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Hearing before the House Judiciary Committee's Subcommittee on the Constitution and Limited Government, "Government Litigation and the Need for Reform."

Written remarks from Mr. John Shu, Esq.

Imagine that a Republican administration's Justice Department ("DOJ") settles mortgage fraud cases with several bulge-bracket banks for over $25 billion in aggregate, and as part of those settlement agreements the DOJ required the banks to pay "donations" to hundreds of third-party organizations, all of which are politically allied with the Republican administration and none of which are either victims of the banks' wrongdoing or parties to the litigations. Even worse, the Republican DOJ allowed the banks to receive a tax-deductible $2.00 credit for every $1.00 they "donated," money that instead should have gone to helping the banks' victims.

Imagine that a Democrat administration's DOJ settles a securities fraud case with a pharmaceutical giant, and as part of that settlement the defendant pharmaceutical is required to fund

a $5 million professorship at the law school from where the local U.S. Attorney graduated, a move that will certainly boost his political future in local politics. Even worse, the local U.S. Attorney settles several other prosecutions and as part of those settlements he requires the defendant corporations to hire his friends and political allies as “independent monitors,” earning each of them an average of approximately $27 million per year.

The above examples actually happened, except it was the Obama DOJ which violated its own internal guidelines regarding third-party payments and engaged in over $1 billion in aggregate of improper third-party payments to hundreds of politically-allied organizations when settling mortgage fraud cases with banks such as Bank of America, Citi, and JPMorganChase, The DOJ, Congress, nor the banks know for sure on what or how the third-party organizations spent their spoils. Chris Christie was the Republican U.S. Attorney in New Jersey during the Bush (43) Administration who engaged in improper third-party payments and forced Bristol-Myers-Squibb to fund a professorship at Seton Hall Law School as part of its settlement. Christie not only became governor of New Jersey afterwards, but he also ran for the Republican presidential

nomination during the 2016 cycle and reportedly intends on doing so again for the 2024 cycle.

Improper third-party payments ought to trouble each and every Member in this room, regardless of party affiliation or political philosophy, if only because such third-party payments are affronts to Congress' – your – constitutional power and authority which the Executive Branch may not arrogate, and which likely violate the Miscellaneous Receipts Act (31 U.S.C. § 3302(b)) and the Anti-Deficiency Act (31 U.S.C. §§ 1341-1351). Moreover, improper third-party payments intentionally avoid Congressional oversight and auditing, thus violating the "Statement and Account" portion of the Appropriations Clause as well as basic common sense.

As Professor Nicholas Rosenkranz previously testified to the Judiciary Committee, in a monetary settlement, the executive branch agency is responsible for determining the value of the government's claims against the charged party, but only the Congress is responsible for determining where and how those funds are to be used. Constitutionally, federal settlement proceeds first should be paid into the Treasury, and then Congress appropriates those funds. Whenever an

executive branch agency forces a defendant against whom the agency is litigating to pay politically-allied or "approved" third parties via settlements or mitigation plans, it unconstitutionally violates Congress's exclusive power of the purse and basic separation of powers. This is even more so where Congress expressly declines to fund organizations or programs in a budget that the President signed into law, and the executive branch agency uses these third-party payments to re-fund them against Congress' express will. As the Supreme Court stated in *United States* v. *MacCollom*, 426 U.S. 317 (1976), "the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."

The DOJ is not the only executive branch agency which engages in improper third-party payments. Other agencies which also frequently do it include the EPA, HUD, and the Department of the Interior.

Improper third-party payments are also blatantly partisan and political when financial restitution for victims is not, or at least should not be. Chris Christie was criticized, rightly, for his third-party payment choices when he was the U.S. Attorney in

New Jersey. As former House Judiciary Chairman Bob Goodlatte and the Judiciary Committee discovered, the Obama DOJ directed the banks to pay their third-party payments from the banks' mortgage fraud settlements to the Obama Administration's political allies and away from its political opponents. For example, a July 9, 2014 email from [redacted, but perhaps Deborah Leff or Karen A. Lash], DOJ's Acting Senior Counselor for Access to Justice, to Maame Ewusi-Mensah Frimpong, Principal Deputy Associate Attorney General, stated that

> "Concerns include: a) not allowing Citi to pick a statewide intermediary like the Pacific Legal Foundation (does conservative property-rights free legal services) or a statewide pro bono entity (will conflict out of most meaningful foreclosure legal aid) we are more likely to get the right result from a state bar association affiliated entity."

In 2017, then-Attorney General Sessions prohibited improper third-party settlement payments, stating that "Department attorneys may not enter into any agreement on behalf of the United States … that directs or provides for a payment of loan to any non-governmental person or entity that is not a party to the dispute," subject to three clear and limited exceptions. On May 5, 2022, however, Attorney General

Merrick Garland rescinded AG Sessions' prohibition and ordered the DOJ to revise the Justice Manual accordingly. It is worth noting that from 1997 – 2018, the DOJ's U.S. Attorneys' Manual states in § 9-16.325 that, except for certain very limited circumstances:

> Plea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendant to pay funds to a charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant's criminal conduct. Such payments have sometimes been referred to as "extraordinary restitution." This is a misnomer, however, as restitution is intended to restore the victim's losses caused by the criminal conduct, not to provide funds to an unrelated third party.

Executive agencies violate Article I of the Constitution whenever they coerce and/or compel defendants to pay third parties without congressional approval. More investigation and research into the funds' beneficiaries and use is needed. The Congress and the American public have a right to know about the existence, extent, use, and impacts of such improper third-party payments, regardless of whether they are labeled "donations," "mandatory donations," or some other euphemism.

Congress has the power to protect its constitutional and other interests against improper third-party payments. H.R. 788, the "Stop Settlement Slush Funds Act of 2023" is measured and constitutional. In fact, it would be well-within Congress' power to ensure that it covers all improper third-party payments in the context of settlement agreements, *e.g.* not limited to "donations," and Congress has the power to require that settlement monies go only to either the victims whom the defendants allegedly directly harmed and/or to the U.S. Treasury, and not to any third party who, by definition, is neither a victim nor a party to the government's litigation.

Accordingly, this subcommittee should critically examine and analyze the non-partisan question of whether an executive branch agency may require a settling defendant to pay or otherwise give money to a politically-allied or any other third party which is neither a victim nor a party to the settling defendant's litigation, as well as critically examining and analyzing the constitutional and statutory ramifications.

Thank you very much.