatever source, however obtained, and whether in the form of cash, intangible property, or physical assets—are public monies, subject to public control

5 Editorial, *supra* note 1.

6 *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. 1-3 (Jan. 6, 2015).

7 *Id.* at 2-3.

8 *Id.* at 1-2.

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

10 Act of Mar. 3, 1905, ch. 1484 § 4, 33 Stat. 1214, (codified as amended at 31 U.S.C. §§ 1341-1351 (2012)).

11 *See* U.S. Const. art. I, § 7; INS v. Chadha, 462 U.S. 919 (1983); U.S. House of Representatives v. Burwell, Civil Action No. 14-1967 (RMC), slip op. 2 (D.D.C. May 12, 2016). To ensure that neither Congress nor the President can evade that intentionally onerous procedure and create a "Law" by labeling a proposal as something other than a "Bill," Article I expressly applies to any "Bill" and "[e]very Order, Resolution, or Vote" requiring the approval of both chambers other than an "Adjournment."

12 The constitutional regulations on federal receipts and federal expenditures work hand-in-hand. *See* Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1345 (1988).

13 U.S. Const. art. I, § 9, cl. 7. That last term—"Law"—is critical because it is the identical term used elsewhere in Article I to describe what Congress may enact with the President's approval or over his veto. *Compare* U.S. Const. art. I, § 7, cl. 2, *with id.* § 9, cl. 7.

14 U.S. Const. art. I, § 9, cl. 7.

15 *See* 31 U.S.C. § 3302(b)(a) ("Except as provided by another law, an official or agent of the United States Government having custody or possession of public money shall keep the money safe without—(1) lending the money; (2) using the money; (3) depositing the money in a bank; and (4) exchanging the money for other amounts."); *id.* § 3302(b) ("Except as provided in section 3718(b) of this title, 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."); Stith, *supra* note 21, at 1364-70. Separate legislation has created exceptions for debt collection actions, revolving funds, and gifts to agencies. *See* Stith, *supra* note 21, at 1365-66. The Justice Department settlement practice is not authorized by legislation and cannot be squeezed into one of those cubbyholes.

16 The Antdeficiency Act prohibits the government from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding . . . an appropriation" or relevant fund. 31 U.S.C. § 1341(a)(1)(A) (2012). Appropriations also must be expended during the life of the relevant authorization bill. Agencies cannot "bank" any remaining funds. *See* 31 U.S.C. § 1502 (2012).

17 OPM v. Richmond, 496 U.S. 414, 430 (1990) (citing 31 U.S.C. §§ 1341 & 1350 (2012)).

18 *See* Stith, *supra* note 12, at 1356. Professor Stith formulated those principles in her discussion of the teachings of the Appropriations Clause, *id.* at 1356-60, but they carry through when the Miscellaneous Receipts and Anti-Deficiency Acts are added to the mix. *Id.* at 1363-77.

and accountability."[19] The other is the "*Principle of Appropriations Control*," the proposition that "[a]ll expenditures from the public fisc must be made pursuant to a constitutional 'Appropriation[ ] made by Law.'"[20] Combined, those principles establish that "there may be no spending in the name of the United States except pursuant to legislative appropriation."[21]

II. Legal Problems with the DOJ Settlement Practice

The DOJ's settlement practice is likely illegal for three different reasons. First, the Justice Department lacks the authority to hand over unappropriated government funds to parties of its choosing. The Constitution and federal law dictate how taxpayers' money can be disbursed, and those authorities teach that it is Congress's prerogative to decide who should receive federal funds.[22] Congress also takes this constitutional responsibility seriously, as witnessed by the detailed allocations of federal funds made by the annual appropriations bills it passes. Congress does not give the President a lump sum allowance that he can spend as he sees fit. Rather, Congress specifies in detail exactly which person or entity is to receive appropriated funds, how much money each one gets, and for what purposes that money can be used. The DOJ's settlement practice therefore is an end run around Congress's constitutional role in deciding how taxpayer money should be spent.

The Supreme Court has, from time to time, treated various constitutional provisions as pliable. The Appropriations Clause, however, is not one of them. In its first decision addressing the clause, the Supreme Court unanimously held in *Reeside v. Walker* that "[i]t is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress."[23] The Court has reaffirmed that proposition on several occasions.[24] In 1976, for example, the Court noted that "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."[25] That is the case even when the President exercises a prerogative like the clemency power.[26] The President has plenary authority to grant clemency, the Court ruled, but he "cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress."[27]

The second objection to the DOJ's settlement practice is that it allows the Justice Department to pick and choose among organizations that should receive federal funds without any guidance from Congress or any oversight by the Judiciary or Appropriations Committees in either chamber. The entirely discretionary nature of this process can easily lead to favoring one charity or organization over another on entirely subjective—or even cronyist—grounds. The parties who benefit from the government's practice may be worthy recipients of federal funds because they improve the lot of the citizenry in particular ways (perhaps by helping to improve the environment in areas that a corporation allegedly damaged). But why should, for example, an environmental organization receive money that could just as easily go to a school that trains dogs to serve as guides for the blind? If there is no guarantee that the payments a settling corporation makes to a third party chosen by the government will go to the actual victims of the alleged wrong, why should one worthy organization receive funds rather than another? A reasonable argument can be made that any number of other charitable organizations equally deserves the same opportunity to assist people in need of better food, drinking water, health care, education, public transportation, housing, and so forth. The usual and constitutional answer to this difficult choice between equal goods is to leave it to the tough negotiations among elected representatives in Congress to decide. But the DOJ's practice avoids that very process in favor of a non-public and unaccountable decisionmaking process that is liable to unknown and unredressable bias. The decision how to disburse federal funds should not be made in a process that shrouds how those decisions are made and empowers unaccountable decisionmakers to rely on personal biases.

Article I of the Constitution empowers Congress to make appropriations in order to minimize opportunities for executive cronyism. As noted above, the conditions in the Housing Settlement Cases are an archetypal example of the corruption that Article I sought to prevent. These conditions allow the Justice Department to pick and choose among private recipients of "donations" without any direction from Congress or any oversight by the Judiciary or Appropriations Committees. Even if Justice Department lawyers act with noble motives, Article I requires Congress to make funding decisions to avoid the risk of cronyism, a risk that is heightened whenever funds are dispensed to an administration's political allies. In sum, these agreements are precisely what the Framers had in mind when they denied executive officials the authority to decide how to disburse federal money.

The third objection that could be raised is that the practice denies the public the opportunity to know how public funds are spent and to hold elected officials accountable for their choices. The Constitution and federal law combine to ensure that the Executive Branch cannot spend money without the prior direction of Congress. That rule ensures that the electorate knows what every member of Congress does with his or her tax dollars and can use that information every two or six years when a new

19 *Id.* at 1356.

20 *Id.* at 1356-57.

21 *Id.* at 1357.

22 *Supra* text accompanying notes 13-21.

23 52 U.S. (11 How.) 272, 291 (1850).

24 *See* Knote v. United States, 95 U.S. 149, 154 (1877); Hart v. United States, 118 U.S. 62, 66 (1886); Cincinnati Soap Co. v. United States, 301 U.S. 308, 321-22 (1937); United States v. MacCollom, 426 U.S. 317, 321 (1975) (plurality opinion); OPM v. Richmond, 496 U.S. 414, 424-30 (1990); *cf.* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385-86 (1947); Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 63 (1984).

25 *MacCollom*, 426 U.S. at 321.

26 *Knote*, 95 U.S. 149. *Knote* addressed the issue whether the President could pardon a former supporter of the Confederacy and also direct the U.S. Treasury to pay him for property taken from him during the Civil War. The President had the authority to accomplish the former, the Court ruled, but not the latter, since only an act of Congress can authorize a payment of funds once deposited in the treasury.

27 *Id.* at 153-54.

election comes around to decide whether to "throw the bums out." By letting the Executive Branch make decisions that the Constitution envisions that they will make, the members of Congress who allow this practice to continue are asking the voters to ignore the man behind the curtain in the hope that they will not be held accountable at the polls for any funding decisions that the public dislikes. The DOJ settlement practice therefore denies the public valuable information needed to make informed decisions at the polls.

III. Ethical Problems with the DOJ Settlement Practice

Consider this hypothetical: You have hired a lawyer to represent you in a tort case in which you will be entitled to receive money if you win or settle. You win the case or settle it favorably, and your attorney is now discussing with your opponent's counsel how you will be paid. Imagine your lawyer saying to opposing counsel: "I know that my client is due $1 million, but he doesn't need that much money. He makes a good income and can get by with $750,000. Take the other $250,000 and give it to a charity that appears on a list I will give you. Better yet, just give the money to a person or organization of your own choosing. I don't care how the recipient uses the money, and I'm not going to audit how it is spent. Just give me $750,000 for my client, and we'll call it a day."

No private lawyer could direct a defendant to divert settlement funds from the lawyer's client to someone else whom either the lawyer or the defendant believes can make a better use of them. That conduct is inconsistent with the duty of undivided loyalty that all attorneys owe their clients, and any lawyers who engaged in that practice would clearly violate their ethical obligations to zealously represent their clients.[28] Any state bar association would revoke or suspend the license of any lawyer who told a defendant or potential defendant, without the client's approval, to give a portion of settlement proceeds to someone else.

The ethical obligations imposed on private lawyers by state bar rules and the profession's code of conduct apply to Justice Department attorneys. The McDade Amendment, codified at Section 530B of Title 28, subjects every "attorney for the Government" to the "State laws and rules" of ethics applicable to other lawyers licensed to practice in each state in which an attorney appears in court to represent the United States.[29] The term "State laws and rules" includes all rules governing the "ethical conduct" of an attorney in the relevant jurisdiction unless there is a specific federal statute or regulation to the contrary.[30] The McDade Amendment and the implementing Justice Department regulations direct all Department lawyers, "including supervisory attorneys,"[31] to comply with the ethical rules of each relevant state. Accordingly, even though the Attorney General is responsible for managing litigation in the federal courts[32] and, as the "Principal Officer" at the Justice Department,[33] for supervising the conduct of all other Department personnel, Congress has imposed on Department lawyers, including the Attorney General, the same ethical duties that the states demand of non-government lawyers.

The requirements imposed by state-law ethical principles parallel the ones required by the Miscellaneous Receipts Act. Both the former and the latter demand that a government lawyer turn over all settlement funds received from an adversary *to the client*. In the former case, that client is the plaintiff in the tort action. In the latter, the client is the United States or the public as a whole. By directing a defendant to give a third party money that properly belongs to the client, Justice Department lawyers are violating not only the Miscellaneous Receipts Act, but also the McDade Amendment and their ethical duty to act in their client's interests.

IV. Proffered Defenses to the DOJ Settlement Practice

Curiously, the Justice Department has not offered a defense to the criticisms levelled against its settlement practice.[34] Instead, Professors David Uhlmann and David Min defended the Department's position before Congress.[35] Professor Uhlmann, a

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28 *See* ABA, Model Rules of Professional Conduct Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer (2016) ("A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."); *id.* Rule 1.7 Conflict of Interest: Current Clients; *cf. id.* Rule 1.15: Safekeeping Property.

29 The McDade Amendment, 28 U.S.C. § 530B (2012), which is captioned "Ethical standards for attorneys for the Government," provides as follows:

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

(c) As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

The implementing regulations apply to lawyers at the Justice Department and in the U.S. Attorneys' Offices whether engaged in criminal or civil enforcement proceedings. 28 C.F.R. § 77.1-77.3 (2016). The regulations impose the same ethical obligations on those lawyers that apply to other lawyers in a relevant state. *Id.* § 77.3 ("In all criminal investigations and prosecutions, in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings, attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State, as these terms are defined in § 77.2 of this part.").

30 28 C.F.R. §§ 77.1(b), 77.1(c), 77.2(h), 77.2(k), and 77.

31 28 C.F.R. § 77.4(e).

32 *See* United States v. San Jacinto Tin Co., 125 U.S. 273, 279 (1888).

33 U.S. Const. art. II, § 2, cls. 1 & 2.

34 The Office of Legal Counsel (OLC) has offered its opinion on whether certain unusual payments or practices would violate the Miscellaneous Receipts Act. *See* Deputy Ass't Att'y Gen'l C. Kevin Marshall, Off. of Legal Counsel, Dep't of Justice, *Application of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement*, Memo. Opinion for the Gen'l Counsel U.S. Trade Rep. (Aug. 22, 2006) (hereafter OLC, *Canadian Softwood*); Deputy Ass't Att'y Gen'l Larry A. Hammond, Off. of Legal Counsel, Dep't of Justice, *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General*, Memo. Opinion for the Associate Attorney Gen'l (June 13, 1980) (hereafter OLC, *Settlement Authority*).

35 *See* Written Testimony of Prof. David K. Min, Before the Subcommittee on

former Section Chief of the Environmental Crimes Section of the Justice Department's Environment and Natural Resources Division (ENRD), argued that third-party payments, which he described as "community service" agreements, are often used because they are "the best way to ensure that the generalized harm that often occurs in environmental crimes [is] addressed by the defendant."[36] Focusing on the Department's settlements with some major U.S. banks in cases involving alleged fraud in mortgages, Professor Min argued that this practice is subsumed within the Attorney General's authority to settle cases if two criteria are met: "(1) the settlement is executed before an admission or finding of liability in favor of the federal government;" and "(2) the federal government does not retain post-settlement control over the disposition or management of the funds or any projects carried out under the settlement, except for ensuring that the parties comply with the settlement."[37]

There is no merit to the argument that appropriations rules do not apply because settlement funds never come directly into the federal government's possession. In fact, the Department has taken the exact opposite position in criminal cases. The Justice Department has prosecuted numerous high-level drug traffickers whose fingerprints never showed up on any of the packages being imported, distributed, or sold, but who directed how those drugs should be distributed. The government is involved in parallel conduct here. The only difference is that it is directing a third party to transfer money rather than cocaine. Given that the Department has taken the position in criminal cases that the ability to manage distribution of an item—whether drugs, money, guns, or widgets—implicates a person in the distribution even if he never physically touched the item at issue, Professor Min should not treat as exculpatory the fact that the Department directs a defendant to give the money to a third party rather than passing the funds through the government's coffers on the way to its destination.

Atop that, the central flaw in the professors' arguments is that, regardless of whether this practice is reasonable, the text of the Miscellaneous Receipts Act quite clearly forbids it. The Department has broad settlement authority, but it cannot settle a case in a manner prohibited by law, and in this case the Miscellaneous Receipts Act provides the governing law. Moreover, OLC opinions are not the law; they are just one interpretation of it.[38] Perhaps the environmental "community service" agreements described by Professor Uhlmann and the housing assistance projects defended by Professor Min are reasonable ways to rectify environmental insults suffered by a community when a company causes widely distributed environmental harm and housing problems suffered by the poor when banks practice abusive lending. But that is a decision to be made by Congress, which could require some oversight regarding how the money will be spent. Money is fungible, so the funds that third parties receive from these settlements can underwrite activities that Congress never would have funded, and sometime perhaps expressly declined to do so. Oversight therefore is necessary.

Professor Uhlmann did not address the argument that the Department's practice violates state ethical laws incorporated by the McDade Amendment, but Professor Min did. His response, though, is only that government lawyers are not in the same position as private attorneys because they must serve the public. It is true that government lawyers must serve the public—that's a given; the question is how. Congress has decided to regulate the conduct of government lawyers by subjecting them to the same ethical rules that would apply to a lawyer practicing in the same state. Unless the McDade Amendment is unconstitutional—a position that the Justice Department has not taken—that statute defines how government lawyers must act. If state bar rules forbid

Oversight and Investigations of the United States House of Representatives Committee on Financial Services, *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?*, (May 19, 2016), *available at* http://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-dmin-20160519.pdf; (hereafter *Min Testimony*). Testimony of Prof. David M. Uhlmann, 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), *available at* https://www.law.umich.edu/newsandinfo/Documents/Uhlmann_Testimony_Community_Service_Environmental_Crimes.pdf (hereafter *Uhlmann Testimony*).

36 *Uhlmann Testimony* 5.

37 *Min Testimony* 5 (footnote omitted). Professor Min relies on the OLC opinions noted above, but they are inapposite. The first one, OLC, *Settlement Authority*, involved a lawsuit jointly brought by the United States and the Commonwealth of Virginia for damage to wildlife caused by the defendant's oil spill. The opinion makes it clear that "the fact that no cash actually touches the palm of a federal official is irrelevant for purposes of [the Miscellaneous Receipts Act], if a federal agency could have accepted possession and retains discretion to direct the use of the money." *Id.* at 688. In that case, however, the federal government could allow the defendant to pay wildlife damages to a private waterfowl organization because "the United States has not incurred any expense or monetary loss in connection with" the wildlife destroyed by the defendant's oil spill, and the "co-plaintiff, the Commonwealth of Virginia . . . has an independent claim to these damages, grounded in the traditional *parens patriae* authority of state sovereigns." *Id.* at 688. The other opinion involved a complicated international trade dispute and "atypical scenario" private parties brought a claim against the government for damages, and a proposed settlement would have the government essentially serve as an escrow agent for the distribution of certain funds. OLC, *Canadian Softwood*. OLC concluded that "[t]he real issue in dispute is to whom the United States should give the funds—to private American parties pursuant to the Byrd Amendment [Section 1003 of the Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, 114 Stat. 1549, 1549A-73 (2000) (codified at 19 U.S.C. § 1675c (West Supp. 2006], or to the Canadian Producers as a refund pursuant to federal law, *see*, *e.g.,* 19 U.S.C. § 1673(f) (2000) (permitting the "refund[s]" of duties that were improperly assessed.)." OLC, *Canadian Softwood*, *supra*, at 9. Accordingly, OLC found that "there is little basis for attributing any of the $450 million to the United States." *Id*. Yet, because it was "conceivable" that the disputed funds could wind up belonging to the United States depending on the outcome of litigation in the Court of International Trade and arbitration pursuant to the North American Free Trade Agreement, *id.*, OLC went on to address the applicability of the Miscellaneous Receipts Act. The OLC opinion concluded that the act does not bar the government from holding the funds in escrow for others because no count had yet held that the United States has a right to the funds and no governmental agency will exercise any control over the funds once they are in a third party's hands. *Id*. at 9-10. Professor Min also maintains that the Ninth Circuit in *Sierra Club v. Elec. Controls Design, Inc.*, 909 F.2d 1350 (1990), "has upheld this reasoning," *Min Testimony* 5, but that is clearly mistaken. The *Elec. Controls Design* decision does not cite or discuss the Miscellaneous Receipts Act.

38 *Cf.* Mitchell v. Forsyth, 472 U.S. 511, 520-24 (1985) (ruling that the Attorney General is not entitled to absolute immunity for his actions).

an attorney from giving away money due to his client—as all of them do—the government may not do so either. It is easy to forget that Justice Department lawyers, even though they report to the Attorney General, owe their ultimate loyalty, not to any particular Attorney General or President, but to the Constitution, to which they take an oath of loyalty,[39] and to "the People of the United States." Giving away the client's money is an unlawful and unethical practice even when that client is the citizenry.

V. Conclusion

The Justice Department's third-party payment practice is an improper and unlawful disbursement of funds that, by law, must be deposited into the U.S. Treasury, the bank account of the U.S. people. Several different sources of law—the Appropriations Clause and Antideficiency Act implicitly, the Miscellaneous Receipts Act and state ethical rules expressly—separately and together demand that government lawyers deposit into the U.S. Treasury funds they receive in the settlement of cases. No private lawyer could give away a client's settlement money, and no government lawyer may do so either. It is time for this unlawful practice to end.

39 U.S. Const. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution[.]").