

5-1-2009

Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice

Todd David Peterson

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [American Politics Commons](#), and the [Law and Politics Commons](#)

Recommended Citation

Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. Rev. 327 (2009).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2009/iss2/3>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice

*Todd David Peterson**

INTRODUCTION

In the wake of the 9/11 attacks, and the subsequent presidentially declared war on terror,¹ the President and the executive branch assumed new powers to respond to the perceived terrorist threat. Some of these powers, like those granted by the Patriot Act² and the Authorization for the Use of Military Force,³ were granted by Congress. Other authority, such as the power to authorize the National Security Agency (“NSA”) to conduct warrantless wiretaps on American citizens⁴ and the power to use coercive interrogation techniques⁵ were assumed by the President without any congressional authorization. The President took these actions in accordance with secret legal opinions issued by the Department of Justice’s Office of Legal Counsel (“OLC”).⁶ The OLC memoranda supported a conception of the President’s

* Professor of Law, The George Washington University Law School. The author gratefully acknowledges the helpful comments received from Fred Lawrence, Peter Raven-Hansen and Jennifer Waters on earlier drafts and the expert research assistance of Mike Hissam.

1. See Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 18, 2001); Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 18, 2001); see also John F. Harris & Mike Allen, *President Details Global War on Terrorists and Supporters*, WASH. POST, Sept. 21, 2001, at A1.

2. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001*, Pub. L. No. 107-56, 115 Stat. 272.

3. See *Authorization for the Use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224 (2001).

4. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; Peter Baker & Jim VandeHei, *Clash is Latest Chapter in Bush Effort to Widen Executive Power*, WASH. POST, Dec. 21, 2005, at A1.

5. See Dana Priest, *CIA Puts Harsh Tactics on Hold*, WASH. POST, June 27, 2004, at A1.

6. See Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172* (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge Univ. Press 2005).

commander-in-chief powers that was so broad as to be virtually unlimited, and they rejected the notion that Congress could statutorily control the President's exercise of this authority.⁷

Not surprisingly, the OLC memoranda prompted a storm of protest.⁸ One commentator wrote that the OLC's torture memorandum was not something "of which anyone could be proud" and that "[t]he overwhelming response by experts in criminal, international, constitutional, and military law was that the legal analysis in the government memos was so faulty that the lawyers' advice was incompetent."⁹ This critique of the OLC memoranda prompted observers to question the process by which the memoranda were created, a process that excluded anyone who might have differing views and that was designed to create a brief for presidential authority rather than a deliberate and independent assessment of the powers of the President.¹⁰ Scholars have begun to question whether the Department of Justice, the Office of the Solicitor General ("SG"), and OLC, in particular, were capable of providing anything other than position papers on behalf of unrestricted presidential power.¹¹

As a result, these criticisms have caused some to wonder whether the Department of Justice can adequately protect the constitutional separation of powers in its current form. Although many would agree with former OLC chief, Theodore Olson, that "it is not our function to prepare an advocate's brief or simply to find support for what we or our clients might like the law to be,"¹² other commentators have begun to suggest that the Department of Justice

7. *Id.*

8. See, e.g., Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1 (2006); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005); Julie Angell, Comment, *Ethics, Torture and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 GEO. J. LEGAL ETHICS 557 (2005); Marisa Lopez, Note, *Professional Responsibility: Tortured Independence in the Office of Legal Counsel*, 57 FLA. L. REV. 685 (2005).

9. Wendel, *supra* note 8, at 68.

10. See *id.* at 70.

11. See, e.g., Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 682-83 (2005).

12. *Id.* at 727 (quoting Theodore B. Olson, Remarks to the Federal Legal Council 5 (Oct. 29, 1981)); see also Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1306 (2000) (arguing that the OLC has an institutional obligation to provide an independent and non-vertically directed view of the law).

needs to develop new internal checks on the issuance of legal opinions¹³ or have even questioned whether the Constitution should be amended to make the Attorney General independent from the President's control.¹⁴

These proposals are not new. Congress held hearings on the possibility of an independent Department of Justice after the Watergate scandal.¹⁵ The issue was also raised by President Carter, who requested the Department of Justice to analyze whether Congress could constitutionally make the Department of Justice independent from the President's control.¹⁶ The tendency of all these discussions is to focus upon visible assertions of presidential authority. The exercise of presidential authority in the area of national security or war power certainly grabs our attention and demonstrates the importance of independent and unbiased legal advice that properly constrains the exercise of presidential authority.

But these dramatic examples of presidential power are not the only context in which the Department of Justice exercises considerable authority over the constitutional separation of powers. There are innumerable ways in which the Department's control over the litigation on behalf of the United States gives it the opportunity to respect or to evade the authority allocated so carefully by the Constitution. In particular, the Department's actions can respect or subvert the Constitution's grant of appropriations authority to Congress.

The Constitution clearly and unambiguously places control over the appropriation of federal funds squarely in the hands of Congress.¹⁷ The Framers recognized that the control over the power

13. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2336–37 (2006).

14. See William P. Marshall, *Break Up the Presidency?: Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2449 n.5 (2006).

15. See *Removing Politics from the Administration of Justice: Hearings Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary*, 93d Cong. (1974).

16. See *Proposals Regarding an Independent Attorney General*, 1 U.S. Op. Off. Legal Counsel 75, 77–78 (1977) (concluding that proposals to make the Attorney General independent would be unconstitutional).

17. U.S. CONST. art. I, § 9, cl. 7. Numerous scholars have outlined the general contours of Congress's appropriations authority. See Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J. ON LEGIS. 297 (1998); Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1 (1988); Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1349

of the purse was the foundation of Parliament's ability to resist the authority of the king, and they gave Congress the same power so that it would have the ultimate weapon against executive tyranny.¹⁸ Congress has unquestionably used this authority effectively to control not only the amount of federal expenditures, but also the policy priorities of the federal government and, through explicitly targeted restrictions on the appropriations, the conduct of the other branches.¹⁹

In spite of this authority, or perhaps indeed because of Congress's great power, the executive branch has sought ways to circumvent congressional control over the federal purse and achieve its own ends outside of the will of Congress. Most famously in recent years, the Reagan Administration sought to avoid the Boland Amendment—a congressional restriction on aiding the Nicaraguan Contras—through the use of funds obtained from the covert sale of arms to Iran.²⁰ But executive efforts to evade congressional control over the appropriations process go back much further than the Iran-Contra affair. During the Nineteenth Century, executive agencies, particularly the War Department, routinely entered into contracts for which there were no appropriations and put Congress in the awkward position of having to fund the contract or tell government contractors that they were not going to be paid for material delivered to the federal government. In response, Congress enacted the Antideficiency Act to prohibit the obligation of federal funds for which there was no existing appropriation.²¹ Executive branch contracting officials proved so adept at avoiding or just plain ignoring the Antideficiency Act, however, that Congress found it necessary to amend the Act multiple times.²² Finally, Congress

(1988); Charles Tiefer, *Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse*, 13 YALE J. ON. REG. 501 (1996).

18. See THE FEDERALIST NO. 58, at 394 (James Madison) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961).

19. See generally WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE (1994); PAUL EINZIG, THE CONTROL OF THE PURSE (1959); E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790 (1961).

20. See S. REP. NO. 100-216 (1987); H.R. REP. NO. 100-433 (1987) (hereinafter *Hearings*); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 837 (1994).

21. 31 U.S.C. § 1341(a) (2000).

22. See S. DOC. NO. 87-11, at 45-46 (1961). See *infra* pg. 13 for a more in-depth discussion of the Antideficiency Act.

became so fed up with the evasion of its appropriations authority that it amended the Act to provide criminal sanctions for the violation of its provisions.²³ Because that did not exhaust the ingenuity of executive officials in finding innovative ways around the appropriations process, Congress adopted other statutes to enforce its exclusive authority over the appropriations process. For example, the Miscellaneous Receipts Act requires executive branch agencies to deposit any monies collected by the agency in the general Treasury account, which prevents the agencies from supplementing their appropriations budget.²⁴

But Congress cannot close every loophole in the appropriations process and entirely prevent the executive branch from finding ways around its appropriations authority. In particular, the litigation authority of the Department of Justice allows it to circumvent Congress's appropriations power in two different ways. First, when the Department is enforcing a federal statute, it may propose a settlement that requires the defendant to perform certain actions that benefit the Department or other federal agency. These actions may not violate the Miscellaneous Receipts Act because there are technically no "receipts," but it circumvents Congress's appropriations power by augmenting the agency's budget.

Second, when the Department defends cases brought against the federal government, it may wish to compensate plaintiffs for political reasons or because the administration favors the plaintiff's cause, even though the plaintiff's legal claim is weak. This type of action is aided by the existence of the Judgment Fund, a permanent unlimited appropriation that may be used for paying judgments and settlements against the United States without charging the budget of any executive branch agency. Settlements that take advantage of this governmental deep pocket to evade Congress's appropriations power amount to unauthorized grants to the plaintiffs.

Although the settlement practices of the Department of Justice are not open to public view, there is no reason to believe that a Department that is committed to an advocacy model in advising the President on his constitutional authority would shrink from a settlement policy that permitted political judgments to displace litigation risk assessments. Such practices would amount to an

23. See 31 U.S.C. §§ 1350, 1519 (2000); 18 U.S.C. § 3559(a)(5) (2000).

24. 31 U.S.C. § 3302 (2000).

invisible but substantial usurpation of Congress's appropriations power. The same concerns that have driven scholars to propose a set of neutral principles to guide OLC's provision of legal advice,²⁵ also counsel the creation of a set of settlement principles to guide the Department's litigation decisions in a manner that respects the appropriations prerogatives of Congress.

This Article proceeds in three steps to analyze the implications of these issues. Part I examines Congress's appropriations power and the ways in which the executive branch has attempted to circumvent that authority. Part II explores the extent to which the settlement authority of the Department of Justice creates continuing loopholes in Congress's appropriations authority. In particular, two types of problems are identified: the Augmentation Problem and the Unauthorized Grant Problem, both of which enable the Department to utilize its settlement authority to evade Congress's exclusive control over appropriations. Finally, in Part III, this Article examines the ability of the judicial and legislative branches to oversee the Department's settlement practices and concludes that, as a practical matter, there is little the other branches can do to protect Congress's appropriations authority from concerted efforts to use the Department's settlement authority to circumvent Congress's control over the appropriations process. As a result, the Department must commit to a set of principles to guide settlements that will help to ensure that the Department respects the constitutional preeminence of Congress on the appropriation of funds from the Federal Treasury.

I. CONGRESS'S APPROPRIATIONS AUTHORITY AND THE EXECUTIVE'S ATTEMPTS TO EVADE IT

Congress's constitutional appropriation authority derives from British practice. Although English kings had many sources of revenue upon which they could draw without the need for parliamentary authorization, there were occasions, particularly when undertaking significant military operations, when the Crown was forced to turn to Parliament for additional sources of revenue.²⁶ Beginning in the fourteenth century, Parliament's growing authority

25. See *infra* at pp. 47-49.

26. See Raven-Hansen & Banks, *supra* note 20, at 891 (explaining how ordinary royal revenue was "sufficient for most domestic purposes for centuries").

over the king developed from its power over military supplies.²⁷ The Crown often attempted to bypass this parliamentary authority by obtaining funds from private citizens and foreign governments.²⁸ However, these open attempts to circumvent Parliament's authority contributed to civil war and resulted in "the loss by Charles I of his office and his head."²⁹

By the end of the seventeenth century, Parliament had succeeded in wresting control over appropriations from the Crown. In 1678, the House of Commons asserted that it had the exclusive right to grant "aids and supplies" on such terms and conditions as it adopted in appropriations bills.³⁰ In the 1689 Bill of Rights, Parliament forbade the raising or maintenance of a standing army during peace time and the raising of money by "pretense of prerogative" without its consent.³¹ Thus, by the time the colonies began to be established in America, the British legislature had assumed plenary control over the appropriations process.

The colonial legislatures adopted this model and asserted their authority over military expenditures. Because English colonial policy required the colonies to finance their own defense, the colonial legislatures used their appropriations authority to control how that money would be spent.³² Using this power, the colonial legislatures frequently overrode the colonial governors' control over the military and dictated many of the details of military service and supplies.³³ Indeed, the Revolutionary War itself was, in many respects, controlled and managed by committees of the Continental Congress.³⁴

The tensions created by the Continental Congress's control over both the funding and the operations of the military led the Framers to divide the authority to direct military operations from the power

27. See EINZIG, *supra* note 19, at 29.

28. *Id.* at 57–62.

29. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 212 (3d ed., Univ. Press of Kan., 1991) (1978).

30. EINZIG, *supra* note 19, at 113–14.

31. 1 W. & M., c. 2 (1689) (Eng.).

32. See Raven-Hansen & Banks, *supra* note 20, at 892.

33. See *id.*

34. See JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 197 (Alfred A. Knopf, Inc., 1979); JENNINGS B. SANDERS, EVOLUTION OF EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS: 1774–1789, at 6–7 (1935).

to fund such operations. The President was made “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”³⁵ The Framers gave to Congress “the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States”³⁶ Article I, section 9 of the Constitution grants the appropriation power solely to Congress: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”³⁷ One scholar has argued that even if there were no Appropriations Clause in the Constitution, Congress would have the legislative authority to enact the substantial equivalent of the Appropriations Clause because, “[i]f Congress could not prohibit the Executive from withdrawing funds from the Treasury, then the constitutional grants of power to the legislature to raise taxes and to borrow money would be for naught because the Executive could effectively compel such legislation by spending at will.”³⁸ The Framers understood that by giving Congress the exclusive power to appropriate funds, they endowed Congress with substantial authority over the shape and direction of the federal government. In *The Federalist*, Hamilton wrote that “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.”³⁹ Similarly, Madison argued that

The house of representatives can not 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

35. U.S. CONST. art. II, § 2, cl. 1.

36. *Id.* at art. I, § 8, cl. 1.

37. *Id.* at art. I, § 9, cl. 7.

38. Stith, *supra* note 17, at 1349.

39. THE FEDERALIST NO. 30, at 188 (Alexander Hamilton).

the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.⁴⁰

The Framers vested Congress with this authority precisely because it was the most representative branch; the immediate accountability of Congress, particularly the House, protects taxpayers from excessive taxation and insures equitable distribution of government funds.⁴¹

The Framers also anticipated that Congress's appropriation power would give it the right to specify not only the amount of government expenditures, but also control the purposes to which those expenditures would be put. As Alexander Hamilton explained, "no money can be expended, but for *an object*, to an *extent*, and *out of a fund*, which the laws have prescribed."⁴² Although the very first appropriations bill adopted by the new Congress contained only four general categories of spending,⁴³ subsequent appropriations bills confined much more narrowly the purposes for which the funds could be put.⁴⁴

The Supreme Court has frequently recognized Congress's exclusive appropriation authority. The Court has stated that the Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."⁴⁵ In *Hart v. United States*,⁴⁶ the Court of Claims ruled that "absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people."⁴⁷ This authority requires that Congress must act first before the federal government may spend: "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be

40. THE FEDERALIST NO. 58 (James Madison), *supra* note 18, at 394.

41. See Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 740 (1978); Abner J. Mikva, *Congress: The Purse, the Purpose, and the Power*, 21 GA. L. REV. 1, 4 (1986).

42. 8 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 128 (Henry Cabot Lodge ed., G.P. Putnam's Sons 1885).

43. See Act of Sept. 29, 1789, ch. 23, 1 Stat. 95.

44. See, e.g., Act of Feb. 28, 1793, ch. 18, 1 Stat. 325-29; see also Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief's Spending Power*, 81 IOWA L. REV. 79, 99 (1995).

45. *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (citing *Reeside v. Walker*, 52 U.S. 272, 291 (1851)).

46. *Hart v. United States*, 16 Ct. Cl. 459 (1880), *aff'd*, 118 U.S. 62 (1886).

47. *Id.* at 484.

expended unless prohibited by Congress.”⁴⁸ Even with respect to the President’s exclusive and unrestricted power to grant a pardon, the Court has refused to order a payment from the Treasury of proceeds derived from the sale of a pardoned convict’s forfeited property. In *Knote v. United States*,⁴⁹ the Court held:

[I]f the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law. However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers,—it cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power.⁵⁰

Thus, the meaning of the Appropriations Clause can be summed up in a few simple propositions. First, once money is placed in the Treasury of the United States, it may not be withdrawn or spent without express authorization from Congress. Second, the President is dependent upon a congressional appropriation for the funding of the executive branch and the implementation of the powers that are granted to him by the Constitution. Finally, Congress may impose restrictions on the use of funds that limit the President’s authority in exercising his own constitutional power. As the Supreme Court has recognized, “Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.”⁵¹

The executive branch cannot obligate the expenditure of funds without congressional action on appropriations. For example, in *Schism v. United States*,⁵² retired military personnel sued the federal government for breach of an implied-in-fact contract.⁵³ Plaintiffs claimed that military recruiters had promised free lifetime medical care for them and their dependents in exchange for twenty years of

48. *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

49. *Knote v. United States*, 95 U.S. 149 (1877).

50. *Id.* at 154.

51. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990).

52. *Schism v. United States*, 316 F.3d 1259 (Fed. Cir. 2002), *cert. denied*, 539 U.S. 910 (2003).

53. *Id.* at 1262.

service.⁵⁴ In rejecting the plaintiff's arguments, the Federal Circuit noted:

As Commander-in-Chief, the President does not have the constitutional authority to make promises about entitlements for life to military personnel that bind the government because such powers would encroach on Congress' constitutional prerogative to appropriate funding. Under Article I, § 8, only Congress has the power of the purse. To say that the Executive Branch could promise future funds for activities that Congress itself had not authorized . . . would allow the Executive Branch to commandeer the power of the Legislative Branch.⁵⁵

Congress not only may specify the amount of funds available but may also dictate the terms and conditions under which the funds may be used:

Congress can decree, either in the appropriation itself or by separate statutory provisions, what will be required to make the appropriation "legally available" for any expenditure. It can, for example, describe the purposes for which the funds may be used, the length of time the funds may remain available for these uses, and the maximum amount an agency may spend on particular elements of a program. In this manner, Congress may, and often does, use its appropriation power to accomplish policy objectives and to establish priorities among federal programs.⁵⁶

The Supreme Court has also upheld Congress's authority to suspend or cancel federal programs through restrictions and appropriations bills.⁵⁷ Congress may also include preconditions in an appropriations bill that prevent the use of appropriated funds until certain requirements are met in order to effectuate congressional oversight of a federal program.⁵⁸ Moreover, the Appropriations Clause does not dictate to Congress how it shall implement its

54. *Id.*

55. *Id.* at 1288.

56. 1 U.S. GEN. ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-5 (3d ed. 2004) [hereinafter GAO REDBOOK].

57. *See, e.g.*, *United States v. Will*, 449 U.S. 200, 222 (1980) (holding that Congress intended, in an appropriations statute, to amend the salaries paid to federal judges); *United States v. Dickerson*, 310 U.S. 554, 555 (1940).

58. *See AT&T v. United States*, 307 F.3d 1374, 1376-79 (Fed. Cir. 2003) These provisions permit "the appropriate legislative committees to monitor compliance and, presumably, guarantee enforcement in the form of future reductions in, or limitations on, appropriated funds". *Id.* at 1377.

appropriations power. Instead, with one exception,⁵⁹ Congress has the authority to do this either through the annual budgeting process or through permanent funding statutes.⁶⁰

It did not take long for the executive branch to begin to resist Congress's plenary authority over the appropriations process. In 1809, Senator James Hillhouse of Connecticut introduced a resolution to investigate possible methods to prevent the improper expenditure of federal funds.⁶¹ In 1816 and 1817, Senator John C. Calhoun protested against the diversion of federal funds for uses other than those specified by Congress.⁶² Congress began early on to enact statutes to enforce its appropriations prerogatives. In 1809, Congress enacted a forerunner of the current purpose statute⁶³ in order to prohibit the transfer of appropriations between different executive accounts.⁶⁴

Congress faced an even more vexing challenge to its appropriations authority in the executive's practice of obligating expenditures by assigning a contract without the existence of an available appropriation to pay for the items under contract. These so-called "coercive deficiencies" presented Congress with a difficult dilemma: they could either fail to fund the contract and thus injure the blameless contractor, or acknowledge the moral obligation to pay and allow the executive branch to force an appropriation. These repeated coercive deficiencies rankled congressional sensibilities:

A consistent theme runs through myriad pages of floor debates and reports on supplemental appropriation bills: The Congress was tired of receiving appropriation requests which it could not, in good conscience, refuse because the agency had legally or *morally* committed the United States to make good on a promise. We term

59. U.S. CONST. art. I, § 8, cl. 12 states that Congress shall have power to "raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." The Department of Justice and GAO have both construed this two-year limit to apply only to personnel, operations, and maintenance, and not to other military appropriations, such as weapons systems procurement or military construction. *See* 40 Op. Att'y Gen. 555 (1948); 25 Op. Att'y Gen. 105 (1904).

60. *See* 1 GAO REDBOOK, *supra* note 56, at 1-11.

61. 19 ANNALS OF CONG. 347 (1809) (remarks of Sen. Hillhouse).

62. *See* Gary L. Hopkins & Robert M. Nutt, *The Anti Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 MIL. L. REV. 51, 57 n.7 (1978).

63. *See* 31 U.S.C. § 1301(a) (2007) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.").

64. *See* Act of Mar. 3, 1809, ch. 28, 2 Stat. 535.

such commitments “coercive deficiencies” because the Congress has little choice but to appropriate the necessary funds.⁶⁵

In order to put a halt to these practices, Congress passed the Antideficiency Act in 1820, which stated that “no contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment”⁶⁶ In 1870, Congress expanded the statute to apply to all federal agencies.⁶⁷ Notwithstanding the far-reaching language of the 1870 statute, Congress continued to face so many compliance problems that in 1905 it amended the Antideficiency Act to add criminal penalties for violation of the Act.⁶⁸ Although there is no record of any criminal prosecutions having been brought under the Act, the *in terrorem* effect of the criminal sanctions has been enough to get the executive branch to take the provisions of the Act seriously.⁶⁹ The 1905 amendments also required the executive agencies to apportion annual appropriations in order to prevent the agency from exhausting its appropriation before the end of the year and seeking a supplemental appropriation, and it prohibited executive agencies from accepting voluntary services on the theory that such voluntary services might result in a later claim that Congress was morally obligated to provide compensation for those services.⁷⁰ Even so, some commentators have concluded that enforcement of the Antideficiency Act remains inconsistent.⁷¹

65. See 59 Comp. Gen. 369, 372 (1980).

66. Act of May 1, 1820, ch. 52, § 6, 3 Stat. 567, 568.

67. The 1870 Act provided that:

[I]t shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations.

Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251.

68. See Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257–58. The criminal penalty of the Act is codified at 31 U.S.C. § 1350 (2003).

69. See Stith, *supra* note 17, at 1371 n.140.

70. Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257; see 30 Op. Att’y Gen. 51, 52–53 (1913).

71. See Herbert L. Fenster & Christian Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 PUB. CONT. L.J. 155 (1979).

[I]t has been the habit of certain departments—but principally the Department of Defense—to ignore, selectively, the entire subject [of the Antideficiency Act

The executive branch quickly learned that there was more than one way to get around Congress's appropriations power. Since the Constitution prohibits the withdrawal of money from the Treasury in the absence of a congressional appropriation, one way to avoid Congress's authority is to divert funds received by an agency to that agency's uses before they are directly deposited in the Treasury. Thus, an agency might attempt to retain or use the judgments it was authorized or able to collect in order to supplement their own appropriations.

Although one could certainly argue that the act of diverting money received by the government before it was to be deposited in the Treasury violates one of the implied requirements of the Appropriations Clause,⁷² Congress sought to close this loophole legislatively by adopting the Miscellaneous Receipts Act in 1849, which provided that all funds "received from customs, from the sales of public lands, and from all miscellaneous sources, for the use of the United States, shall be paid . . . into the treasury of the United States

requirements] when exigencies demand. Such selective disregard has been made possible by the tacit—but clearly conscious—indulgence of Congress

The deterioration, or veritable nonexistence, of the expenditure control discipline, has had far-ranging negative ramifications. Congress is substantially unable to plan accurately for the appropriation of funds and the authorization of programs. . . .

As consistent experience since enactment [of the Antideficiency Act] has shown, even this updated form of the Act has failed to compel the executive departments to manage their appropriations so as to avoid deficiencies [T]he executive still has not accepted its responsibility under the Act to have funds currently available to cover liabilities (obligations) *as it incurs them* in the contracting process. . . .

The Antideficiency Act was intended to compel the government to institute businesslike fiscal management practices so that deficiencies would never arise. In practice, however, it has succeeded only in preventing the government from making payments of money in excess or advance of appropriations; it has failed to stop the creation of obligations in excess or advance of available money.

Id. at 156, 166–167, 182.

72. See Stith, *supra* note 17, at 1356 ("These conclusions deprived from the Constitution's appropriations clause may be summarized in two governing principles. First, the *Principle of the Public Fisc*: All funds belonging to the United States—received from whatever source, however obtained, and whether in the form of cash, intangible property, or fiscal assets—are public monies, subject to public control and accountability. This principle implies that all monies received by the United States are in 'The Treasury,' to use the language of the Constitution. 'The Treasury' includes not only tax receipts, but also any borrowing on the credit of the United States and proceeds from the sale of government goods and services and gifts to the government.").

. . . .”⁷³ As now codified at 31 U.S.C. § 3302, the Miscellaneous Receipts Act requires that any “official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury”⁷⁴ Under this provision, any money received by an executive agency from a source outside the agency must be deposited into the general fund of the Treasury and not into the agency’s own appropriations account “even though the agency’s appropriations may be technically still ‘in the Treasury’ until the agency actually spends them.”⁷⁵ As one early decision by the Comptroller of the Treasury explained, the Miscellaneous Receipts Act

could hardly be made more comprehensive as to the monies that are meant and these monies are required to be paid “into the Treasury.” This does not mean that the moneys are to be added to a fund that has been appropriated *from* the Treasury and may be in the Treasury or outside. It seems to be that it can only mean that they shall go into the general fund of the Treasury which is subject to any disposition which Congress might choose to make of it. This has been the holding of the accounting officers for many years. If Congress intended that these moneys should be returned to the appropriation from which a similar amount had been once expended it could have been readily so stated, and it was not.⁷⁶

The GAO succinctly summarized the significance of this provision:

Once money is deposited into a “miscellaneous receipts” account, it takes an appropriation to get it out. [T]hus, the effect of 31 U.S.C. § 3302(b) is to ensure that the executive branch remains dependent upon the congressional appropriation process. Viewed from this perspective, [the Act] emerges as another element in the statutory pattern by which Congress retains control of the public purse under the separation of powers doctrine.⁷⁷

An agency may obtain monies it receives only if the receipts qualify as “repayments’ to an appropriation”⁷⁸ or if the agency has express

73. Act of Mar. 3, 1849, ch. 110, 9 Stat. 398, 398.

74. 31 U.S.C. § 3302(b) (2007).

75. 2 GAO REDBOOK, *supra* note 56, at 6-167.

76. 22 Comp. Dec. 379, 381 (1916).

77. 2 GAO REDBOOK, *supra* note 56, at 6-168-169 (citations omitted).

78. *Id.* at 6-170; *see, e.g.*, 6 Comp. Gen. 337, 337-338 (1926); 5 Comp. Gen. 734, 736 (1926).

statutory authority to do so.⁷⁹ Despite Congress's effort to shore up the loopholes that allow executive encroachment into Congress's appropriations power, opportunities still exist for executive encroachment.

II. CONTINUING LOOPHOLES IN CONGRESS'S APPROPRIATIONS AUTHORITY

Because the Department of Justice possesses the authority to litigate on behalf of the United States, it is uniquely positioned to take advantage of several possible loopholes in Congress's well-constructed statutory defense of its constitutional appropriations prerogative. In particular, the ability to settle cases without significant review from the courts or Congress gives the Department the potential both to augment the budgets of federal agencies in enforcement cases brought against private defendants and to use the judgment fund to make, effectively, unauthorized grants to plaintiffs in suits brought against the government.

A. *The Settlement Authority of the Department of Justice*

The settlement authority of the Department of Justice derives from its role as litigator on behalf of the United States government. Although the Judiciary Act of 1789 vested plenary authority over the legal affairs of the United States in the Attorney General,⁸⁰ the

79. 2 GAO REDBOOK, *supra* note 56, at 6-170. As Professor Stith has described: "There are three major types of legislation that create exceptions to the general requirement of the Miscellaneous Receipts statute: first, legislation that allows agencies to retain certain 'collections'; second, legislation that permits agencies to create certain 'revolving funds'; and, third, legislation that grants certain agencies 'gift authority.'" Stith, *supra* note 17, at 1366.

Some agencies that are allowed to charge fees for services are permitted to retain these fees as part of the agency's appropriation account. *See, e.g.*, 38 U.S.C. § 8109 (providing that the Veterans' Benefit Administration may retain parking fees). Revolving funds are created by Congress with an initial appropriation that is then loaned out or distributed to recipients (such as in the case of student loans), who are then expected to repay the amounts back into the revolving fund. Stith, *supra* note 17, at 1366-67. Gift authority allows an agency to keep money voluntarily donated to it, which the Miscellaneous Receipts Act would otherwise require to be deposited in the general Treasury account. *Id.* at 1368-67.

80. *See* Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 93 ("[T]here shall . . . be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by heads of any of the departments, touching any matters that may concern their departments . . .").

Attorney General's statutory authority to conduct litigation on behalf of the United States was not fully established until Congress created the Department of Justice in 1870.⁸¹ In addition to establishing the Department of Justice, the 1870 Act transferred certain specified solicitors who were performing litigation functions within the various agencies to the Department of Justice where they were to be supervised by the Attorney General.⁸² The Act also gave the Attorney General supervisory authority over the United States District Attorneys who litigated in the various judicial districts and "also [over] all other attorneys and counselors employed in any cases or business in which the United States may be concerned."⁸³ Finally, the 1870 Act prohibited other executive branch departments from employing attorneys or outside counsel at government expense. Instead they were required to:

[C]all upon the Department of Justice, . . . and no counsel or attorney fees shall hereafter be allowed to any person . . . besides the respective district attorneys . . . for services in such capacity to the United States, . . . unless hereafter authorized by law, and then only on the certificate of the Attorney-General that such services . . . could not be performed by the Attorney-General, . . . or the officers of the department of the justice . . .⁸⁴

Thus, by granting the Department of Justice virtually exclusive litigating authority for the United States, Congress sought to centralize decision-making concerning litigated cases and create a "unity of decision, a unity of jurisprudence . . . in the executive law of the United States."⁸⁵ Centralization also allowed for more efficient preparation of cases on appeal and before the Supreme Court.⁸⁶

In the years following the enactment of the Judiciary Act of 1870, the courts recognized and enforced the exclusive litigating authority of the Department of Justice. In *United States v. San*

81. Act of June 22, 1870, ch. 150, 16 Stat. 162.

82. *Id.* at § 3, 16 Stat. 162.

83. *Id.* at § 16, 16 Stat. 164.

84. *Id.* at § 17, 16 Stat. 164.

85. CONG. GLOBE, 41st Cong., 2nd Sess. 30–36 (1870).

86. See generally Griffin B. Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049 (1978) (recounting the historical development of the office of Attorney General as well as the Department of Justice); Sewall Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 165 (1938) (discussing how historical "trial and error" has proven the efficiency of handling the government's litigation under the Attorney General).

Jacinto Tin Co.,⁸⁷ the Supreme Court stated that the Attorney General was “undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government.”⁸⁸ The Court later ruled that the Attorney General’s authority to conduct litigation on behalf of the United States could be limited only by a clear legislative statement to the contrary.⁸⁹ In the early part of the twentieth century, Judge Learned Hand summarized the litigating authority of the Attorney General as follows:

The government has provided legal officers, presumably competent, charged with the duty of protecting its rights in its courts. . . . Congress, having so provided for the prosecution of civil suits, can scarcely be supposed to have contemplated a possible duplication in legal personnel. The cost of this is one consideration, but far more important is the centering of responsibility for the conduct of public litigation. The Attorney General has powers of “general superintendence and direction” over district attorneys (title 5, U.S. Code, § 317), and may directly intervene to “conduct and argue any case in any court of the United States” (title 5, U.S. Code, § 309) Thus he may displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press. No such system is capable of operation unless his powers are exclusive, or if the Departments may institute suits which he cannot control. His powers must be coextensive with his duties.⁹⁰

The litigating authority of the Attorney General is now codified at 5 U.S.C. § 3106 and 28 U.S.C. §§ 515–516. The Title V Provision prohibits executive agencies from employing outside counsel and requires them to seek representation from the Department of Justice in cases in which their agencies appear in

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

88. *Id.* at 279.

89. *Kern River Co. v. United States*, 257 U.S. 147, 155 (1921) (“In the absence of some legislative direction to the contrary, and there is none, the general authority of the Attorney General in respect of the pleas of the United States and the litigation which is necessary to establish and safeguard its rights affords ample warrant for the institution and prosecution by him of a suit such as this.”).

90. *Sutherland v. Int’l Ins. Co. of N.Y.*, 43 F.2d 969, 970 (2d Cir. 1930), *cert. denied*, 282 U.S. 890 (1930).

court.⁹¹ The provisions of Title 28 grant the Attorney General the power to supervise and control litigation on behalf of the United States. Section 516 states: “Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”⁹² Congress has authorized some agencies to conduct certain types of cases on their own, but these exceptions to the Attorney General’s statutory litigation authority have been construed narrowly to allow agencies to proceed on their own only when a statute clearly and unambiguously grants such authority.⁹³

The litigating authority of the Department of Justice includes as a necessary incident the power to settle and compromise cases. For example, in 1933, President Roosevelt issued an executive order to supplement the statutory powers of the Attorney General to manage litigation on behalf of the United States. In addition to centralizing the power to initiate cases on behalf of the United States and defend cases brought against the United States, the executive order stated:

As to any case referred to the Department of Justice for a prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon a prosecution or defense,

91. 5 U.S.C. § 3106 (2004) (“Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.”).

92. 28 U.S.C. § 516 (2003). In addition, § 519 states:

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under Section 543 of this title in the discharge of their respective duties.

93. See *Marshall v. Gibson’s Prods., Inc. of Plano*, 584 F.2d 668, 676 n.11 (5th Cir. 1978) (“[I]n the absence of an express congressional directive to the contrary, [the Attorney General] is vested with plenary power over all litigation to which the United States or one of its agencies is a party.”); see also *ICC v. S. Ry. Co.*, 543 F.2d 534, 535–38 (5th Cir. 1976); *In re Grand Jury Subpoena of Persico*, 522 F.2d 41, 54 (2d Cir. 1975); *FTC v. Guignon*, 390 F.2d 323, 324 (8th Cir. 1968); *United States v. Tonry*, 433 F. Supp. 620, 622 (E.D. La. 1977).

now exercised by any agency or officer, is transferred to the Department of Justice.⁹⁴

Several years later, Roosevelt's Attorney General Homer Cummings concluded that the power to settle or compromise litigation:

[I]s a power, whether attaching to the office or conferred by statute or Executive order, to be exercised with wise discretion and resorted to only to promote the Government's best interest or to prevent flagrant injustice, but that it is broad and plenary may be asserted with equal assurance, and it attaches, of course, immediately upon the receipt of a case in the Department of Justice, carrying with it both civil and criminal features, if both exist, and any other matter germane to the case which the Attorney General may find it necessary or proper to consider before he invokes the aid of the courts; nor does it end with the entry of judgment, but embraces execution.⁹⁵

This inherent settlement authority is buttressed by various sections of the United States Code, which speak directly to the power to settle or compromise cases.⁹⁶ Based upon the litigation authority of the Attorney General the courts have recognized the power of the Attorney General permits him to settle or compromise claims in his discretion.⁹⁷

94. Exec. Order No. 6166, § 5 (June 10, 1933), *reprinted in* 5 U.S.C. § 901 note.

95. 38 Op. Att'y Gen. 98, 102 (1934).

96. *See, e.g.*, 28 U.S.C. § 2414 (2003) ("Except as otherwise provided by law, compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States, made by the Attorney General or any person authorized by him, shall be settled and paid in a manner similar to judgments in like causes . . ."); 28 U.S.C. § 2677 (2003) ("The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under [28 U.S.C.] § 1346(b) . . . after the commencement of an action thereon.");

97. *See, e.g.*, *New York v. New Jersey*, 256 U.S. 296, 308 (1921) ("[W]e cannot doubt that the intervention of the government was proper in this case and that it was within the authority of the Attorney General to agree that the United States should retire from the case upon the terms stated in the stipulation . . ."); *Executive Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 761-62 (4th Cir. 1993); *United States v. Hercules, Inc.*, 961 F.2d 796, 798 (8th Cir. 1992); *United States v. Newport News Shipbuilding & Dry Dock Co.*, 571 F.2d 1283, 1287 (4th Cir. 1978), *cert. denied*, 439 U.S. 875 (1978); *Smith v. United States*, 375 F.2d 243, 247 (5th Cir. 1967), *cert. denied*, 389 U.S. 841 (1967); *Halbach v. Markham*, 106 F. Supp. 475, 479-81 (D.N.J. 1952), *aff'd*, 207 F.2d 503 (3d Cir. 1953), *cert. denied*, 347 U.S. 933 (1941).

The Department of Justice has opined that although “[t]he settlement power is sweeping, . . . the Attorney General must still exercise her discretion in conformity with her obligation to ‘enforce the acts of Congress.’”⁹⁸ The Office of Legal Counsel has stated that to “guide the Attorney General in the exercise of his settlement discretion, the 1934 opinions of Attorney General Cummings proposed a ‘promote the Government’s best interest, or . . . prevent flagrant injustice’ standard.”⁹⁹ In doing so, however, “the Attorney General must, as a general matter, exercise her broad settlement discretion in a manner that conforms to the specific statutory limits that Congress has imposed upon its exercise.”¹⁰⁰

B. The Potential Problems Created by the Settlement Authority of the Department of Justice

Because the Department of Justice has such broad settlement authority, it has the ability to use settlements to circumvent the appropriations authority of Congress. The potential for such problems exists in both enforcement cases where the Department is prosecuting cases against violators of federal statutes and in cases in which the Department is defending the United States in lawsuits brought against it.

1. The augmentation problem

First, the Department is in a position to leverage its enforcement litigation authority to obtain settlements that skirt the provisions of the Miscellaneous Receipts Act. This first type of problem we can generally categorize as the “Augmentation Problem.” The Department could not directly receive money from the settlement of a case brought against a private party and put that money to its own use or benefit. Once the Department receives money in settlement of a case, the Miscellaneous Receipts Act requires that the money be deposited in the General Treasury Account and that it not be spent until appropriated by Congress. However, the Department of Justice has the power to short circuit the Miscellaneous Receipts Act

98. Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion, 1999 WL 1262049, at *9 (Op. Off. Legal Counsel June 15, 1999) [hereinafter Authority of the United States].

99. 6 Op. Off. Legal Counsel 47, 60 (1982) (citing 38 Op. Att’y Gen. at 102).

100. Authority of the United States, *supra* note 98, at *9.

requirement by agreeing to settlement terms that require the violator of a federal statute to undertake certain responsibilities or actions that might inure to the benefit of the executive branch. For example, the Department might require the violator to agree to take an action that would relieve an executive agency of the burden of doing so itself. That would free up funds that would otherwise have been devoted to that purpose for use in some other way. Thus, the Department could effectively augment the appropriations of the executive branch without running afoul of the technical requirements of the Miscellaneous Receipts Act—although creating an unconstitutional interference with Congress’s appropriations power.

This is not an imaginary or merely hypothetical possibility. As will be discussed in much more detail below, the violators of environmental statutes such as the Clean Air and Clean Water Acts are frequently required to perform Supplemental Environmental Projects (“SEPs”) as part of the settlement of an environmental enforcement action against them. These SEPs clearly run the risk of treading upon Congress’s appropriations prerogative by requiring a polluter to perform a project specified by the executive branch rather than pay funds to be deposited in the General Treasury.

2. The unauthorized grant problem

The second potential danger to Congress’s appropriations power derives from the role of the Department of Justice in defending cases on behalf of the federal government. This issue may generally be termed as the “Unauthorized Grant Problem.” The potential for this type of problem is created when individuals, groups, or even countries with a grievance against the United States sue the United States government to obtain financial relief. These claimants against the United States have a cause that may or may not be just and a legal claim that may or may not be meritorious. Unfortunately, the worthiness of the cause is not always congruent with the meritoriousness of the claim. The government frequently has defenses to claims by aggrieved plaintiffs that may prevent recovery by plaintiffs whom the administration would like to reward for reasons that may be either political or simply related to the belief that the plaintiffs should receive compensation notwithstanding the legal merit of the claim. In either case, the proper source of relief for a claim that is legally questionable is Congress, not the executive

branch. The Department of Justice, however, has the power to compromise and settle these claims for amounts that may not reflect their legal merit but rather the desire of the executive branch to compensate plaintiffs whom they deem worthy. This end-run of the appropriations process creates access to the Federal Treasury without the necessity of persuading the majority in Congress of the worthiness of the cause.

The appeal of using case settlements to further policy objectives without regard to the true risk that a judgment might be entered against the United States is made infinitely more appealing by the availability of the Judgment Fund to pay for any settlement. The Judgment Fund is a permanent, indefinite appropriation available to pay judgments entered against the United States and settlements of litigated or threatened cases.¹⁰¹ Prior to 1956, monetary judgments against the United States required Congress to authorize an appropriation for the payment of every single judgment.¹⁰² For obvious reasons this requirement became a significant burden upon Congress, so Congress enacted the Judgment Fund Act to provide for payment of most judgments against the United States without the need for individual appropriations.¹⁰³ In 1961, the statute was amended to allow for payment of compromised settlements out of the Judgment Fund as well.¹⁰⁴ Even though the original Judgment Fund statute included a limit upon payments of \$100,000, Congress expected that the fund would cover ninety-eight percent or more of all judgments rendered against the United States.¹⁰⁵ In 1977, Congress eliminated the ceiling on payments from the Judgment Fund.¹⁰⁶ As a result, the Judgment Fund is now available to pay any covered judgment or settlement, regardless of the amount.

101. 31 U.S.C. § 1304 (2007):

(a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law

102. See Jeffrey Axelrad, *What is the Judgment Fund?*, ASS'N OF TRIAL LAW. OF AM. 435 (2004) (“[U]ntil as recently as 1956, monetary judgments against the United States required enactment of an appropriations bill individually in order to pay each judgment.”).

103. Act of July 27, 1956, ch. 13, 70 Stat. 694.

104. Act of Aug. 30, 1961, Pub. L. No. 87-187, 75 Stat. 416 (codified as amended at 28 U.S.C. § 2414 (2007)).

105. See *Hearings on Supplemental Appropriation Bill, 1957, Before Subcommittee of the House Committee on Appropriations*, 84th Cong., pt. 2 at 884 (1956).

106. Supplemental Appropriations Act of 1977, Pub. L. No. 95-26, § 101, 91 Stat. 61, 96.

The Department of the Treasury¹⁰⁷ requires applicants for payments from the Judgment Fund to fill out certain forms specifying the details of the litigation and citations to the authority for payment from the Judgment Fund,¹⁰⁸ but, as the Department of Treasury itself acknowledges, the actual internal “‘certification’ step is largely ministerial, in that Treasury does not review the merits of the underlying judgments or settlement.”¹⁰⁹ Thus, the determination by the Department of Justice on the merits of the settlement is, for all intents and purposes, conclusive.

The appeal of the Judgment Fund is that payments made out of it for settlements or judgments in litigated cases are not deducted from any agency’s budget. The Department of Treasury has noted that:

The Judgment Fund has no fiscal year limitations, and there is no need for Congress to appropriate funds to it annually or otherwise. Moreover, disbursements from it are not attributed to or accounted for by the agencies whose activities give rise to awards paid. Absent a specific statutory requirement, the agency responsible is not required to reimburse the Judgment Fund.¹¹⁰

The Judgment Fund is available to pay for judgments and settlements that are “not otherwise provided for,” in other words those that cannot legally be paid from any existing appropriation or fund.¹¹¹ Because most agency appropriations for federal executive branch agencies are not available to pay judgments or settlements in litigated cases, the Judgment Fund is available for the payment of most judgments and settlements in cases litigated against the United States.¹¹²

107. In 1996, Congress amended the statute to substitute the Secretary of the Treasury for the Comptroller General in the requirement for certification of the payment. General Accounting Office Act of 1996, Pub. L. No. 104-316, 201, 110 Stat. 3826, 3843. This substitution was made in response to the Supreme Court’s decision in *Bowsher v. Synar*, 478 U.S. 714 (1986), which ruled that the Comptroller General, as an officer of Congress, could not perform executive functions. *Id.* at 714–715.

108. See U.S. DEP’T. OF THE TREASURY, FIN. MGMT. SERV., Treasury Financial Manual, pt. 6, ch. 3100 (2000).

109. See U.S. DEP’T. OF TREASURY, FIN. MGMT. SERV., JUDGMENT FUND: BACKGROUND, <http://fms.treas.gov/judgefund/background.html> (last visited Mar. 26, 2006).

110. *Id.*

111. 31 U.S.C. § 1304(a)(1) (2007).

112. See U.S. DEP’T. OF TREAS., *supra* note 109.

Department of Justice officials acknowledge that the existence of the Judgment Fund helps to create additional pressure upon the Department of Justice to compensate injured plaintiffs even if their legal claims are not actually likely to lead to judgments against the United States. As Jeffrey Axelrad, the former head of the Torts Branch in the Civil Division of the Department of Justice, has noted:

Since agencies do not have a direct fiscal incentive to guard against excessive payments from the Judgment Fund, in that payments from the Judgment Fund do not reduce agency appropriations available for their programs, it is the Attorney General's especial duty to guard against unauthorized or excessive payments. Special interests pursued by claimants are noisy and visible (and, with all respect, persons with claims against the United States and their counsel frequently and very definitely pursue special interests, justifiably perhaps, but parochial nonetheless). The incentive to yield to the perceived special need du jour is all too evident.¹¹³

Given these incentives, the Department of Justice has a vital and unique role in protecting the Judgment Fund and thereby protecting Congress's appropriations authority.

C. Illustrating the Problems

1. The augmentation problem: supplemental environmental projects

The Environmental Protection Agency's use of Supplemental Environmental Projects ("SEPs") as part of its agreements to settle cases against polluters presents a good example of the perils of the Augmentation Problem and the benefits of careful legal analysis by the Department of Justice in avoiding interference with Congress's appropriations prerogatives.¹¹⁴ A SEP is "an environmentally

113. Axelrad, *supra* note 102 (footnote omitted).

114. See generally Kathleen Boergers, *The EPA's Supplemental Environmental Projects Policy*, 26 *ECOLOGY L.Q.* 777 (1999); Steven Bonorris, Chelsea Holloway, Annie Lo, & Grace Yang, *Environmental Enforcement in the Fifty States: The Promise and Pitfalls of Supplemental Environmental Projects*, 11 *HASTINGS W.-NW. J. ENVTL. L. & POL'Y* 185 (2005); David A. Dana, *The Uncertain Merits of Environmental Enforcement Reform: The Case of Supplemental Environmental Projects*, 1998 *WIS. L. REV.* 1181; Jeff Ganguly, *Environmental Remediation Through Supplemental Environmental Projects and Creative Negotiation: Renewed Community Involvement in Federal Enforcement*, 26 *B.C. ENVTL. AFF. L. REV.* 189 (1998); Edward Lloyd, *Supplemental Environmental Projects Have Been Effectively Used in Citizen Suits to Deter Future Violations as Well as to Achieve Significant Additional Environmental Benefits*, 10 *WIDENER L. REV.* 413 (2004); Laurie Droughton, Note, *Supplemental Environmental Projects: A Bargain for the Environment*, 12 *PACE ENVTL. L. REV.* 789 (1995); Michael Paul Stevens,

beneficial project that a violator voluntarily agrees to perform, in addition to actions required to correct the violation(s), as part of an enforcement settlement.”¹¹⁵ As further described by the EPA,

[w]hen volunteering to perform a SEP, a company must show that it can and will complete the project, and must provide all funds used to finance the project. EPA provides oversight to ensure that the company does what it promises to do. EPA, however, does not manage or control the funds.¹¹⁶

Through the SEP program, the EPA has used settlement agreements with companies accused of violating environmental laws to accomplish a wide range of projects that have environmental or public health benefits.¹¹⁷

The potential Augmentation Problem with the SEP program is clear. By requiring a Supplemental Environmental Project as part of a settlement agreement with an environmental defendant, the EPA (and the Department of Justice acting as counsel on behalf of the EPA), reduces the amount of fines or penalties that might be paid by the violator in exchange for the agreement to undertake the SEP. Such fines or penalties would otherwise be paid into the general treasury account pursuant to the Miscellaneous Receipts Act where they would be available for congressional appropriation. Such a policy arguably evades the requirements of the Miscellaneous Receipts Act and almost certainly raises the possibility of the agency augmenting its appropriations by requiring an environmental defendant to perform projects that might be within the scope of the EPA’s duties, thereby leaving more funds available to the EPA for other purposes.

The Comptroller General has, at least on one occasion, determined that such a program circumvented Congress’s appropriations power. In 1991, John Dingell, the chair of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, requested an opinion from the Comptroller General, as head of the Government Accountability

Note, *Limits on Supplemental Environmental Projects in Consent Agreements to Settle Clean Water Act Citizen Suits*, 10 GA. ST. U. L. REV. 757 (1994).

115. ENVTL. PROT. AGENCY, BEYOND COMPLIANCE: SUPPLEMENTAL ENVIRONMENTAL PROJECTS 4 (2001), available at <http://www.epa.gov/compliance/resources/publications/civil/programs/sebrochure.pdf>.

116. *Id.*

117. *Id.* at 4–37.

Office (GAO),¹¹⁸ on the legality of SEPs.¹¹⁹ In particular, Representative Dingell asked whether the EPA had the legal authority to settle certain mobile source air pollution enforcement actions by including SEPs.¹²⁰ These SEPs would “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.”¹²¹ The Comptroller General determined that the EPA’s proposed settlement was similar to a scheme proposed earlier by the Nuclear Regulatory Commission, which the Comptroller General had already determined would “allow the NRC to circumvent 31 U.S.C. § 3302(b) [the Miscellaneous Receipts Act] and the general rule against augmentation of appropriations.”¹²² The Comptroller General emphasized that the Miscellaneous Receipts Act

[r]equires agencies to deposit money received from any source into the Treasury; its purpose is to ensure that Congress retains control of the public purse. In our view, the enforcement scheme proposed by the NRC would have resulted in an augmentation of NRC’s appropriations, allowing it to increase the amount of funds available for its nuclear safety research program.¹²³

The Comptroller General concluded that there was no reason to distinguish the EPA’s proposed settlement from the earlier NRC proposal.¹²⁴

After the EPA protested the Comptroller General’s conclusion, the Comptroller General reevaluated its earlier opinion and reaffirmed its conclusion.¹²⁵ The Comptroller General concluded that:

[a]n interpretation of an agency’s prosecutorial authority to allow an enforcement scheme involving supplemental projects that go

118. The GAO (then known as the General Accounting Office), is an investigative arm of the legislative branch. *See* *Bowsher v. Synar*, 478 U.S. 714, 727–28 (1986); *see also infra* page 45.

119. *See generally* Decs. of the Comp. Gen., B-247155 (1992), 1992 U.S. Comp. Gen. LEXIS 1319.

120. *Id.* at *1.

121. *Id.* at *1–2.

122. *Id.* at *7, *3.

123. *Id.* (citations omitted).

124. *Id.*

125. *See* Decs. of the Comp. Gen., B-247155.2 (1993), 1993 WL 798227, at *1.

beyond remedying the violation in order to carry out other statutory goals of the agency, would permit the agency to improperly augment its appropriations for those other purposes, in circumvention of the congressional appropriations process.¹²⁶

Ultimately, in subsequent face-to-face meetings, representative Dingell's staff, the GAO, and the EPA agreed that these GAO opinions did not apply to all SEPs, but the legality of the public awareness campaigns that were the subject of the opinions remained uncertain.¹²⁷ The EPA and the Department of Justice continued with the implementation of the SEP program while both agencies worked on a revised SEP policy that would regulate SEPs so as to avoid the Augmentation Problem.

These negotiations ultimately resulted in the issuance of a final Supplemental Environmental Projects policy in 1998.¹²⁸ The SEP policy was carefully crafted in order to respect the appropriations power of Congress and avoid clashes with the Miscellaneous Receipts Act and the anti-augmentation principle of the Constitution. Accordingly, the policy sets forth five legal guidelines. First, "[a] project cannot be inconsistent with any provision of the underlying statutes."¹²⁹ This requirement simply ensures that a SEP does not run afoul of the statute under which the action is filed. The second guideline establishes a nexus requirement that links the SEP with the objectives of the environmental statute that provides the basis for the enforcement action:

2. All projects must advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action and must have adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if:
 - a. The project is designed to reduce the likelihood that similar violations will occur in the future; or

126. *Id.* at *2.

127. See Ganguly, *supra* note 114, at 213–14.

128. See Final EPA Supplemental Environmental Projects Policy Issued, 63 Fed. Reg. 24,796 (May 5, 1998) [hereinafter *1998 SEP Policy*], available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?IPAddress=frwais.access.gpo.gov&dbname=1998_register&docid=98-11881-filed.pdf.

129. *Id.* at 24,798.

- b. The project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or
- c. The project reduces the overall risk to public health or the environment potentially affected by the violation at issue.

Nexus is easier to establish if the primary impact of the project is at the site where the alleged violation occurred or at a different site in the same ecosystem or within the immediate geographic area. Such SEPs may have sufficient nexus even if the SEP addresses a different pollutant in a different medium. In limited cases, nexus may exist even though a project will involve activities outside of the United States. The cost of a project is not relevant to whether there is adequate nexus.¹³⁰

The nexus requirement ensures that the EPA and the Department of Justice may not use a potential enforcement action to induce the defendant to engage in remediation activities that have no connection to the underlying violation. As a result, the agency may not trade off funds that might have been extracted in the form of a settlement that would be deposited in the Treasury for a project that they deemed to be meritorious but, because it has no connection with the underlying violation, is an action that should be funded by Congress.

The third requirement states:

3. EPA may not play any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP. Nor may EPA retain authority to manage or administer the SEP. EPA may, of course, perform oversight to ensure that a project is implemented pursuant to the provisions of the settlement and have legal recourse if the SEP is not adequately performed.¹³¹

This requirement avoids the obvious Augmentation Problem that would result if the EPA retained any control over the SEP funding. If the EPA were able to control or manage the funds, it would in effect augment the EPA's budget by giving it additional money over which it had authority. This could conceivably raise Miscellaneous Receipts Act problems, and it certainly would run afoul of the anti-augmentation principle of the Constitution.

130. *Id.* (citations omitted).

131. *Id.*

The fourth requirement states:

4. The type and scope of each project are defined in the signed settlement agreement. This means the “what, where and when” of a project are defined by the settlement agreement. Settlements in which the defendant/respondent agrees to spend a certain sum of money on a project(s) to be defined later (after EPA or the Department of Justice signs the settlement agreement) are not allowed.¹³²

This requirement ensures that neither the EPA nor the Department of Justice will be able to circumvent the SEP policy by specifying a particular project after the settlement agreement is signed.

The final legal requirement states:

5. a. A project cannot be used to satisfy EPA’s statutory obligation or another federal agency’s obligation to perform a particular activity. Conversely, if a federal statute prohibits the expenditure of federal resources on a particular activity, EPA cannot consider projects that would appear to circumvent that prohibition.

b. A project may not provide EPA or any federal agency with additional resources to perform a particular activity for which Congress has specifically appropriated funds. A project may not provide EPA with additional resources to perform a particular activity for which Congress has earmarked funds in an appropriations committee report. Further, a project cannot be used to satisfy EPA’s statutory or earmark obligation, or another federal agency’s statutory obligation, to spend funds on a particular activity. A project, however, may be related to a particular activity for which Congress has specifically appropriated or earmarked funds.

c. A project may not provide additional resources to support specific activities performed by EPA employees or EPA contractors. For example, if EPA has developed a brochure to help a segment of the regulated community comply with environmental requirements, a project may not directly, or indirectly, provide additional resources to revise, copy or distribute the brochure.

132. *Id.*

d. A project may not provide a federal grantee with additional funds to perform a specific task identified within an assistance agreement.¹³³

Each of these requirements is clearly directed at avoiding augmentation problems by prohibiting the use of SEPs to assist any project upon which the EPA or any other federal agency might be required to spend appropriated funds, which would, as a result, increase the funds the federal agency would have available for other activities.

The SEP program illustrates two aspects of the Augmentation Problem. First, even in the context of a massive and highly visible program, the executive branch has the ability to induce settlements that run the risk of creating significant augmentation problems. The SEP program involves projects that have had a dollar value of over a hundred million dollars in at least one year.¹³⁴ Yet even a program this large and public was able to be implemented in spite of opposition from influential members of Congress and the GAO. It took careful and responsible efforts from the Department of Justice and EPA to ensure that Congress's appropriations prerogatives would be respected. A Department of Justice that was inclined to cheat on these standards in order to dodge Congress's appropriations authority would undoubtedly be able to avoid detection or resist any efforts to constrain its ability to evade Congress's power of the purse.

Second, Congress necessarily relies on the good faith of the Department of Justice in settling cases on terms that respect its constitutional authority. The SEP policy is a good example of how the Department of Justice ought to approach the Augmentation Problem presented by case settlements so as to honor the Constitution and Congress's proper role in controlling the appropriations process. It is not hard to imagine, however, that a Department of Justice oriented toward an advocacy model, a more aggressive approach to executive prerogative, and the pursuit of the administration's own policy ends would be able to take significant advantage of its litigation authority to undermine and usurp Congress's constitutional prerogatives. If the decision makers in the Department of Justice are not committed to fair and independent

133. *Id.* at 24,798–99 (citations omitted).

134. *See* Dana, *supra* note 114, at 1189.

analysis of the constitutional issues raised by these kinds of settlement practices, the constitutional separation of powers can be damaged in ways that are as significant, even if less dramatic, than the more visible and publicized matters relating to assertion of national security powers.

2. *The unauthorized grant problem: case studies*

In cases in which the Department of Justice is defending claims against the United States, the Department may be tempted to offer more compensation to the plaintiffs than would be warranted by an independent assessment of the litigation risk presented by plaintiffs' claims. The Department may wish to reward litigants who are political allies or it may have a sincere belief that the moral claims of the plaintiffs deserve to be compensated, notwithstanding the defenses the United States may have against the legal claims. Below, this article considers a number of actual cases defended by the Department of Justice to illustrate the kind of tug that the Department of Justice officials may feel when settling cases brought against the United States.

a. *The Black Farmers case.* The case famously known as the Black Farmers case presents an example of how the settlement power might be abused for political reasons. In the summer of 1997, a group of black farmers filed a class action suit against the United States Department of Agriculture (USDA) in federal district court in Washington, D.C.¹³⁵ The lawsuit was filed on behalf of 641 farmers who had filed discrimination complaints with the USDA over the previous fifteen years.¹³⁶ The plaintiffs claimed that the Department of Agriculture had discriminated against them on the basis of their race by denying them subsidized agricultural loans and then by unfairly refusing to investigate their discrimination complaints after the loans were denied.¹³⁷

The farmers presented a compelling factual claim, and the Department of Agriculture and the Department of Justice, which was representing the Department of Agriculture in the litigation, moved quickly to settle the litigation and provide relief to the

135. See Michael A. Fletcher, *USDA Accused of Ignoring Discrimination Complaint; Black Farmers Also Allege Departmental Bias*, WASH. POST, Aug. 29, 1997, at A3.

136. *Id.*

137. *Id.*

plaintiffs.¹³⁸ The lawsuit drew attention not only from the Secretary of Agriculture, but from President Clinton himself, who met personally with members of the plaintiff class.¹³⁹ The plaintiffs left the meeting with support from President Clinton to obtain a rapid settlement of their litigation.¹⁴⁰

The problem that emerged in the litigation, however, was that the applicable discrimination statutes had a two-year statute of limitations, which would have left the vast majority of farmers without relief.¹⁴¹ In order to settle the litigation, the Associate Attorney General asked the Office of Legal Counsel for advice concerning whether the department could waive the two-year statute of limitations that applied to claims under the Equal Credit Opportunity Act.¹⁴² At that point, Congress's appropriation prerogatives came into play because only Congress may waive statutes of limitations in cases filed against the government. As the OLC opinion noted, "[t]he doctrine of sovereign immunity precludes suit against the United States without the consent of Congress, and the terms of its consent define the extent of a court's jurisdiction."¹⁴³ As a corollary of this rule, the Supreme Court has ruled that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity."¹⁴⁴ As a result, the OLC opinion concluded that, "[b]ecause the terms of consent are established by Congress, modifying the terms of consent requires legislative action. Thus the Attorney General cannot waive the statute of limitations in the litigation or in the compromise of these pending claims."¹⁴⁵

138. Associated Press, *Black Farmers, Clinton to Meet Today Over Bias*, BALTIMORE SUN, Dec. 17, 1997, at 4.A.

139. See Peter Hardin, *\$600 Million for Farmers Planned; Meeting with Clinton 'Forward Movement'*, RICHMOND TIMES DISPATCH, Dec. 18, 1997, at A1.

140. *Id.*

141. See Curt Anderson, *As Bias Claims Blocked, White House Seeks Waiver For Black Farmers*, PHILA. INQUIRER, Apr. 9, 1998, at A12.

142. See Statute of Limitations and Settlement of Equal Credit Opportunity Act Discrimination Claims Against the Department of Agriculture [hereinafter Statute of Limitations and Settlement], 22 Op. Off. Legal Counsel 11 (1998), 1998 OLC LEXIS 43, at *1.

143. *Id.* at *3; see also *United States v. Mottaz*, 476 U.S. 834, 841 (1986).

144. *Block v. North Dakota*, 461 U.S. 273, 287 (1983).

145. Statute of Limitations and Settlement, *supra* note 142, 1998 OLC LEXIS, at *3 (citations omitted).

The OLC memorandum then responded to a suggestion from the Department of Agriculture that, even if it were not authorized to settle Equal Credit and Opportunity Act claims when the statute of limitations had elapsed, it could make administrative settlements of discrimination claims even in the absence of a lawsuit.¹⁴⁶ A previous OLC opinion concluded that, consistent with the Purpose Statute,¹⁴⁷ the Secretary of Agriculture could award monetary relief in administrative settlements or prelitigation equal credit claims if a court could award such relief in an action brought under the act.¹⁴⁸ Moreover, the FTC, which was statutorily authorized to investigate and prosecute equal credit opportunity act claims, had authorized the Department of Agriculture to investigate equal credit claims and provide compensation for those claims prior to litigation.¹⁴⁹ The OLC opinion concluded, however, that because

USDA's authority to use existing appropriations to pay administrative ECOA claims depends upon the existence of a viable civil action that could be brought by the aggrieved claimant . . . ECOA's waiver of sovereign immunity is valid only where a claim is filed before the expiration of the limitations period . . . and the agency cannot rely on the existence of a viable ECOA claim as a basis for extending appropriated funds to pay compensatory damages as part of an administrative settlement.¹⁵⁰

The first OLC opinion was confirmed in a later opinion. This second opinion addressed whether the Supreme Court's decision in *Irwin v. Department of Veterans Affairs*¹⁵¹ altered or in any way undermined the principle that the statute of limitations, in claims against the federal government, is conditioned upon the waiver of sovereign immunity that may not be altered or waived absent congressional action.¹⁵² The second opinion goes into greater detail about the extent of Congress's control over the waiver of statutes of

146. *Id.* at *5.

147. 31 U.S.C. § 1301(a) (2000) (providing that a federal agency may spend funds only on the objects for which they were appropriated).

148. Statute of Limitations and Settlement, *supra* note 142, at *10.

149. *Id.* at *4.

150. *Id.* (citations omitted).

151. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990).

152. *See* Waiver of Statutes of Limitations in Connection with Claims Against the Department of Agriculture, 22 Op. Off. Legal Counsel 127 (1998), 1998 OLC LEXIS 6, at *1.

limitations in suits against the government. Congress's control of waiver is rooted in the separation of powers generally, and more specifically in its appropriations authority: "Congress's exclusive authority over the terms upon which the United States may be sued is rooted in Congress's plenary authority over the appropriation of federal funds."¹⁵³

OLC's conclusion was supported by clear Supreme Court precedent. For example, in *Munro v. United States*,¹⁵⁴ the plaintiff had a good argument that his failure to file within the statute of limitations was induced by the federal government because he was erroneously advised that service of process would toll the applicable statute of limitations.¹⁵⁵ The Supreme Court, however, held that the U.S. Attorney "had no power to waive conditions or limitations imposed by statute in respect of suits against the United States."¹⁵⁶ In this case, the Supreme Court cited *Finn v. United States*,¹⁵⁷ in which the Supreme Court ruled that if a federal statute of limitations creates a "condition or qualification of the right to a judgment against the United States,"¹⁵⁸ the statute of limitations is a nonwaivable bar against any judgment against the United States, unless Congress has "conferred authority upon any of [the government's] officers to waive the limitation imposed by statute."¹⁵⁹

As a result of the Department's decision to adhere to the conclusions of the OLC opinions, the Clinton Administration went to Congress to seek legislation that would waive the two-year statute of limitations.¹⁶⁰ Although the Department took some political heat for proceeding in this manner, it respected Congress's appropriations power and left it up to Congress to adopt the appropriate waiver.¹⁶¹ Ultimately, Congress did adopt a provision in an appropriations bill that extended the statute of limitations from two years to seventeen.¹⁶²

153. *Id.* at *5.

154. 303 U.S. 36 (1938).

155. *Id.* at 36.

156. *Id.* at 41.

157. 123 U.S. 227 (1887).

158. *Id.* at 232.

159. *Id.*

160. Anderson, *supra* note 141, at A12.

161. *Id.*

162. Jenna Greene, *Pigford v. Glickman*, LEGAL TIMES, Nov. 9, 1998, at 25, 25.

Deleted:

After passage of the statutory extension of the time within which to file suit, the Department of Justice settled the case by agreeing to pay hundreds of millions of dollars to compensate the black farmers who were the victims of the USDA's discriminatory loan policies.¹⁶³ This settlement was ultimately approved by the district judge on terms that gave a fixed payment to most of the plaintiffs and allowed a smaller number with better documented proof of damages to go before an independent arbitrator to prove the amount of loss they had suffered.¹⁶⁴ Eventually, the government paid out more than \$600 million dollars under the terms of the settlement agreement.¹⁶⁵

The Black Farmers case is a good example of how the settlement process ought to proceed, with due respect given to Congress's appropriations authority. Rather than leaping over or subverting the limitations imposed by Congress's control over the circumstances in which money judgments may be obtained against the United States, the Department of Justice went to Congress for the appropriate authority before it settled the case. For this result to take place, however, there had to be a commitment to seek neutral legal advice on the difficult questions of settlement authority as well as a commitment to follow that advice once it was given.

b. The Japanese Latin Americans case. Most Americans are familiar with the detention of Japanese Americans during World War II in American internment camps, an internment notoriously upheld in *Korematsu v. United States*.¹⁶⁶ This story is a tragic episode in the history of America's treatment of racial minorities as well as the Court's inability to protect vulnerable groups from oppression by the majority. Congress attempted to bring some sort of closure to this sad tale of injustice by adopting the Civil Liberties Act of 1988,¹⁶⁷

163. See David Firestone, *Agriculture Dept. to Settle Lawsuit by Black Farmers*, N.Y. TIMES, Jan. 5, 1999, at A1.

164. Editorial, *Judge Approves Settlement for Black Farmers*, N.Y. TIMES, Apr. 15, 1999, at A29; Peter Scott, *Pay Dirt: Black Farmers Settle Racial Bias Claims*, ATLANTA J.-CONST., Apr. 15, 1999, at 4B. Ultimately, the D.C. Circuit ruled that the consent decree was fair and reasonable. See Jennifer Bier, *Pigford v. Glickman*, LEGAL TIMES, Apr. 10, 2000, at 46.

165. See Carol McKay, *Farmer Class Action Victory Slowing Down*, FED. LAW., Jan. 2003, at 22, 22.

166. *Korematsu v. United States*, 323 U.S. 214 (1944).

167. Civil Liberties Act of 1988, Pub L. No. 100-383, 102 Stat. 903 (1988) (codified at 50 U.S.C. § 1989 (2006)).

which offered a formal apology to the Japanese Americans along with \$20,000 to each Japanese American internee.¹⁶⁸

Few, however, are familiar with the country's internment of Japanese Latin Americans, who were taken from Latin American countries, principally Peru, and transported to the United States where they were held in internment camps throughout the war.¹⁶⁹ The detention of these Japanese Latin Americans derived from a conference of the foreign ministers of North and South America that convened in Rio De Janeiro in January 1942.¹⁷⁰ These ministers adopted a number of resolutions at the conference, including one that advocated the "[i]nternment of dangerous Axis agents and nationals for the duration of the emergency."¹⁷¹ After the United States agreed to pay for the transportation and detention of these Japanese Latin Americans, over one dozen Latin American countries sent internees to the United States.¹⁷² By the time the last ship transporting Japanese Peruvians arrived in the United States on October 21, 1944, over 2000 Latin Americans had been taken from their homes and imprisoned in United States' internment camps.¹⁷³ These Japanese Latin Americans were kept not only because of the supposed national security threat they posed (although what threat they posed in Peru and other Latin American countries was highly questionable), but also to provide the United States with individuals who might be swapped for Americans being held in Japanese custody.¹⁷⁴ Ultimately, between November 1945 and February 1946 the United States deported between 1400 to 1700 Japanese Latin

168. *Id.* at § 1; § 105(a)(1).

169. See generally C. HARVEY GARDINER, PAWNS IN A TRIANGLE OF HATE: THE PERUVIAN JAPANESE IN THE UNITED STATES (1981); HIGASHIDE SEIICHI, ADIOS TO TEARS: THE MEMOIRS OF A JAPANESE-PERUVIAN INTERNEE IN U.S. CONCENTRATION CAMPS (1994); Corey Takahashi, *The Other Japanese American Internment*, A. MAGAZINE, Sept. 30, 1997, at 40; Julie Tamaki, *An Enduring Indignity: Japanese Latin Americans Interned During War Still Seek Redress*, L.A. TIMES, Feb. 24, 1997, at B1.

170. See GARDINER, *supra* note 169, at 16–17.

171. *Id.*

172. See MICHIE WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS 59 (1996).

173. See Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians—A Case Study*, 40 B.C. L. REV. 275, 290 (1998).

174. *Id.* at 293–94.

Americans to Japan.¹⁷⁵ Others were forced to reside indefinitely in the United States.¹⁷⁶

The congressional effort to provide compensation to those interned during World War II began in 1979 with the creation of the Commission on Wartime Relocation and Internment of Civilians, which Congress created to investigate the internments and to recommend what, if any, compensation should be provided to the wartime internees.¹⁷⁷ After holding a number of public hearings, the commission recommended (1) compensatory payments of \$20,000 to the approximately 60,000 surviving internees; (2) a formal apology by the United States government to all internees; and (3) a presidential pardon for those Japanese Americans convicted of curfew violations.¹⁷⁸ Ultimately, Congress adopted the Civil Liberties Act of 1988.¹⁷⁹ Although previous versions of the bill had required compensation recipients to be citizens or permanent residents of the United States at the time the Act was passed, the conference committee included a requirement that to be eligible for compensation individuals must have been either U.S. citizens or permanent residents at the time of their internment.¹⁸⁰ The result was that Japanese Latin American internees were excluded from the purview of the Act since they were not U.S. citizens or permanent residents, not having lived in the United States prior to internment and having been transported into the United States for the purpose of internment only.

In 1996, the Japanese Latin American internees filed a class-action suit, *Mochizuki v. United States*,¹⁸¹ in which they demanded the same compensation rights that the 1988 Civil Liberties Act granted to Japanese Americans.¹⁸² The lawsuit alleged that the failure

175. See WEGLYN, *supra* note 172, at 64 n.28.

176. Lika C. Miyake, Note, *Forsaken and Forgotten: The Internment of Japanese Peruvians During World War II*, 9 ASIAN L.J. 163, 177-179 (2002); see also Manjusha P. Kulkarni, Note, *Application of the Civil Liberties Act to Japanese Peruvians: Seeking Redress for Deportation and Internment Conducted by the United States Government During World War II*, 5 B.U. PUB. INT. L.J. 309, 316 (1996).

177. See generally COMMISSION ON WARTIME RELOCATION AND INTERMENT OF CIVILIANS: PERSONAL JUSTICE DENIED (1982).

178. *Id.* at xxiii.

179. See *supra* note 167.

180. See H.R. REP. NO. 100-785, at 8-9 (1988) (Conf. Rep.).

181. *Mochizuki v. United States*, 43 Fed. Cl. 97, 97 (1999).

182. See Tim Golden, *Group Seeks Reparations as Detainees*, N.Y. TIMES, Aug. 29, 1996, at A18.

to include Japanese Latin Americans in the compensation fund enacted by the Civil Liberties Act of 1988 deprived the Japanese Latin Americans of equal protection under the laws.¹⁸³ The suit was defended by the federal programs branch of the Civil Division of the Department of Justice, and ultimately the plaintiffs and the government agreed upon a settlement that offered a payment of \$5000 to each of the eligible Japanese Latin American plaintiffs.¹⁸⁴ This settlement was ultimately approved by the Chief Judge of the United States Court of Federal Claims,¹⁸⁵ who, in approving the settlement of the litigation, spoke movingly about the plight of the plaintiffs:

The court approves the settlement of this case based upon the moving and eloquent testimony of several of the class members as well as plaintiffs' fine lawyers. The court believes those class members' statements provide valuable insight into the tragic experiences of Latin Americans of Japanese descent who were interned here during World War II.¹⁸⁶

This all sounds like a reasonable, if not altogether satisfying, conclusion to the tragic saga of the Japanese Latin Americans. But not according to John Miller, who wrote in the *National Review* that the Department of Justice had "gamed" the system by agreeing to the settlement with Japanese Latin Americans.¹⁸⁷ Miller reported that in October 1997, sixty-five members of Congress had sent a letter to President Clinton that urged the President to provide the same \$20,000 compensatory payment to Japanese Latin Americans as was being paid to Japanese Americans under the terms of the Civil Liberties Act of 1988.¹⁸⁸ Clinton replied in January of 1998 that he regretted that it was not "within my authority" to compensate Japanese Latin Americans under the Act.¹⁸⁹ Shortly after Clinton's comment, the Department of Justice filed a brief with the Court of Federal Claims, which was hearing the *Mochizuki* case, in which it

183. *See id.*

184. *See* Dara Akiko Tom, *US Settles Suit Over Wartime Internments*, BOSTON GLOBE, June 13, 1998, at A3; *U.S. Will Pay Reparations to Former Latin American Internees*, N.Y. TIMES, June 15, 1998, at A19.

185. *See Mochizuki*, 43 Fed. Cl. at 97.

186. *Id.*

187. John J. Miller, *Intern Problem*, NAT'L REV., May 3, 1999, at 24.

188. *Id.*

189. *Id.*

stated that “[t]he plain language of the Act leaves no room for doubt that (ACLU) plaintiffs are ineligible for redress payments.”¹⁹⁰ Miller then alleged that political appointees in the Department of Justice suggested a settlement of \$5,000 per plaintiff.¹⁹¹ Miller claimed that the settlement was approved by the Deputy Attorney General notwithstanding a dissent from the General Counsel of the Justice Management Division, who wrote: “I see virtually no litigative risk. Accordingly I cannot advise an accountable officer to certify the settlement payments you propose to make.”¹⁹² Miller also quotes career officials as stating, “There was no way we were going to go down We had an airtight case, and the lawsuit would have been dismissed.”¹⁹³

Although the case for compensation of Japanese Americans is truly compelling, if the Japanese Latin Americans were, as seems to be the case, ineligible for compensation under the Civil Liberties Act, then the decision to settle for an amount that did not reflect the litigation risk of the *Mochizuki* lawsuit amounted to a grant of money unauthorized by the Congress.¹⁹⁴ Indeed it is the compelling nature of the plaintiffs’ moral claim that tests the resolve of the Department of Justice to settle cases based upon the applicable law and leave the policy judgments up to Congress in whose hands the appropriations power constitutionally lies.¹⁹⁵ As of yet, however, Congress has not passed legislation to establish a separate fund to compensate the Japanese Latin American internees in the same manner as Japanese Americans.¹⁹⁶

190. *Id.*

191. *Id.* at 25.

192. *Id.*

193. *Id.* at 24.

194. The settlement agreement provided that settlement funds were to be paid out of the fund established for compensating Japanese Americans. Ultimately, however, this fund was exhausted, and the Department of Justice had to fund the remaining \$4.3 million of the settlement by an appropriation “[b]uried deep inside the supplemental appropriations bill.” *Id.* By that point, Congress had little choice but to complete the settlement payout.

195. Indeed, Congress has been presented with a bill titled “The Wartime Parity and Justice Act” which calls for an official apology and a \$20,000 payment to each Japanese Latin American interned in the United States during World War II. See Connie Kang, *Interned Japanese-Latin Americans Seek Redress*, L.A. TIMES, May 16, 2000, at B2.

196. See Tim Johnson, *Deportation Affected Ethnic Japanese in at Least 12 Latin Countries*, MIAMI HERALD, Mar. 16, 2003, available at <http://www.latinamericanstudies.org/us-relations/japanese.htm>.

c. *The sale of F-16 fighter jets to Pakistan.* In the 1980s, the U.S. Government approved a proposed contract between General Dynamics Corporation and Pakistan for the sale of twenty-eight F-16 fighter jets.¹⁹⁷ Pakistan ultimately paid \$658 million for the twenty-eight planes, but the planes were never delivered because a statute known as the Pressler Amendment (named for Senator Larry Pressler of South Dakota) barred all United States military and economic assistance to a country if the President stated that he was unable to certify that the country was not developing nuclear weapons.¹⁹⁸ In 1990, President Bush notified Congress that he was unable to certify that Pakistan had not developed nuclear weapons.¹⁹⁹ As a result, Pakistan did not receive delivery of any of the F-16 jets.²⁰⁰ Ultimately, this impasse became a major stumbling block in relations between Pakistan and the United States.²⁰¹ The Pressler Amendment foreclosed the possibility of Pakistan obtaining the jets, while contractual provisions prevented Pakistan from obtaining a refund of the money it had paid for the jets.

The Clinton Administration found a solution for this standoff by resorting to the Judgment Fund. After Pakistan had threatened to sue the United States over the nondelivery of the jets, the administration reached an agreement with Pakistan under which Pakistan would be paid \$324,600,000 in cash from the Judgment Fund and receive an additional \$142,300,000 from other sources as compensation for the twenty-eight F-16s that Pakistan had paid for in 1989 but had never received.²⁰² News reports at the time noted that using the settlement of a potential claim as a means for obtaining funds from the Judgment Fund allowed the administration to avoid seeking an appropriation from Congress.²⁰³ The reports also indicated that “lawmakers probably would have refused such a request. Many members believe Pakistan created the problem by

197. See Thomas W. Lippman, *Compromise Proposed on Fighter Sale to Pakistan*, WASH. POST, May 24, 1995, at A8.

198. *Id.*

199. *Id.*

200. *Id.*

201. See generally Brian McGrory, *US Looks for a Carrot to Dissuade Pakistan from Answering Rival*, BOSTON GLOBE, May 15, 1998, at A27.

202. Thomas W. Lippman, *U.S. Pays Pakistan for F-16s Withheld Over Nuclear Issue*, WASH. POST, Jan. 1, 1999, at A17 [hereinafter Lippman, *Nuclear Issue*]; *U.S. to Pay Pakistan Back for Undelivered Jets*, N.Y. TIMES, Dec. 22, 1998, at A19.

203. See Lippman *Nuclear Issue*, *supra* note 205, at A17.

deceiving Congress about its nuclear intentions and by paying for the planes, knowing that delivery might be blocked under a 1985 law known as the Pressler Amendment.²⁰⁴ Some sources at the time suggested that the settlement did not accurately reflect litigation risk, but that it was simply a way to get around the need to go to Congress for the funds.

Again, it is unclear whether and to what extent political officials in the Department of Justice may have influenced the settlement of the F-16 case in order to further the political and international relations agenda of the administration. At the very least, it points out the potential use and the incentive to use the Judgment Fund in order to avoid having to seek congressional appropriations. As long as the Department of Justice has control over the settlement of litigation, it has the power to evade Congress's constitutional appropriations authority. Thus, independent and neutral judgment with respect to the settlement of litigation is just as important in preserving Congress's prerogatives as advice to the President on national security issues.

III. THE ENFORCEMENT OF CONGRESS'S APPROPRIATIONS PREROGATIVE

The Appropriations Clause of the Constitution and the statutes promulgated by Congress to protect its appropriations authority are not self-enforcing. Someone has to be responsible for ensuring that executive branch agencies follow the requirements of the Constitution and federal appropriations statutes. Each of the three branches may play some role in enforcing Congress's appropriations prerogative, but there are distinct limitations on the ability of both the judicial and legislative branches to ensure that Congress's rights are protected. Unfortunately, neither the Augmentation Problem nor the Unauthorized Grant Problem can be supervised effectively by any branch of government other than the executive and by any part of the executive branch other than the Department of Justice. As a result, for the reasons discussed below, the department is the only effective check on itself and therefore the only effective defender of Congress's appropriations prerogative in these types of situations. Only an honest and detached analysis of the issues raised by these

204. *Id.*

kinds of cases will protect the public treasury from being raided without any congressional approval.

A. The Judicial Branch

The judicial branch has on a number of occasions enforced appropriations restrictions and other congressional limitations on spending authority.²⁰⁵ In other cases, however, courts have refrained from intervening on justiciability grounds in disputes about the executive's spending authority and alleged violations of congressional restrictions on appropriations.²⁰⁶ Moreover, even "where private parties would have standing to challenge executive compliance with most federal appropriation limitations, they may choose not to do so" because they may be the beneficiaries of the failure to comply with the restriction.²⁰⁷ In short, because the judicial branch is dependent upon private litigants presenting them with litigable and justiciable cases or controversies, the courts are ill-equipped to serve the role of enforcers of Congress's appropriations prerogatives. At best, the courts may be able to provide general guidelines on the scope of Congress's appropriations power. They are ill-suited, however, for day-to-day monitoring of compliance with the Appropriations Clause and the statutory regime enforcing it.

205. See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 172–73 (1978) (holding that TVA appropriations were subject to limitations originating from the Endangered Species Act); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Donovan*, 746 F.2d 855, 859–63 (D.C. Cir. 1984) (holding that appropriations legislation permitted the Secretary of Labor to distribute lump-sum appropriations among selected training programs), *cert. denied*, 474 U.S. 825 (1985); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510–11 (D.C. Cir. 1984) (en banc) (upholding the justiciability of a claim that the President had permissibly violated Congress's appropriations authority by training Salvadorian soldiers in Honduras), *vacated and remanded*, 471 U.S. 1113 (1985); *City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977) (holding that Secretary of Transportation had violated restrictions in appropriations legislation).

206. See, e.g., *Phelps v. Reagan*, 812 F.2d 1293, 1294 (10th Cir. 1987) (denying taxpayer standing to challenge the use of appropriated funds for the appointment of an ambassador to the Vatican); *Crockett v. Reagan*, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (holding that congressman's challenge to military assistance to El Salvador is nonjusticiable), *cert. denied*, 467 U.S. 1251 (1984); *Dickson v. Ford*, 521 F.2d 234, 235 (5th Cir. 1975) (per curiam) (declining to entertain challenge to President's expenditure of appropriated funds in support of Israel because it was a nonjusticiable political question), *cert. denied*, 424 U.S. 954 (1975).

207. See Stith, *supra* note 17, at 1387 (citations omitted).

B. The Legislative Branch

Enforcement through the legislative branch may come from congressional committees or investigations and opinions issued by the Government Accountability Office on appropriations-related matters.

1. Enforcement by congressional committees

Congress has two basic methods for enforcing its appropriations prerogatives. First, it may conduct oversight and investigations through its own committees to determine whether the executive branch is complying with appropriations statutes. Most of this oversight is routinely conducted by the appropriations committees and the committees with the specific responsibility for particular executive branch departments, such as the Armed Services Committee's oversight over Pentagon spending. Congress has initiated special investigations of particularly egregious violations of its appropriations authority, such as in response to the Iran-Contra affair,²⁰⁸ but congressional oversight, however diligent, cannot begin to keep track of the innumerable appropriations issues dealt with by the executive branch agencies. For this responsibility, Congress relies upon the Comptroller General of the United States and the GAO.

2. The Government Accountability Office

The GAO was established as the General Accounting Office²⁰⁹ as a result of the Budget and Accounting Act of 1921.²¹⁰ Prior to the enactment of the Budget and Accounting Act, auditing and financial review functions of the federal government were carried out by the Department of the Treasury.²¹¹ Because of the perceived shortcomings of the Treasury's audits of executive branch financial transactions,

208. See *Hearings*, *supra* note 20.

209. Effective July 7, 2004, the GAO's legal name was changed to the Government Accountability Office pursuant to the GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811.

210. Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 23 (codified as 31 U.S.C. § 702 (2000)).

211. See RICHARD E. BROWN, *THE GAO: UNTAPPED SOURCE OF CONGRESSIONAL POWER* 10 (1970).

the Budget and Accounting Act . . . transferred audit responsibilities from the Treasury Department . . . to the GAO . . . [and] broadened the scope of audit work by requiring the comptroller general to investigate all matters relating to the receipt, disbursement, and application of public funds and to recommend measures that might lead to greater economy in public expenditure.²¹²

In addition, the Act stated that the Comptroller General shall “make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures.”²¹³ The Act also required the Comptroller General to “specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.”²¹⁴ Thus, the GAO has primary responsibility for ensuring that Congress’s exclusive appropriations authority is preserved.²¹⁵

The Comptroller General is appointed by the President with the advice and consent of the Senate for a term of fifteen years and is removable by joint resolution of Congress, a provision which the Supreme Court has determined makes the Comptroller General an officer of Congress rather than the Executive.²¹⁶ Because the Comptroller General is an officer of Congress, the Court ruled that it was unconstitutional for Congress to vest in the Comptroller General executive authority.²¹⁷ As a result of the Court’s decision in *Bowsher*, the GAO has no binding authority over executive branch agencies. Instead, the Department of Justice has concluded that the GAO’s opinions and audits are advisory only.²¹⁸ Thus, although the

212. *Id.* at 11.

213. Budget and Accounting Act § 312(b), 42 Stat. at 26.

214. *Id.* § 312(c), 42 Stat. at 26.

215. See generally BROWN, *supra* note 211; FREDERICK C. MOSHER, A TALE OF TWO AGENCIES: A COMPARATIVE ANALYSIS OF THE GENERAL ACCOUNTING OFFICE AND THE OFFICE OF MANAGEMENT AND BUDGET (1984); FREDERICK C. MOSHER, THE GAO: THE QUEST FOR ACCOUNTABILITY IN AMERICAN GOVERNMENT (1979); CASES IN ACCOUNTABILITY: THE WORK OF THE GAO (Erasmus H. Kloman ed., 1979).

216. See *Bowsher v. Synar*, 478 U.S. 714, 727–28 (1986), *superseded by statute*, Pub. L. No. 99-366, 100 Stat. 773 (1986), *as recognized in* Nat’l Ass’n of Counties v. Baker, 842 F.2d 369 (D.C. Cir. 1988).

217. *Bowsher*, 478 U.S. at 736.

218. See 20 Op. Off. Legal Counsel 214 (1996), 1996 OLC LEXIS 16, at *36–*37.

GAO's decisions are usually followed by the executive branch,²¹⁹ the Department of Justice feels free to disagree and follow its own interpretation of the applicable law.

An example of such an instance arose in connection with the Bush Administration's controversial use of video news releases without disclosing that the government was the source of the news releases.²²⁰ The GAO issued an opinion in which it concluded that the news releases were not authorized by the applicable appropriations statutes and that the misuse of funds by the Department of Health and Human Services ("HHS") constituted a violation of the Antideficiency Act.²²¹ The Office of Legal Counsel, however, concluded otherwise and, in an opinion for the General Counsel of HHS, ruled that HHS was not bound by the GAO opinion.²²² The OLC opinion generated a storm of protest,²²³ and, ultimately, Congress passed an appropriations rider to prevent the government from using video news releases without disclosing their source.²²⁴ This is, however, the rarest of cases in which an issue is so publicly controversial that Congress is willing and able to enact a statute to reverse the OLC's interpretation of a statute. Much more frequently, the parties remain at odds, and the executive branch follows the Department's ruling on the law.²²⁵

Thus, GAO provides a weak check on the Department of Justice's authority. In the vast majority of cases, the settlement of the Department's cases never comes to the attention of GAO. In the cases in which they do, the Department feels free to ignore GAO's

219. The GAO's recommendations are usually followed because it is required by statute to report on its activities directly to Congress, which is in turn responsible for authorizing agency appropriations. See 31 U.S.C. § 719 (2000).

220. See Kevin R. Kosar, *The Law: The Executive Branch and Propaganda: The Limits of Legal Restrictions*, 35 PRESIDENTIAL STUD. Q. 784 (2005).

221. See Matter of: Department of Health and Human Services, Centers for Medicare and Medicaid Services—Video News Releases, Comp. Gen. B-302710 (2004), 2004 WL 1114403.

222. Expenditure of Appropriated Funds for Informational Video News Releases, 2004 OLC LEXIS 7 (July 30, 2004); see also Christopher Lee, *Administration Rejects Ruling on PR Videos*, WASH. POST, Mar. 15, 2005, at A21.

223. See, e.g., Emily Pierce, *Democrats Blast OMB memos on 'Propaganda'*, ROLL CALL, Mar. 15, 2005, available at 2005 WLNR 3987543.

224. See Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, § 6076, 119 Stat. 231, 301 (2005).

225. See, e.g., Jennifer Yachnin, *GAO, Justice at Odds over GPO Printing*, ROLL CALL, Nov. 21, 2002, available at 2002 WLNR 2222386.

interpretations of the statutes designed to enforce Congress's appropriations prerogatives.

C. Executive Branch Enforcement of Congress's Appropriations Authority

The gaps in the ability of the judicial and legislative branches' ability to oversee the executive's compliance with Congress's appropriations authority means that ultimately the executive branch is responsible for protecting Congress's constitutional prerogatives. The executive, and, in particular, the Department of Justice, must find a way to establish an institutional culture that respects Congress's appropriations power in the course of handling litigation on behalf of the United States. This conclusion has a number of implications for scholars who are considering possible institutional changes at the Department of Justice as well as for executive officials who wish to keep the Department within constitutional bounds.

First, any scholarly discussion of the Department's role within the executive branch, and the need for independence from presidential or political control, must surely take into account the opinion writing function of the Office of Legal Counsel and the litigating function in the Supreme Court of the Solicitor General's office. But it must also take into account the potential for evasion of Congress's appropriations power inherent in the Department's control over litigation on behalf of the United States Government. The Department of Justice's power to settle cases on its own terms presents temptations to circumvent the appropriations process in both the prosecution of cases against private defendants and in the defense of cases brought against the federal government. Any normative discussion of the role played by the Justice Department's lawyers must take into account these real-life temptations and provide for the protection of Congress's constitutional prerogative.

Second, to the extent that these issues involve the role of the Office of Legal Counsel, which is frequently called upon to give advice on appropriations related issues and the legality of settlements, the Office should turn for guidance to a set of foundational principles recently proposed by a number of former

appointees and attorneys from the Office.²²⁶ The ten principles set forth in this proposal provide a foundation for approaching all issues presented to the OLC, but are particularly appropriate in connection with the appropriations issues discussed above. In particular, the first proposed principle is particularly relevant to this issue:

When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.²²⁷

This model of OLC lawyering does not require the OLC lawyer to act only as a judge, without regard to the interests of the office's client, but rather, as Randolph Moss has suggested, the

executive branch lawyer should work within the framework and tradition of executive branch legal interpretation and seek ways to further the legal and policy goals of the administration he serves. He should do so, however, within the framework of the best view of the law and, in that sense should take the obligation neutrally to interpret the law as seriously as a court.²²⁸

Several other principles also provide necessary guidance in the context of the appropriations issues discussed above. For example, principle number two counsels that the "OLC's advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of the coordinate branches of the federal government—the courts and Congress—and constitutional limits on the exercise of governmental power."²²⁹ The important element of this principle is that the constitutional obligation of the President and his subordinates in the Office of Legal Counsel is to defend the entire Constitution, not just the executive powers granted by Article II. Although OLC frequently

226. See WALTER E. DELLINGER ET AL., PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL (2004), http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf [hereinafter OLC PRINCIPLES].

227. *Id.* at 1 (emphasis omitted).

228. Moss, *supra* note 12, at 1306.

229. OLC PRINCIPLES, *supra* note 226, at 2.

provides analysis for the President on disputed issues such as executive privilege and congressional oversight of the executive branch, the Office nevertheless has the responsibility for ensuring that Congress's constitutional prerogatives are respected as well.

This conclusion is particularly true when, as is the case with the Justice Department's settlement authority, the Department's actions are essentially unreviewable. The third of the proposed OLC principles speaks to this concern: "OLC's obligation to counsel compliance with the law, and the insufficiency of the advocacy model, pertain with special force in circumstances where OLC's advice is unlikely to be subject to review by the courts."²³⁰ OLC's prior approach, which "would equate 'lawful' with 'likely to escape judicial condemnation,'" ill serves "the President's constitutional duty by failing to describe all legal constraints and by appearing to condone unlawful action as long as the President could, in a sense, get away with it."²³¹ The OLC can play an important role in ensuring that Congress's constitutional authority is respected during the litigation settlement process, but in order to do so, the office must be committed to providing a fair analysis of the issues presented by difficult cases where there may be a strong pull to reach a settlement result that furthers the administration's political and policy goals.²³²

*D. Principles to Guide the Settlement of Cases by the
Department of Justice*

The proposed principles to guide the Office of Legal Counsel also suggest a model that might be emulated in connection with the issues presented by the Justice Department's settlement of litigation. These proposed principles borrow in part from the Supplemental Environmental Project ("SEP") program guidelines in order to address the Augmentation Problem and include additional principles

230. *Id.*

231. *Id.*

232. It is, of course, also important for OLC to do what it can to ensure that it will be consulted on these difficult issues. Hence the ninth of the proposed principles states: "OLC should strive to maintain good working relationships with its client agencies, and especially the White House Counsel's Office, to help ensure that OLC is consulted, before the fact, regarding any and all substantial executive branch action of questionable legality." *Id.* Thus, in cases where the authority to settle is questionable or implicates Congress's appropriations prerogative (such as the Black Farmer's case), it is essential for OLC to remain involved in the process and to provide advice that respects the Constitution's division of authority between the executive and legislative branches.

to address the Unauthorized Grant problem. The underlying protections offered by the proposed principles for OLC guidance and the SEP program would also protect against circumvention of Congress's appropriations power in Department of Justice settlement cases. The following nine principles are inspired by the proposed OLC principles and the SEP guidelines.

In cases prosecuted by the Department of Justice:

1. A settlement may not provide the Department of Justice or any federal agency with resources to increase the funds available for expenditure by the agency or to perform a function for which Congress has appropriated funds.

This guideline sets forth the basic anti-augmentation principle, which prevents a federal agency from effectively enlarging its own budget by having a defendant make resources available to a federal agency in lieu of fines that would otherwise be paid into the Federal Treasury.

2. A settlement may not require the defendant to perform actions that will satisfy a federal agency's responsibility to perform the particular action.

This guideline prevents the Justice Department from evading the anti-augmentation principle by passing off an agency's statutory duties to a defendant in order to make more funds available for other projects.

3. Neither the Department nor any federal agency may control or manage any funds that are paid by the defendant to settle the litigation.

This guideline avoids another evasion of the anti-augmentation principle by preventing the Department of Justice from retaining control over funds that may technically remain in the hands of the defendant. Such a settlement technique might meet the letter of the Miscellaneous Receipts Act because the money would not technically be paid to the government, but it would contravene the anti-augmentation principle by effectively giving the agency control over more funds than Congress appropriated, presumably at the price of a higher settlement that would have been paid into the Treasury.

4. A settlement may not require the defendant to perform any actions that do not have a nexus to the alleged violation of the law.

This guideline ensures that the Justice Department does not utilize a settlement to get the offender to perform the Department's idea of a good work that does not have any connection with the underlying subject of the suit. Trading off possible fine payments for remedial action that is connected with the violation is within the generally accepted enforcement authority of the executive branch. If, however, there is no connection between remedial action and the alleged violation, the Department will have traded off the payment of potential fines for an action that cannot be considered remedial of the violation and therefore is akin to an augmentation of the Department's budget.

5. A settlement may not be inconsistent with a provision of the statutes that authorize the case.

This guideline ensures that any settlement terms reflect the requirements of the statutes under which the Department of Justice has prosecuted the alleged violator of federal law. Even if the Department complies with all of the Appropriations Clause related requirements of the Settlement Principles, the Department must still adhere to any requirements that are specific to the law under which the enforcement action has been brought.

In cases defended by the Department of Justice:

6. A case may not be settled with money to be paid out of the Judgment Fund on terms that do not reflect the actual litigation risk to the United States of the claim.

This guideline prevents the Justice Department from paying a settlement simply because it believes the plaintiffs have a worthy cause rather than an actionable case. Congress has the constitutional authority to authorize the payment of the federal government's money for worthy causes, and the executive branch may do so only pursuant to a statutory authorization from Congress.

7. Assessments of litigation risk should be made by career lawyers responsible for the case in order to avoid even the appearance of political favoritism.

This guideline serves two purposes. First, by leaving the assessment of litigation risk to the Justice Department's career lawyers, it would prevent the political appointees from favoring those sympathetic to the administration or those whose causes are consistent with administration policy, thus eliminating any potential

political conflicts. Second, by creating a clear line of authority over risk assessment, the guideline will increase trust in the settlement process by avoiding even the appearance that political motives caused the Department to fudge its assessment of litigation risk. The assessment of litigation risk does not involve the kinds of policy decisions that should remain with accountable political appointees. Litigation risk is not, of course, a science, but it is predictive rather than normative, and, therefore, it should not worry us to leave the political appointees out of the process.

8. The Department may not authorize payment of a settlement from the Judgment Fund if another account is available for the payment (even if there is currently no money in that account to pay the judgment).

This guideline simply codifies the requirement of the Judgment Fund Act. It makes sense to include here, however, that the Department of Justice has a responsibility not to fudge its interpretations of that statute in order to get access to the deep pocket of the Judgment Fund.

9. The Department may not waive defenses, such as the applicable statutes of limitations, that are conditions of Congress's waiver of sovereign immunity.

This guideline underscores the principle that Congress's appropriations power may prevent the government from waiving certain defenses that may be waivable for private defendants. Only Congress has the right to dictate the terms on which the United States may be sued, and the Justice Department may not, on its own, change the terms under which Congress has permitted suit, even if the Department believes the cause to be worthy of compensation.

CONCLUSION

The executive branch has long sought ways to avoid Congress's clear constitutional authority over appropriations from the federal Treasury. Congress has created a web of statutes to enforce its appropriations prerogatives, but the executive branch continues to find ways to manipulate the appropriations process. The settlement authority of the Department of Justice remains one of the biggest loopholes to Congress's control over appropriations. Unfortunately, neither the judicial nor legislative branch has any realistic hope of overseeing the Department's settlement of cases. Instead, as is true

with many issues of executive authority, the executive branch must commit to a set of principles governing the settlement process in order to ensure that it respects Congress's constitutional appropriations power.

