ONGOING OVERSIGHT: MONITORING THE ACTIVITIES OF THE JUSTICE DEPARTMENT'S CIVIL, TAX AND ENVIRONMENT AND NATURAL RESOURCES DIVISIONS AND THE U.S. TRUSTEE PROGRAM

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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CONTENTS

MAY 19, 2015

Page

OPENING STATEMENTS

WITNESSES

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Page

APPENDIX

Material Submitted for the Hearing Record

ONGOING OVERSIGHT: MONITORING THE ACTIVITIES OF THE JUSTICE DEPARTMENT'S CIVIL, TAX AND ENVIRONMENT AND NATURAL RESOURCES DIVISIONS AND THE U.S. TRUSTEE PROGRAM

TUESDAY, MAY 19, 2015

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 1:13 p.m., in room 2141, Rayburn House Office Building, the Honorable Tom Marino (Chairman of the Subcommittee) presiding.

Present: Representatives Marino, Goodlatte, Issa, Collins, Ratcliffe, Trott, Johnson, Conyers, Jeffries, and Peters.

Staff Present: (Majority) Dan Huff, Counsel; Andrea Lindsey, Clerk; (Minority) Slade Bond, Counsel.

Mr. MARINO. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law will come to order. Without objection, the Chair is authorized to declare a recess of the Committee at any time and we are going to vote very shortly. We welcome everyone here today to today's hearing on Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environment and Natural Resources Division and the United States Trustee Program. I will recognize myself now for an opening statement.

House rules in good governance require that congressional Committees conduct regular oversight over Federal agencies within their jurisdiction. The last oversight hearing featuring these Justice Department components took place on May 31, 2012. In the meantime, the activities of these components have raised serious questions that merit congressional oversight. For example, will the Federal Deposit Insurance Corporation's withdraw of its list of "High Risk Merchants" prompt the Civil Division to rethink Operation Choke Point?

A Justice Department spokesperson advised that "because each of our investigations is based on specific evidence of unlawful conduct, the FDIC's revised regulatory guidance will not have an effect on the ongoing investigations." This misses the point. Fraud may be the Civil Division's target, but Operation Choke Point's methodology is having spillover effects. Congress has received numerous reports of banks severing relationships with law-abiding customers from legitimate industries that the Administration has designated "High Risk."

The FDIC's retraction reflected an understanding of these troubling effects. The Civil Division should follow the FDIC's lead and eliminate Operation Choke Point's potential for collateral damage. In the absence of such concrete steps, I fear the Civil Division may simply be continuing with Operation Choke Point as if nothing changed.

Another high profile matter is a Texas judge's finding that division attorneys misled the court during legal challenges to the President's administrative actions on immigration. After a hearing on the matter, the judge wrote, "the Court is extremely troubled by the multiple representations made by the Government's counsel—both in writing and orally . . ." This is not the only judge worried about Civil Division lawyer misconduct.

In a Contracts case involving the ATF, Judge Francis Allegra ruled that "the record revealed at least two instances of conduct by defendant's counsel that, in the court's view, provide indication that fraud on the court has occurred here." How does the Department plan to restore its reputation with these judges and what internal controls have been put in place to prevent a recurrence?

On March 24, 2015, the House Judiciary Committee approved H.R. 712 which addresses inappropriate sue and settle tactics. In this arrangement, plaintiffs and a sympathetic agency collaborate to accomplish, under the authority of a court order a policy change that both want but neither could obtain as readily through standard processes.

In July 2013, 12 State Attorneys General sued the Environmental Protection Agency saying they are to use sue and settle action tax needs to circumvent the legislative and regulatory process. The complaint alleges the practice has raised utility costs by as much as 20 percent in many regions.

A separate study of just six Obama administration sue-and-settle environmental regulations found that they would cost an estimated $101 billion annually. How does ENRD evaluate whether to settle environmental cases? Furthermore, how does it ensure in the settlement context that, the statutes and Executive Orders intended to ensure quality regulations and adequate public input are respected? Environmental enforcement is also a frequent source of over-criminalization. What steps is ENRD taking to prioritize the right cases and use civil sanctions rather than criminal penalties where appropriate? This is a bipartisan concern.

Finally, there is an overreaching theme of Obama administration lawyers subordinating law to cause. In a recent article, a former Reagan administration lawyer drew a powerful contrast between Obama administration lawyers and Reagan-era advisers who, for the sake of principle, frequently stood in the way of "actions and policies, thought to be of great value to the administration."

There is much ground to cover in this hearing today and I want to thank the witnesses for appearing and I look forward to their testimony. I look to the Ranking Member, Mr. Johnson, for his opening statement.

Mr. JOHNSON. Thank you, Mr. Chairman. Today four components of the Justice Department, the Civil Division, the environmental and natural resources division and the tax division and U.S. Trustee Program will report to us about their work and about their many accomplishments.

The Civil Division plays a major role in defending the interest of the United States and its citizens over a broad spectrum of issues. The ENRD is charged with protecting the environment and the Nation's natural resources. The tax division ensures compliance with the U.S. Tax Code and we do need one, although it's too complicated, filled and riddled, really, with loopholes and you are—while you're being defunded in terms of your ability to get those entities who are large enough to have the army of lawyers to avoid paying taxes, and you're trying to create a fair tax system or tax enforcement regimen, should I say, despite the budget cuts. I really appreciate the work that you're doing, complying—ensuring compliance with the U.S. Tax Code and ensuring that the Nation's tax revenues are collected. And also, the fourth division, the U.S. Trustee Program promotes the integrity and the efficiency of the bankruptcy system ensuring benefits to all stakeholders in bankruptcy, debtors, creditors and the public.

We have not held oversight hearings of these components in several years, and accordingly, there is much ground to cover. Additionally, I anticipate that the majority may question several of the Justice Department's recent settlement agreements. Since 2013, the Civil Division has investigated and combated mass market consumer fraud by focusing on payment systems on the automated clearinghouse ACH network.

To date, the Justice Department has entered into settlement agreements with three banks: CommerceWest Plaza, CommerceWest Plaza, and Four Oaks. Each of these agreements stem from complaints filed by the Justice Department alleging that the banks lacked reasonable controls to respond to red flag activity, or knew and deliberately ignored the use of these banks accounts and access to the national banking system to defraud consumers of millions of dollars. For instance, Four Oaks Bank allowed a payment processor to directly access the ACH network, allowing it to conduct transactions on behalf of the illegal activity such as online gambling and a Ponzi fraud scheme.

Beyond those investigations, the Justice Department has recently settled with several banks, JPMorgan, Citigroup, and Bank of America, relating to their fraudulent conduct that directly led to the mortgage foreclose crisis and the Great Recession. And in the case of Chase, fraudulent conduct and abuse of the bankruptcy systems integrity; all of this being at such levels that have been no greater than since the Great Recession.

Collectively, these settlements amply demonstrate the fraud that pervaded every level of the securities industry, fraud that substantially contributed to the mortgage foreclosure crisis and the recession, and even fraud on consumers that has occurred years after the onset of the Great Recession.

In addition to significant civil penalties, several of these agreements contain consumer relief provisions designed to provide much-needed relief to millions of Americans affected by the fraudulent sale of toxic securities, including educational assistance through the housing counsel agencies and other programs.

The Department of Housing and Urban Development has documented that if a consumer works with a HUD-approved housing counseling agency, the odds of a favorable outcome to a mortgage foreclose are almost two times greater.

As we search for ways to avoid another mortgage crisis while we are paring the incalculable damage that has already occurred, it is essential that we use every tool to keep families in their homes. Although I wish that the Justice Department settlements had required more of the banks that contributed directly to the plight of so many, I am confident that these agreements will do much to help millions of consumers across the country.

I thank the Justice Department for fighting on behalf of consumers, and I encourage it to continue its investigations and I yield back.

Mr. MARINO. Thank you. The Chair now recognizes the Chairman of the Judiciary Committee, Congressman Goodlatte of Virginia for his opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman. Good afternoon and welcome to our witnesses. The Judiciary Committee is in the midst of a "pattern or practice" investigation of the Justice Department. There is mounting evidence that DOJ is systematically subverting Congress' budget authority by using settlements to funnel money to activist groups.

There have been two important developments. First, the Department of Justice continues to resist document requests, but what little has been provided confirms that activist groups which stood to gain from mandatory donation provisions were involved in placing those provisions in the settlements.

The evidence includes an email from activist groups requesting a meeting with then-Deputy Attorney General Tony West. They write that they, "worked with" Federal officials to include donations as an option in the 2013 JPMorgan settlement. Now they want to go further and have Mr. West make certain "grants mandatory in all future settlements." In another email, they suggest offering "enhanced credit" for such donations.

On March 4, 2014, the activists met with an official from Mr. West's office. Just a few months later, the Department of Justice announced the Citigroup and Bank of America settlements, both of which require mandatory donations to community groups and offer enhanced credit for donations above the required total minimum of $150 million.

This record does not square well with the DOJ's testimony to the Judiciary Committee earlier this year that, "there was no outside third-party group that participated in any way in these negotiations." The groups involved include two local affiliates of the Industrial Areas Foundation, or "IAF." A celebrated scholarly work on community organizing attests to the activist pedigree of IAF. The book highlights the IAF Training Institute's self-description as a "a school for professional radicals," whose objective is, "training to help leaders see the connection between their local issues and associated progressive causes."

Mandatory donation provisions present real dangers of subversion of Congress's appropriations authority. The core concern is institutional and non-partisan. We raised this concern formal with the Department in November 2014, but instead of spending the practice, the Department of Justice has doubled down.

On March 3, 2015, the U.S. Trustee Program entered into an over $50 million settlement with JPMorgan Chase relating to robosigning. $7.5 million of that did not make it to victims. Instead, it went to a third party, largely to educate high school and college students about using credit cards responsibly. The tenuous connection between the alleged harm and the purpose of the donation creates significant questions, and the mere fact that the donation raises concerns under the Miscellaneous Receipts Act.

Furthermore, from a good government standpoint, the settlement is striking in the lack of oversight. It states explicitly, "the parties understand and agree that neither has any oversight over" the third-party recipient, and "neither will monitor the use of the contribution by the recipient." The situation is even more egregious when one considers that the third-party recipient is to receive a required donation that nearly doubles its net level of assets. It's deeply troubling for that to happen at the unilateral discretion of the Executive Branch.

Since this is the first U.S. Trustee Program settlement containing mandatory donations, it appears DOJ is expanding this controversial practice following its initial use in other areas. This disrespects legitimate congressional concerns and reverses the Department of Justice's own policy in 2008 when it nearly banned the practice of third party payments entirely, "due to instances of perceived abuse."

This issue is a high priority for the Committee, but there is also much more to cover. I thank the witnesses for attending, and I look forward to the discussion.

Mr. MARINO. I thank the Chairman. Without objection the Members' opening statements will be made part of the record.

We have an extremely important panel before us here today and I want to thank you for being here. And I will begin by swearing in the witnesses. Would you please stand and raise your right-hand.

Do you swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God? Please be seated.

Let the record reflect that all the witnesses responded in the affirmative.

I will now introduce our witnesses, I will introduce each one right after the other. Our Ranking Member of the full Committee will be here very shortly and he will make his opening statement.

Mr. Benjamin Mizer, correct?

Mr. MIZER. Yes.

Mr. MARINO. Was appointed Principal Deputy Assistant Attorney General for the Department of Justice Civil Division on March 2nd of 2015. Congratulations.

Mr. MIZER. Thank you.

Mr. MARINO. Prior to his employment, Mr. Mizer served in the DOJ as counselor to then-Attorney General Eric Holder, Jr., on matters that include civil litigation, civil rights and national security, and as a Deputy Assistant Attorney General in the Office of Legal Counsel. Mr. Mizer also served as a solicitor general in Ohio and argued in the United States Supreme Court, the Sixth Circuit Court of Appeals and the Ohio Supreme Court. Mr. Mizer is a graduate of University of Michigan Law School and the College of Wooster. He clerked for Judge Judith Rogers of the United States Court of Appeals for the D.C. Circuit, and for Justice John Paul Stevens of the Supreme Court. Welcome, sir.

Mr. MIZER. Thank you.

Mr. MARINO. Our next witness is Mr. John Cruden. Mr. Cruden was confirmed by the U.S. Senate as the Assistant Attorney General for the Environment and Natural Resources Division on December 16 of 2014. Mr. Cruden's government service spans 35 years. He began as an Army ranger in Vietnam, and took the LSAT in Saigon. That was a double horrendous situation. He began his legal career at Army litigator and moved to the Justice Department in 1991 as chief of Environmental Enforcement. Mr. Cruden has played a leading role in almost every major environmental case, including the government's prosecution for the Exxon Valdez oil spill in Alaska, toxic waste dumping at Love Canal in New York, dioxin contamination in Times Beach, and finally the BP oil spill. Mr. Cruden is a graduate of West Point University of Santa Clara law school and the Woodrow Wilson School at the University of Virginia. Welcome, sir.

Ms. Caroline Ciraolo.

Ms. CIRAOLO. Ciraolo.

Mr. MARINO. I am pronouncing it in the Italian way. I apologize for that. It is Caroline Ciraolo.

Ms. CIRAOLO. That's all right.

Mr. MARINO. Is the Acting Assistant Attorney General for the Tax Division. Prior to assuming the position Ms. Ciraolo survived—excuse me, served—in that office, it's a survival—served as a Principal Deputy Assistant Attorney General and Deputy Assistant Attorney General on Policy and Planning for the Tax Division. Ms. Ciraolo has also worked as an attorney adviser for the Honorable Stanley Goldberg of the U.S. Tax Court. Her private sector experience includes serving as the chair of the tax controversy litigation practice group as Rosenberg, Martin, Greenberg, L.L.P. And working for Martin, Junghans, Snyder & Bernstein, PA. She is a graduate of the College of New Jersey and the University of Maryland School of Law, she also holds an LLM in taxation from the University of Baltimore School of Law. Welcome.

Our next witness is Mr. Clifford White, he's the Director of the U.S. Trustee Program, his former role with the program included serving as Deputy Director and Assistant United States Trustee. Prior to the U.S. Trustee Program, Director White served as a Deputy Assistant Attorney General for the Department of Justice and served in an official capacity for two other Federal agencies. Director White is a graduate of George Washington University, and the George Washington School of Law. Welcome, sir.

Mr. WHITE. Thank you.

Mr. MARINO. Each of the witnesses written statements will be entered into the record into its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within the time, there is a timing light in front of you. The light will switch from green to yellow indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired. Thank you so much.

I think—the bell rang for votes, but we can get a couple of statements in by the witnesses, so I'm going to start with Mr. Mizer.

TESTIMONY OF BENJAMIN C. MIZER, PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. MIZER. Thank you, Chairman Marino, Ranking Member Johnson and Members of the Subcommittee. Thank you for inviting me here to testify about the work of the Civil Division of the Department of Justice. I joined and have lead the Division since March 2 of this year, and I appreciate the opportunity to discuss the important work that Civil Division is doing as well as its budget and resource needs for fiscal year 2016.

The Civil Division is made up of more than 1,300 permanent employees, including more than 950 attorneys. Each year, our attorneys handle tens of thousands of cases that collectively involve tens of billions of dollars in claims and recoveries. The Civil Division represents the United States, its agencies, Members of Congress, cabinet officers and other Federal employees. In doing this work, the Division confronts significant policy issues, often with constitutional dimensions, in defending and enforcing various Federal programs and actions. The priorities of the Division include strengthening the security of our Nation, protecting the health and safety of consumers and pursuing fraud against the government and in the finance sector.

Approximately 87 percent of the Division's cases involve defending claims filed against the government. This litigation reflects the vast diversity of government activities. In fiscal year 2014, well over $100 billion was at issue in our defensive suits alone. I'd like to give some examples to illustrate the work done by the Divisions dedicated and talented public servants.

Our work to protect our national security is vital to defending the Nation. In recent years, the Civil Division has, among other things, successfully defended the validity of a cause of action against state sponsors of terror, as well as screening procedures for individuals entering the United States. And the Division's Office of Immigration Litigation has successfully prevented known or suspected terrorists from becoming naturalized citizens, and defended against habeas corpus petitions seeking the release of known or suspected terrorists.

The Civil Division is also primarily responsible for defending the legality of statutes passed by Congress. For example, among other recent cases raising issues of national significance, we are currently defending against constitutional and statutory challenges to a section of the USA PATRIOT Act. While the majority of the Division's work is defensive, the Division has achieved extraordinary results in affirmative litigation as well.

Through these cases, the Civil Division protects the health, safety and financial security of our citizens, returns billions of dollars to the treasury, and holds accountable those who unlawfully threaten the integrity of our financial systems. Since 2009, the Civil Division working with the United States attorneys across the country has obtained more than $33 billion in civil and criminal judgements and resolutions in affirmative cases. During that same period, the Division often in concert with the U.S. Attorneys has used the False Claims Act to recover more taxpayer dollars lost to fraud, over $24 billion, than in any other comparable period.

In fiscal year 2014 alone, the government recovered a record $5.7 billion in False Claims Act cases. And similarly, the government's health care fraud recoveries since January 2009 are at an all-time high.

In addition, through our efforts to target multiple aspect of fraud that contributed to the 2008 financial crisis, the Civil Division, along with the Federal and State partners recovered over $36 billion from JPMorgan Chase, Citibank and Bank of America collectively through settlements resolving claims arising out of misconduct in the packaging marketing, sale and issuance of residential mortgage-backed securities.

Although the most visible efforts of the Civil Division in this area are those lawsuits that result in large monetary judgments, the impact of the Division's work cannot be measured solely in dollars and cents. It must also take into account the Division's efforts to prevent and deter conduct that harms the consumers and the health care system on which they rely, including by pursuing the misbranding and adulteration of drugs, the distribution of tainted food and the sale of unsafe goods.

The President's fiscal year 2016 request for the Civil Division would provide the resources we require to maintain the superior legal representation services that have yielded such tremendous success. The request seeks 1,360 positions, 968 for attorneys, and approximately $326 million, including increases for pursuing health care fraud, enforcing our immigration laws and improving our litigation support services. We hope the House and Senate will fully fund the Division's 2016 request.

It is an honor to be a part of the Civil Division, and I am tremendously proud of the work my colleagues do on behalf of the American people day in and day out. Mr. Chairman, I look forward to addressing any questions you or Members of the Subcommittee may have.

[The prepared statement of Mr. Mizer follows:]

Department of Justice

STATEMENT OF

BENJAMIN C. MIZER
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL
DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

FOR A HEARING ENTITLED

OVERSIGHT OF THE CIVIL DIVISION

PRESENTED

MAY 19, 2015

Statement of Benjamin C. Mizer
Principal Deputy Assistant Attorney General
Department of Justice

Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Committee on the Judiciary
United States House of Representatives

Concerning the Civil Division of the United States Department of Justice

May 19, 2015

Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee:

Thank you so much for inviting me here to testify on the work of the Civil Division of the Department of Justice. I have led the Civil Division since March 2 of this year, and I appreciate the opportunity to discuss the work of the Civil Division and its budget and resource needs for Fiscal Year 2016.

The Civil Division represents the United States, its agencies, Members of Congress, Cabinet officers and other Federal employees. Approximately 87 percent of its cases involve defending claims filed against the government. This litigation reflects the diversity of government activities, involving, for example, challenges to Acts of Congress and actions of the Executive; national security issues; benefit programs; energy policies; commercial issues such as contract disputes, banking, insurance, and patents; all manner of accident and liability claims; and enforcement of immigration laws. In fiscal year 2014, well over $100 billion was at issue in defensive suits alone.

The Division also brings affirmative cases involving, for example, fraud, debt collection, and civil and criminal violations of consumer protection laws. This work plays a critical role in achieving the Attorney General's priority of combating waste, fraud, and abuse. Since 2009, the Civil Division, working with United States Attorneys across the country, has obtained more than $33 billion in civil and criminal judgments and resolutions in affirmative cases. During that same period, the Civil Division, often in concert with the United States Attorneys, has used the False Claims Act to recover more taxpayer dollars lost to fraud – more than $24 billion – than in any other comparable period. In fiscal year 2014, the government recovered more than $5.7 billion, an all-time annual record, and the fifth straight fiscal year that the Department's False Claims Act recoveries exceeded $3 billion. Similarly, the government's health care fraud recoveries since January 2009 are at an all-time high for any comparable period, with recoveries in each of the last five fiscal years exceeding $2 billion. In fiscal year 2014, the government also recovered an unprecedented $3.1 billion from banks and other financial institutions involved in making false claims.

The Division is made up of more than 1,300 permanent employees, including over 950 attorneys. Each year, Division attorneys handle tens of thousands of cases that collectively involve tens of billions of dollars in claims and recoveries. The Division confronts significant policy issues, which often rise to constitutional dimensions, in defending and enforcing various federal programs and actions. The priorities of the Division include strengthening the security of our nation, protecting the health and safety of consumers, and pursuing fraud against the government and in the financial sector.

NATIONAL SECURITY

Defending the nation remains the highest priority of the Department of Justice. Although other parts of the Department have a more visible role in this effort, the actions of the Civil Division are no less vital to its success. Whether those actions entail the defense of national security laws and regulations, the enforcement of the nation's immigration laws, or the litigation of habeas petitions brought by known or suspected terrorists, Civil Division attorneys are dedicated to the protection of the American people.

The Division's efforts in recent years to defend national security have taken a number of different forms, including:

- Supporting efforts to counter the continuing threat of terrorism, the Civil Division has, among other things, successfully defended the validity of a cause of action against state sponsors of terror and also defended against *Bivens* lawsuits against law enforcement officers and high-level government officials arising out of efforts to protect national security.
- The Division's Office of Immigration Litigation has successfully prevented known or suspected terrorists from becoming naturalized citizens, defended against habeas corpus petitions seeking the release of known or suspected terrorists, and has sought to revoke the naturalizations of terrorists.
- The Civil Division has litigated cases relating to the security of our borders and our airports, defending against constitutional challenges to the restriction on photography at border points of entry, screening procedures for individuals entering the United States, and the maintenance of the No Fly List.
- The Division has continued to defend the actions of the military and law enforcement in numerous lawsuits and habeas petitions arising out of the detention of individuals at Guantanamo Bay and Bagram Air Force Base.
- The Division has responded to recent lawsuits relating to the government's bulk collection of telephony metadata, the collection of which permits National Security Agency (NSA) analysts, acting under strict controls imposed by the Foreign Intelligence Surveillance Court, to detect communications between foreign terrorists and their contacts located in the United States. The legality of the program continues to be litigated in district and appellate courts.

HEALTH AND SAFETY

The Civil Division has placed a special emphasis on pursuing conduct that threatens the health and safety of American consumers, including the misbranding or adulteration of drugs, the distribution of tainted food, and the sale of unsafe goods. The Division also prioritizes pursuing false claims that target federal health care programs and threaten the safety and well-being of our citizens. Although the most visible efforts of the Division in this area are those lawsuits that result in large monetary judgments or settlements, the impact of the Division's work cannot be measured solely in dollars and cents. It must also take into account the ability of the Division to prevent and deter the actions of those who seek to harm consumers and the healthcare system upon which they rely.

Fighting fraud against federal health care programs is a pivotal element of the Division's work to protect consumer health and safety. On May 20, 2009, the Attorney General and the Secretary of the Department of Health and Human Services (HHS) announced the creation of the Health Care Fraud Prevention and Enforcement Action Team (HEAT), to increase coordination and optimize criminal and civil enforcement among agencies. Through enforcement actions under the False Claims Act, and aided by the efforts of HEAT, the conclusion of fiscal year 2014 marked the fifth straight year the Department has obtained more than $2 billion in health care fraud cases, amounting to $14.5 billion in federal health care dollars that have been recovered from January 2009 through the end of the 2014 fiscal year.

A significant component of the Department's health care fraud case load consists of cases alleging misconduct by manufacturers of pharmaceuticals and medical devices, as well as hospitals and home health care providers. The pharmaceutical industry accounted for a substantial part of the $2.3 billion in health care fraud recoveries in fiscal year 2014.

For example, in November 2013, the Department announced a $2.2 billion civil and criminal settlement with Johnson & Johnson to resolve allegations by the government, including allegations that a Johnson & Johnson subsidiary unlawfully marketed a drug to control the behaviors of the nation's most vulnerable patients – including elderly nursing home residents, children, and individuals with mental disabilities – uses that the FDA had never approved. Because J&J marketed the drugs for uses not covered by federal health care programs, the company's promotion of the drugs caused physicians and other health care providers to submit hundreds of millions of dollars in alleged false claims against Medicare, Medicaid, TRICARE and other federal health care programs. In addition to the federal civil recovery of more than $800 million, J&J paid more than $575 million in civil claims to state Medicaid programs and $485 million in criminal fines and forfeitures. Combined with the recoveries for the additional allegations, this $2.2 billion global resolution of the government's claims is one of the largest health care fraud settlements in U.S. history.

As noted, the Department's success in combatting fraud against federal health care programs is not simply a matter of the money recovered; it extends to working with our partners to prevent future harm to the American people. In resolving alleged violations, the Civil Division has placed a renewed emphasis on the inclusion of non-monetary measures to prevent misconduct from recurring. We have done so by including such provisions in our agreements or by working with our client agencies to ensure compliance going forward. For example, in addition to the criminal and civil resolutions, J&J executed a five-year Corporate Integrity Agreement with the Department of Health and Human Services Office of Inspector General that requires J&J to implement major changes to the way its pharmaceutical affiliates do business. Among other things, the agreement requires J&J to change its executive compensation program to permit the company to recoup annual bonuses and other long-term incentives from covered executives if they, or their subordinates, engage in significant misconduct.

The Division has also prioritized cases in which we are able to stop ongoing harm from continuing. For example, in the first four months of 2015 the Department secured permanent injunctions in four separate lawsuits against four companies and seven individuals to prevent the production, distribution, or use of adulterated or misbranded food, dietary supplements, and drugs.

The Division's efforts to protect consumer health have also prompted a focus on the safety of food products. The Division has undertaken a number of important efforts over the past two years to hold food processors accountable for the safety of consumers. In September 2014, the Division won a guilty verdict against three people associated with the Peanut Corporation of America in a case arising out of the sale and distribution of salmonella-tainted peanuts and peanut products. Evidence at trial showed that these individuals misled their customers about the presence of pathogens, most notably salmonella, in their food. Two other officials had previously entered guilty pleas, and we are awaiting sentencing for all five individuals. And in 2015 the Division has continued its focus on food safety, working with the United States Attorneys on criminal and civil cases to prevent the distribution of tainted foods, ranging from eggs to cantaloupe to cheese.

FINANCIAL FRAUD

The Civil Division's efforts to combat financial fraud are most directly focused on enforcement against those bad actors that either take advantage of vulnerable consumers – such as struggling homeowners – or wrongly deplete the federal fisc. However, as we saw from the financial crisis that began in 2008, the harm caused by such fraud often extends beyond the specific victim – whether a consumer, an investor, or the federal government. On a broader scale, such fraud jeopardizes investors, markets, and the economy as a whole. The Civil Division is dedicated to holding accountable those actors that threaten the integrity of our financial system.

That commitment has been demonstrated by the Civil Division's efforts to target multiple aspects of fraud that contributed to the 2008 financial crisis. One facet of that fraud involved actions by financial institutions to knowingly approve mortgages that did not meet federal requirements, putting people into homes that they could not afford. When these mortgages failed, the federal government was required to cover the losses – a practice that led to the depletion of the crucial FHA insurance fund. In the last year, the Civil Division, as part of a collective enforcement effort by President Obama's Financial Fraud Enforcement Task Force, and in combination with our partners in the U.S. Attorney's Offices, reached agreements with U.S. Bank, SunTrust, and MetLife that resulted in payments of over $741 million. As part of these agreements, the financial institutions admitted the conduct that gave rise to the investigations, including failing to carry out a quality control program that was effective in identifying non-compliant loans.

Another important type of financial fraud that contributed to the financial crisis was the fraudulent sale of mortgage-backed securities to investors. This conduct has been the focus of the work of the Task Force's Residential Mortgage-Backed Security Working Group; I am a co-chair of that Working Group. In November 2013, as a result of the Working Group's efforts, the efforts of the Civil Division, and the work of our enforcement partners in the U.S. Attorney Offices and elsewhere, JPMorgan agreed to what was, at the time, the largest settlement against a single entity in American history – $13 billion – to resolve federal and state civil claims arising out of the packaging, marketing, sale and issuance of residential mortgage-backed securities. The settlement also required JPMorgan to provide significant relief to consumers in the housing market, including homeowners who were struggling to afford their mortgages. As a result of the efforts of the Working Group and the Department, the Department has more recently entered into settlement agreements with Citibank (for $7 billion) and Bank of America (for $16.65 billion), each of which featured record-setting civil penalties, relief for consumers, and acknowledgments by the banks as to their conduct.

The fraudulent conduct relating to the sale of financial instruments also included the knowing issuance of inflated ratings that misrepresented their true risks. In February of this year, the Civil Division, working with the U.S. Attorney's Office for the Central District of California, 19 states and the District of Columbia, secured a $1.375 billion settlement in a suit filed against the credit rating agency Standard & Poor's Ratings Services (S&P) alleging that S&P engaged in a scheme to defraud investors in structured financial products. The lawsuit alleged that investors, many of them federally-insured financial institutions, lost billions of dollars on securities for which S&P issued inflated ratings that were falsely represented to be objective, independent, and uninfluenced by S&P's relationships with investment banks.

FRAUD IN GOVERNMENT CONTRACTS

The Civil Division plays a leading role in recovering money lost to fraud involving federal government contracts and grant programs. Since fiscal year 2014, the Department of Justice has secured more than $385 million in settlements and judgments based on allegations of false claims and corruption involving government contracts. Although mortgage, housing and health care fraud dominated recoveries for fiscal year 2014, the Division has continued aggressively to pursue fraud in government procurement and other federal programs.

Significant recoveries include settlements with Supreme Group B.V., Lockheed Martin Integrated Systems, Hewlett-Packard Co., and the Boeing Co. The Dutch corporation, Supreme Group, and several of its subsidiaries paid $146 million to settle alleged false claims for food and bottled water, fuel, and transportation in support of our troops in Afghanistan. In addition to the civil settlement, two Supreme Group companies pleaded guilty to major fraud in overcharging the United States for food and bottled water, and paid $288.36 million in fines and restitution – a sum that includes the maximum criminal fine allowed. In another wartime contract matter, Lockheed Martin paid $27.5 million to settle allegations that the company knowingly charged the Army for personnel lacking the qualifications required by contracts to support U.S. forces in Iraq and Afghanistan. Hewlett-Packard paid $32.5 million to resolve claims involving a contract for IT products and services with the U.S. Postal Service. And Boeing paid $23 million to settle alleged false claims for labor on maintenance contracts for the C-17 Globemaster aircraft with the U.S. Air Force.

In addition, the government is pursuing lawsuits against a number of government contractors. Notably, these suits include claims against Kellogg, Brown & Root (KBR) and foreign subcontractors arising from claims in connection with KBR's contract with the U.S. Army to provide wartime logistical support. The government alleged that KBR employees took kickbacks in return for awarding subcontracts at inflated prices for services and equipment that were often deficient or not provided at all, as well as other false and inflated claims.

DEFENDING FEDERAL STATUTES AND PROGRAMS

The Civil Division is primarily responsible for defending the legality of statutes passed by Congress. Accordingly, the Civil Division has led the Department's response to a number of recent challenges on issues of national significance. The Civil Division defended the constitutionality of the Affordable Care Act, which was ultimately upheld in major part by the Supreme Court in 2012. Subsequent to that decision, the Division has handled numerous additional lawsuits relating to individual provisions of the Act. The Civil Division is also currently defending against constitutional and statutory challenges to Section 215 of the USA PATRIOT Act. Under the authority of this statute, and with strict controls imposed by the Foreign Intelligence Surveillance Court, the government operates a telephony metadata bulk collection program as part of its efforts to fight terrorism. The Civil Division has also led the defense of constitutional challenges to the Adam Walsh Act, which imposes registration requirements on sex offenders; the Protection of Lawful Commerce in Arms Act, which immunizes firearms manufacturers or sellers from qualified civil liability actions; the Professional and Amateur Sports Protection Act, which prohibits states from authorizing private gambling on sporting events; the Emergency Medical Treatment and Active Labor Act, which requires certain hospitals to provide emergency medical treatment without regard to a patient's ability to pay; and many other statutes. The Division is currently defending against a challenge to the constitutionality of the federal debt ceiling.

The Civil Division also defends the interpretations of statutes and the policies and actions of the Executive Branch. In that role, the Division has handled numerous high-profile lawsuits, including the availability of tax credits under the Affordable Care Act through insurance exchanges set up by the federal government on behalf of a State. As another example, the Division is currently defending a challenge to a decision by the Financial Stability Oversight Council to designate MetLife as a nonbank financial company subject to Federal Reserve supervision and enhanced prudential standards under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

PROTECTING THE FEDERAL FISC

The Civil Division represents the United States, including its officers and agents, in suits for money damages. In 2014 alone, the Division's work has helped the government to avoid billions of dollars in damages sought by obtaining favorable judgments or negotiating settlements for less than the full amount of a plaintiff's claim.

Currently, for example, the Civil Division is defending against claims relating to the government's actions in 2008 and 2009 to address the economic crisis. In one case, the Civil Division is defending a class action on behalf of shareholders of the American International Group (AIG), who are seeking tens of billions of dollars based on allegations relating to the government's 2008 rescue of AIG. Division lawyers represented the government during a two-month trial in this matter last fall. Similarly, the Civil Division is representing the government in multiple lawsuits brought by shareholders of Fannie Mae and Freddie Mac challenging the government's actions in connection with conservatorships of those entities.

DEFENDING IMMIGRATION ACTIONS

The Civil Division defends and prosecutes civil immigration matters in federal court. The Division's Office of Immigration Litigation represents the government in cases in the federal courts of appeals challenging determinations that an individual is subject to removal from the United States or is not eligible for some form of relief that would allow him or her to remain in the United States. These cases represent approximately 11 percent of all cases filed in federal appellate courts, with the Division handling nearly 6,000 new filings in fiscal year 2014 alone. For example, the Division has successfully defended the application of the statutory terrorism-related bars against relief from removal.

The Office of Immigration Litigation also litigates significant challenges to the lawfulness of the government's practices in enforcing the immigration laws. For example, the Office coordinates all litigation defending the expedited removal statute, 8 U.S.C. § 1225, which permits immigration officials to remove expeditiously certain recent unlawful entrants apprehended near the border.

PRESIDENT'S BUDGET REQUEST

The President's FY 2016 request for the Civil Division seeks 1,360 positions (968 attorneys) and $326,009,000, including increases for pursuing health care fraud, enforcing our immigration laws, and improving our litigation support services. This request consists of the resources required to maintain the superior legal representation services that have yielded such tremendous success. We hope the House and Senate will fully fund Civil's FY 2016 request.

At this time, Mr. Chairman, I would be happy to address any questions you or Members of the Subcommittee may have.

Mr. MARINO. Thank you, sir. Mr. Cruden.

TESTIMONY OF THE HONORABLE JOHN C. CRUDEN, ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. CRUDEN. Chairman Marino, Ranking Member Johnson and all Members of the Subcommittee, thank you for inviting me to tell you about the work of the Environmental and Natural Resources Division.

Mr. MARINO. Sir, I don't know if your mic's on or if you have to pull it closer.

Mr. CRUDEN. I'll do it. Again, Chairman Marino and Ranking Member Johnson, Members of the Subcommittee, thank you very much for inviting me here to talk about the work of the Environment and Natural Resources Division. Mr. Chairman, as you pointed out, I am returning to the division where I previously was the career Deputy Assistant Attorney General, and before that, I was the Chief of Environmental Enforcement. During that time, I have witnessed the extraordinary efforts of the career public servants that I now supervise in the division. They spend countless hours representing the United States in Federal courts across our Nation.

The division is over 100 years old now, and functions as the Nation's environment and natural resources lawyer. We've got broad responsibility for thousands of cases. Our enforcement and defensive work protects the country's air, land and water, and promotes responsible stewardship of America's wildlife, natural resources and public lands. I'm very proud of what the division accomplished last year. I was not there for most of it, so I can brag about things that they did in my absence of obtaining over $6 billion in corrective measures through court orders and settlements. They secured over $270 million in civil monetary relief, concluded over 48 criminal cases obtaining important sentences of corporations and individuals, and finally, in handling the defensive part of our docket, saved the American taxpayer over $2 billion.

But the division's highest priority in enforcement remains the Deepwater Horizon litigation holding those people accountable for the millions of barrels that were spilled into the Gulf of Mexico in 2010.

That discharge went on for 87 days; 11 people were killed and over 40 people were injured. The spill affected all of the Gulf States. And we have now been litigating over the course of now several years the penalty aspects of that trial. We've already settled with two of the defendants, but we have been now diligently working through the penalty of the remaining two, both BP and Anadarko. The district court has already issued several rulings. In April, we finished the last trial on penalty and we are now awaiting a decision.

In addition to our enforcement docket, a substantial portion of the division's work includes representing Federal agencies in things like the management of public lands and associated natural and cultural resources, including water rights. This ranges from the defense of the U.S. Department of Agriculture's management of forest lands to the defense of the Interior Department's administration of its Federal onshore and offshore oil and gas programs, mining programs and projects expanding the development of renewable sources of energy like wind and solar. Victories in such cases have provided greater certainty to the regulated community, and have enabled substantial development of energy resources across the country.

In the last few weeks, I've also had the honor of announcing cases across the United States, most of them in partnership with States who joined us in the prosecution of these cases. Here's only a few examples that are explained in more detail in my prepared testimony. On Earth Day, with the State of Colorado we announced a significant Clean Air Act case against Noble. That same day, joining with the State of Arkansas, we announced a case, ExxonMobil which involved an oil spill into a tributary of the Arkansas River. Following that, with the State of California, we announced Lehigh Cement, an important Clean Water Act case. In each of those cases, we look for settlements that were going to make sure that those things didn't happen again to violate the law. We're looking to correct the environmental misdeeds and the penalties that we achieved, each one of them were shared with the States.

Just last week, with three U.S. Attorneys' offices in North Carolina, I had the pleasure of announcing the plea agreement with Duke Energy, including over $100 million in fines, which arose from the massive coal ash spill that went into the Dan River in North Carolina in February of 2014.

Mr. Chairman, in my prepared testimony, you have my goals for the year coming up. Here are the few that I would highlight.

We want to enforce the Nation's bedrock environmental laws that protect air, land, and water for all Americans. We are dedicated to protecting the public fisc. We are going to advance environmental justice, but promote and defend tribal sovereignty, treaty obligations, and rights of Native Americans.

And finally, we are going to provide effective stewardship of the Nation's public lands, natural resources, and animals, including fighting for the survival of the world's most protected and iconic species and marine resources and working across the government and the globe to end the illegal trade of wildlife.

Again, I appreciate the opportunity to participate in the hearing and would be happy to address any of your questions.

[The prepared statement of Mr. Cruden follows:]

Department of Justice

STATEMENT OF

JOHN C. CRUDEN
ASSISTANT ATTORNEY GENERAL
ENVIRONMENT AND NATURAL RESOURCES DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

FOR A HEARING CONCERNING

OVERSIGHT OF THE ENVIRONMENT AND
NATURAL RESOURCES DIVISION

PRESENTED

MAY 19, 2015

Statement of Assistant Attorney General John C. Cruden
Environment and Natural Resources Division
U.S. Department of Justice
Before the Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
May 19, 2015

Chairman Marino, Representative Johnson, and Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss the important work of the Environment and Natural Resources Division (ENRD or the Division) of the U.S. Department of Justice.

In January, I returned to the Division as the Assistant Attorney General following my Senate confirmation. I have had the honor and privilege of spending over two decades at the Department of Justice, first as Chief of the Environmental Enforcement Section and then as a career Deputy Assistant Attorney General. I am grateful for the opportunity to represent the interests of the United States in my current capacity.

The Division functions as the nation's environmental and natural resources lawyer. Our work protects the country's air, land, and water, and promotes responsible stewardship of America's wildlife, natural resources, and public lands. About half of ENRD's lawyers bring enforcement cases against those who violate the nation's civil and criminal pollution-control laws. Others defend environmental challenges to government programs and activities, and represent the United States in matters concerning natural resources and public lands. The Division is responsible for the acquisition of real property by eminent domain for the federal government and for cases arising under the wildlife and marine resources protection laws. In addition, ENRD handles a broad array of important matters affecting Indian tribes and their members, as well as protecting the lands and resources held in trust for them by the United States.

The FY 2016 budget requests $127 million to support ENRD's important work as the nation's environment and natural resources lawyer, representing the United States, and its territories and possessions, in civil and criminal cases that arise under more than 150 federal statutes. ENRD is made up of about 600 permanent employees, more than 400 of whom are attorneys. Each year, Division lawyers handle thousands of cases, and represent virtually every federal agency in courts across the United States. Our primary client agencies are the U.S. Environmental Protection Agency (EPA), the U.S. Department of the Interior, the U.S. Army Corps of Engineers, the U.S. Department of Commerce, the U.S. Department of Agriculture, the U.S. Department of Homeland Security, the U.S. Department of Energy, and the U.S. Department of Defense, among others.

I am very proud of the Division's work and its outstanding litigation results. The Division's efforts result in significant public health and other direct benefits to the American people. In fiscal year 2014, we obtained almost $6.3 billion in corrective measures through court orders and settlements, which will go a long way toward protecting the nation's air, water, and other natural resources. We are also committed to ensuring that American taxpayers receive a substantial return on their investment by securing significant monetary recoveries through litigation. For example, in fiscal year 2014, we secured more than $270 million in civil and stipulated penalties, cost recoveries, natural resource damages, and other civil monetary relief, including more than $162 million recovered for the Superfund. We concluded 48 criminal cases against 77 defendants, obtaining more than 37 years in confinement and more than $63 million in criminal fines, restitution, community service funds, and special assessments. Finally, by comparing claims made with the amounts ultimately imposed, we estimate that the handling of defensive and condemnation cases closed in fiscal year 2014 saved the United States more than $2 billion.

In this 21st year since the signing of Executive Order 12898, which directed each federal agency to make achieving environmental justice part of its mission, the Department of Justice and the Division remain staunchly committed to the pursuit of environmental justice. Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental and natural resources laws, regulations, and policies. We have done this in many ways, including by working closely with other federal agencies to coordinate environmental-justice efforts, by engaging communities to an unprecedented degree, and by achieving meaningful results for vulnerable communities in our cases.

Looking forward, I have five goals for the coming year:

- **Goal 1**: Enforce the nation's bedrock environmental laws that protect air, land, and water for all Americans.

- **Goal 2**: Vigorously represent the United States in federal trial and appellate courts, including by defending EPA's rulemaking authority and effectively advancing other agencies' missions and priorities.

- **Goal 3**: Protect the public fisc and defend the interests of the United States.

- **Goal 4**: Advance Environmental Justice through all of the Division's work and promote and defend tribal sovereignty, treaty obligations, and the rights of Native Americans.

- **Goal 5**: Provide effective stewardship of the nation's public lands, natural resources, and animals, including fighting for the survival of the world's most protected and iconic species and marine resources, and working across the government and the globe to end the illegal trade in wildlife.

RECENT DIVISION LITIGATION

For purposes of today's hearing, I will highlight a few cases across ENRD's work.

A. Deepwater Horizon

The Division's top civil enforcement priority remains the Deepwater Horizon—Macondo Well oil spill. On April 20, 2010, an explosion and fire destroyed the Deepwater Horizon offshore drilling rig in the Gulf of Mexico and trigged a massive oil spill amounting to millions of barrels. The discharge continued for nearly 90 days. Eleven people aboard the rig lost their lives, and many others suffered injury. The spill seriously impacted natural habitats, wildlife, and human communities along coastal areas of Alabama, Florida, Louisiana, Mississippi, and Texas.

In December 2010, the United States brought a civil suit against BPXP, Anadarko, MOEX, and Transocean for civil penalties under the Clean Water Act and a declaration of liability under the Oil Pollution Act, as part of multidistrict litigation in the U.S. District Court for the Eastern District of Louisiana. In February 2012, the Department announced a partial settlement agreement in which MOEX agreed to pay \$70 million in civil penalties to resolve alleged violations of the Clean Water Act and to spend at least \$20 million to facilitate land-acquisition projects in several Gulf States that will preserve and protect in perpetuity habitat and resources important to water quality. In January 2013, Transocean Deepwater, Inc., agreed to plead guilty to violating the Clean Water Act and to pay a total of \$1.4 billion in civil penalties and criminal fines for its conduct relating to the Deepwater Horizon disaster, including a then record-setting \$1 billion penalty to resolve Clean Water Act civil claims.

The Division is now more than four years into hard-fought litigation against BPXP and the remaining defendants. We have continued to work closely with other Departmental components, a host of federal client agencies, and the five Gulf States in this action. Federal claims involve billions of dollars, both in Clean Water Act penalties and natural resources damages under the Oil Pollution Act.

The Department tried the first phase of the U.S. case (addressing the cause of the disaster and liability) for nine weeks from February through April 2013, as part of a mass trial in which thousands of private plaintiffs also tried parts of their cases relating to liability and fault. The district court then ruled that BPXP and Anadarko were liable under the Clean Water Act as owners of the well from which oil was discharged. BPXP and Anadarko filed an interlocutory appeal in the Fifth Circuit. In June 2014, a Fifth Circuit panel upheld the district court's liability ruling against BPXP and Anadarko. On January 9, 2015, the Fifth Circuit denied rehearing en banc; and BPXP and Anadarko have petitioned the Supreme Court for review of that judgment. We also tried the second phase of the U.S. case addressing how much oil was discharged into the Gulf of Mexico in September and October 2013.

On September 4, 2014, the court held that the discharge of oil was the result of BPXP's gross negligence, its willful misconduct, or both on the well as it neared completion and also in BPXP's central, and often controlling, role in a number of imprudent decisions that were part of the construction of the well.

On January 15, 2015, the district court ruled on the second phase of trial, finding that some 3.19 million barrels of oil discharged into the Gulf of Mexico. Rulings from the first two trial phases are now on appeal to the Fifth Circuit.

During January and February 2015, we litigated the third and final phase of our penalty claim in the district court. That trial addressed all statutory factors relevant to civil penalty under the Clean Water Act, not addressed in the first two phases of trial. We now await the district court's ruling on the third phase, which we expect to include assessment of a civil penalty against BPXP and Anadarko. As the Deepwater Horizon litigation progresses, the United States will take whatever steps are necessary to hold accountable those responsible for the explosion, fire, and oil spill.

B. Other Civil and Criminal Environmental Enforcement

The Division's many other civil and criminal environmental enforcement efforts have immeasurably protected human health and the environment through significant reductions in emissions and discharges of harmful pollutants. The cases discussed below—*A&E Salvage*, *ExxonMobil*, *Lehigh*, and *Tronox*—are illustrative.

In January 2015, five owners and managers of salvage operations at a former textile plant in Tennessee were sentenced to prison terms for conspiring to commit Clean Air Act offenses in connection with the illegal removal and disposal of asbestos-containing materials. A&E Salvage had purchased the former Liberty Fibers Plant in Hamblen County, Tennessee, out of bankruptcy in order to salvage metals which remained in the plant. The United States alleged that the defendants engaged in a multi-year scheme in which substantial amounts of regulated asbestos-containing materials were illegally removed from the plant without properly removing and disposing of the asbestos or providing workers with the necessary protective equipment. Asbestos has been determined to cause lung cancer, asbestosis, and mesothelioma, and EPA has determined that there is no safe level of exposure to asbestos.

After a three-day sentencing hearing that included expert testimony that the exposures of the A&E Salvage workers to asbestos resulted in a substantial likelihood they would suffer death or serious bodily injury, the district court sentenced all five defendants to prison terms. The former manager was sentenced to five years in prison, to be followed by two years of supervised release. Two other managers were sentenced to 37 months and 28 months, respectively. Two other employees also received sentences of six months in prison. The judge ordered all the defendants to pay restitution of more than $10.3 million to clean up the plant site contamination.

On April 22, 2015, we announced a consent decree with ExxonMobil Pipeline Company and Mobil Pipe Line Company (ExxonMobil) related to a pipeline oil spill in Mayflower, Arkansas, on March 29, 2013. ExxonMobil owns and operates the Pegasus pipeline, a 20-inch-diameter pipeline that transports Canadian heavy crude oil over 850 miles from Patoka, Illinois, to Nederland, Texas. The pipeline ruptured and oil spilled directly into a residential neighborhood and then into nearby waterways, including a creek, wetlands, and Lake Conway, which is a tributary of the Arkansas River. Residents of 22 homes were forced to evacuate due to the hazardous conditions in the neighborhood and most people never moved back home. Remediation efforts are nearing completion. In the complaint, filed in June 2013, we sought civil penalties and injunctive relief under the Clean Water Act. The State of Arkansas brought multiple claims for penalties under state law related to the spill and cleanup. Under the consent decree, ExxonMobil will pay a Clean Water Act civil penalty of $3.19 million, which equates to

$1,000 per barrel discharged, and will perform injunctive relief to help prevent and minimize future spills. ExxonMobil will also pay a penalty to the State in the amount of $1 million.

On April 28, 2015, the United States filed a complaint and consent decree under the Clean Water Act against Lehigh Southwest Cement Company and Hanson Permanente Cement, Inc., operator and owner of a rock and aggregate mining and cement manufacturing facility in Cupertino, California. The State of California, on behalf of the California Regional Water Quality Control Board, is a co-plaintiff. Lehigh and Hanson violated two previous Clean Water Act National Pollutant Discharge Elimination System permits by routinely discharging excessive selenium and solids, and occasionally discharging excessive mercury, hexavalent chromium, and other pollutants. The settlement requires Lehigh and Hanson to pay a civil penalty of $2.55 million and to reduce its selenium discharges to levels that will be protective of a selenium-impaired creek. The facility will also be making major technology changes, spending over $5 million to build a new treatment system for selenium and other metals. The consent decree provides a strict schedule for the facility to complete construction and come into full compliance by 2017, as well as interim limits and deadlines that will ensure the process remains on track. Even before formal lodging of the settlement, the facility had already made approximately 50 percent reductions in its selenium discharges as a result of our enforcement efforts. The biologic treatment system that Lehigh will be putting in is an innovative new technology that may have applications to other facilities and industries. Selenium is a difficult pollutant to remove and it is fitting that in Silicon Valley a state-of-the-art technology will help protect Permanente Creek and the San Francisco Bay.

ENRD also files claims to protect environmental obligations owed to the United States when a responsible party goes into bankruptcy. From the beginning of fiscal year 2009 through the second quarter of fiscal year 2015, we obtained agreements in 43 bankruptcy proceedings, under which debtors committed to spend an estimated $3.75 billion to clean up hazardous-waste sites, reimburse the Superfund more than $2.45 billion plus an additional $88 million in interest, and pay more than $154 million in natural resource damages.

Recent developments in an adversary proceeding arising out of a bankruptcy case, *Tronox, Inc. v. Anadarko Petroleum Corp.*, are particularly noteworthy. There, the United States and its co-plaintiff won an award against defendant "New" Kerr-McGee Corporation and certain related defendant companies, all of which are subsidiaries of the Anadarko Petroleum Corporation. In December 2013, the bankruptcy court in New York concluded that the historic Kerr-McGee Corporation fraudulently conveyed assets in 2005 to evade its debts, including its liability for environmental cleanup at toxic sites nationwide. Subsequently, the parties entered into a $5.15 billion settlement, the largest recovery for the cleanup of environmental contamination in American history, which the district court approved on November 10, 2014. Under the settlement, approximately $4.4 billion will be paid to fund environmental cleanup and for environmental claims at numerous contaminated sites around the country, including radioactive uranium waste on the Navajo Nation's reservation; radioactive thorium in Chicago and West Chicago, Illinois; creosote waste in the Northeast, the Midwest, and the South; and perchlorate waste in Nevada.

C. Increasing Domestic Energy Supplies

One component of the continuing efforts to increase domestic energy supplies is expansion of cleaner domestic sources of energy like wind and solar power. The Division has defended challenges to permits and rights-of-way in nearly 40 cases involving solar and wind projects across the country. Our recent successes included favorable rulings on summary judgment in cases involving the Ivanpah Solar Project, the Genesis Solar Project, the North Sky River Wind Energy Project, the Ocotillo Wind Energy Project, the West Tennessee Solar Farm Project, the Deerfield Wind Project, the Cape Wind Project, and the Steens Mountain Wind Project. These victories have enabled substantial development of renewable energy resources across the country.

D. Other Clean Air Act Litigation

Through a settlement approved by the district court in January 2015, the Division obtained its largest Clean Air Act penalty in *United States v. Hyundai Motors Co.*, for violations related to testing and certification of close to 1.2 million vehicles that will emit approximately 4.75 million metric tons of greenhouse gases in excess of their certification to EPA. Automakers Hyundai and Kia will pay a $100 million penalty, spend approximately $50 million on measures to prevent future violations, and forfeit 4.75 million greenhouse gas emissions credits estimated to be worth over $200 million.

On April 22, 2015, we announced a consent decree with Noble Energy, Inc., and simultaneously filed a complaint to support the lodging of the decree. The settlement covers Noble's natural gas production operation in the Denver-Julesburg Basin north of Denver, an area that fails to attain the National Ambient Air Quality Standards for ground level ozone. At issue were emissions of vapors from hydrocarbon liquids, which contain volatile organic compounds, methane, and hazardous air pollutants such as benzene. EPA and State of Colorado inspectors observed emissions from storage tanks using state-of-the-art optical imaging and thermal infra-red cameras. Under the terms of the settlement, Noble will conduct an engineering evaluation of vapor systems, undertake corrective actions as needed, and verify the adequacy of the actions at over 3,400 tank batteries. In addition, Noble will retain a third party to audit the performance of this work, and install next-generation pressure monitoring on tank batteries. The total value of the civil penalty being split between the United States and the State of Colorado, plus Supplemental Environmental Projects, is $8.95 million.

Division cases frequently involve challenges to regulations promulgated to implement other aspects of the Clean Air Act. The Department recently successfully defended two sets of important rules involving power-plant emissions. In April 2014, the Department obtained a victory in the D.C. Circuit concerning EPA's Mercury and Air Toxics Standards rule, which was the first rule limiting emissions of mercury and other hazardous air pollutants from the nation's fossil-fuel-fired electric power plants. One aspect of the D.C. Circuit's decision has been briefed and argued before the Supreme Court, and we expect a decision shortly. Also, in April 2014, the Supreme Court upheld EPA's Cross-State Air Pollution Rule, which limits emissions of nitrogen oxides and sulfur dioxide that contribute to the formation of ozone and particulate-matter pollution that drifts from state-to-state. The Supreme Court found that the rule reflected a "permissible, workable, and equitable" approach to this complex interstate pollution problem.

E. Management of Public Lands and Resources

A substantial portion of the Division's work includes litigation under dozens of statutes and treaties related to the management of public lands and associated natural and cultural resources. Cases involving the U.S. Department of Agriculture's Forest Service, for example, are a significant part of the ENRD docket. The Forest Service is responsible for forests and grasslands totaling 193 million acres. The agency manages those lands according to the multiple-use mandate given to it by Congress. Forest Service lands are important for timber production, watershed protection, non-motorized and motorized outdoor recreation, and wildlife management. Management of Forest Service lands may result in litigation by industry groups, timber companies, environmental organizations, tribes, states, counties, and individuals. Litigation over the management of these lands arises at all levels, ranging from challenges to nationwide rules to small, site-specific timber-harvest projects. Currently, more than a hundred of these cases are pending in the district and appellate courts.

ENRD recently successfully defended the Forest Service's 2012 Planning Rule, which governs the Forest Service's development of individual land and resource management plans for 155 national forests and 20 national grasslands covering over 180 million acres of forest and rangeland throughout the United States. In *Federal Forest Resource Coalition v. Vilsack*, plaintiffs, a coalition of trade associations representing the timber industry, grazers, and motorized recreational interests, brought a facial challenge to the rule. On April 28, 2015, the district court issued a comprehensive opinion explaining that it was dismissing the case because plaintiffs lacked standing to challenge the rule.

ENRD also handles a variety of cases involving federal onshore and offshore oil and gas programs. Typically, these cases challenge decisions by the Interior Department that make federally managed lands or discrete tracts of the Outer Continental Shelf available for lease, exploration, and development by the oil and gas industry. We also handle litigation concerning the amount of royalties that are owed to the United States for oil and gas produced from federal sources, and cases involving the apportionment of oil and gas royalties between the United States and states located along the Gulf Coast.

F. Indian Tribal Work

The Division handles a broad range of matters affecting Indian tribes and their members. We have been actively engaged with the Interior Department and tribes to protect tribal interests such as tribal water rights; tribal hunting, fishing, and gathering rights; reservation boundaries; and tribal jurisdiction and sovereignty. The United States has a government-to-government relationship with each of the 566 federally recognized Indian tribes, and we seek to work collaboratively with them in carrying out this work wherever possible.

We assert water-rights claims for the benefit of tribes to secure safe and reliable drinking water for tribes, as well as water for sanitation, economic development, and other purposes. For example, during this Administration, ENRD contributed to six landmark Indian water-rights settlements and corresponding statutes which, when fully implemented, will resolve complex and contentious water-rights issues in Arizona, Montana, Nevada, and New Mexico.

ENRD is also charged with representing the United States in civil litigation brought by tribes and their members against the United States, including claims that the United States has breached its trust responsibility. Over the past several years, the Division has sought to resolve, without protracted litigation, dozens of Indian tribal "breach of trust" lawsuits. In these cases, numerous federally recognized Indian tribes allege that the United States, principally the Departments of the Interior and the Treasury, violated the federal government's trust duties and responsibilities to the tribes by failing to provide full and complete historical trust accountings and failing to properly manage the tribes' trust funds and non-monetary trust assets or resources. The tribes seek declaratory and injunctive relief, as well as monetary compensation for their financial injuries. From 2002 until today, some 128 Indian tribes and tribal entities filed over 100 such "breach of trust" lawsuits in federal district courts and in the Court of Federal Claims. To date, the United States has settled the trust-accounting and trust-management claims of 87 tribes in 64 cases. The United States will continue settlement discussions in other pending cases and is committed to resolving these matters in a manner that is fair and reasonable to the tribes and the United States.

Among other things, all of these settlements set forth a framework for promoting tribal sovereignty and improving aspects of the tribes' relationship with the United States, while reducing or minimizing the possibility of future disputes and avoiding unnecessary litigation. Under the settlements, the tribes and the United States will implement measures that will lead to strengthened management of trust assets and improved communications between the Department of the Interior and the tribes. Also, the tribes and the United States will use an alternative dispute-resolution process to address concerns regarding the future management of the tribes' trust funds and non-monetary trust resources.

To accomplish these objectives, the President's 2016 budget request includes a $3 million increase to hire attorneys and procure contract litigation support and expert consultant services. We expect to hire hydrologic experts to assess the impact of water depletion and water quality degradation. These expert consultants will also assist in collecting and/or interpreting air-emission and water-quality data to develop civil and criminal cases for potential violations of the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Resource Conservation and Recovery Act in Indian Country.

G. Wildlife Trafficking

The Department, principally through ENRD, has long been a leader in the fight against illegal wildlife trafficking. In the past decade, wildlife trafficking has escalated into an international crisis. Beyond decimating the world's iconic species, this illegal trade threatens international security. Reports from the State Department and elsewhere indicate that transnational criminal organizations, including some terrorist networks, armed insurgent groups, and narcotics trafficking organizations, are increasingly drawn to wildlife trafficking due to the exorbitant proceeds from this illicit trade. These criminal groups breed corruption, disrupt the peace and security of fragile regions, and destabilize communities and their economies, thus undermining not just wildlife laws and international agreements, but the rule of law itself.

Over the last several years, the Department has engaged fully in the Administration's redoubled effort to combat wildlife trafficking through the Presidential Task Force on Wildlife

Trafficking, established by the July 2013 Executive Order on Combating Wildlife Trafficking. The Division serves as a Task Force co-chair (as the Attorney General's delegate) and worked with the other co-chairs from the Departments of State and the Interior, and the numerous other Task Force agencies, to craft the *National Strategy for Combating Wildlife Trafficking*, which the President signed and issued on February 11, 2014. The *National Strategy* emphasizes the need for a "whole of government" approach to combating this problem and identifies three priorities: (1) strengthening domestic and global enforcement; (2) reducing demand for illegally traded wildlife at home and abroad; and (3) strengthening partnerships with foreign governments, international organizations, nongovernmental organizations, local communities, private industry, and others to combat illegal wildlife poaching and trade. The *National Strategy* provides a set of overarching principles to guide the U.S. response to the increasing global wildlife-trafficking crisis.

The Task Force agencies have been working in coordination to implement the Strategy since its issuance, and in February of this year, the Task Force released an Implementation Plan that builds upon the Strategy. The Implementation Plan provides a robust, focused reaffirmation of the nation's commitment to stopping wildlife trafficking, and sets out specific steps to achieve each strategic priority.

The Division works with U.S. Attorneys' Offices around the country and federal agency partners (such as the U.S. Fish and Wildlife Service, U.S. Immigration and Customs Enforcement, and the National Oceanic and Atmospheric Administration) to combat wildlife trafficking under the Endangered Species Act and the Lacey Act, as well as statutes prohibiting smuggling, criminal conspiracy, and related crimes. The Department has successfully prosecuted numerous cases of illicit wildlife smuggling involving trafficking of rhinoceros horns, elephant ivory, South African leopard, Asian and African tortoises and reptiles, and many other forms of protected wildlife and protected plant species. Through enforcement efforts like "Operation Crash"—which is focused on the lucrative and often brutal trade in rhinoceros horns—we work to bring traffickers to justice. This operation has resulted in 20 successful prosecutions thus far, and we are continuing to unravel the sophisticated international criminal networks that engage in these crimes.

Last March, I had the honor of leading the U.S. delegation to the Kasane Conference on the Illegal Wildlife Trade, in Kasane, Botswana, where representatives from more than 30 nations gathered to follow up on the commitments made at last year's London Conference.

To support these efforts, the President's 2016 budget includes a $2 million increase and serves three purposes. First, ENRD seeks two attorney positions to support the additional case and capacity building work that is developing. Second, the Division will retain consulting experts to assist in analysis of a variety of issues important to the development of our cases, including plant and animal identification. In particular, such expert assistance will help us in conducting complex investigations into the operations of multinational corporations involved in the global trade in illegal wildlife and timber and the tracking of proceeds from this trafficking. Third, we will consult with experts to develop a detailed analysis of the domestic ivory markets and supply chain that will help identify targets in this area and prioritize enforcement resources.

H. Land Acquisition

Another portion of the Division's caseload consists of eminent domain litigation. This important work, undertaken with Congressional direction or authority, involves the acquisition of land for projects such as national parks or the construction of federal buildings and for national security-related purposes. Consistent with the mandate of the Fifth Amendment to the U.S. Constitution to pay just compensation when the United States must acquire private property, ENRD works to ensure that all landowners receive fair-market value, while taxpayers are not required to pay in excess of fair-market value. Great efforts are made to resolve disputes without litigation where feasible. As an example of our litigation in this area, we exercised the federal government's power of eminent domain to condemn nearly 276 acres of land in Somerset County, Pennsylvania, where United Airlines Flight 93 crashed on September 11, 2001. The land was acquired to construct the Flight 93 National Memorial. In December 2013, following a week-long trial, the Land Commission issued a report finding that the fair-market value of the property was $1,535,000, which was $21,765,000 less than the amount sought in the litigation. The federal district court in Pennsylvania adopted the Land Commission's report in March 2014. Through this litigation, American taxpayers saved tens of millions of dollars in obtaining the land necessary to develop a national memorial to the passengers on United Airlines Flight 93, who tragically lost their lives on September 11, 2001.

CONCLUSION

At this time, Mr. Chairman, I would be happy to address any questions you or Members of the Subcommittee may have.

Mr. MARINO. Thank you. Ms. Ciraolo.

CAROLINE CIRAOLO, ACTING ASSISTANT ATTORNEY GENERAL, TAX DIVISION, U.S. DEPARTMENT OF JUSTICE

Ms. CIRAOLO. Chairman Marino, Ranking Member Johnson and Members of the Subcommittee, thank you for this opportunity to appear before you to discuss the work of Department of Justice's Tax Division. The Tax Division's mission is to enforce the Nation's Internal Revenue laws fully, fairly and consistently in Federal and State courts throughout the country. In doing so, we aim to promote voluntary compliance with the tax laws by deterring those who try to avoid paying what they owe, and promoting the sound development of law by carefully considering the issues raised in our cases.

In every single case the Tax Division tries to collect the proper amount of tax due and owing, no more, no less. In every criminal case the Tax Division authorizes appropriate charges based on the law and the evidence. The Tax Division typically has 6,000 civil cases in various stages involving claims exceeding $9 billion, and our civil appellate attorneys handle between 600 and 700 appeals each year.

In addition, the Tax Division annually authorizes between 1,300 and 1,800 criminal tax investigations and prosecutions. The Tax Division employs approximately 340 attorneys, 120 executive and administrative staff. These men and women are bright, honest, hardworking and truly dedicated to public service. As Acting Assistant Attorney General, I am honored to represent them today.

One of the biggest enforcement challenges we face is stolen identity refund fraud, commonly referred to as SIRF. In SIRF crimes, offenders steal personal identification information, and file tax returns early in the season showing false refund claims. These crimes often involve multiple offenders at various levels in the conspiracy, and frequently target the most vulnerable members of our society.

SIRF crimes require immediate action to prevent enormous harm to the American public. To this end, the Tax Division delegates authority to the U.S. Attorneys offices to open SIRF related grand juries, charge SIRF offenders by criminal complaint, and seize SIRF-related illegal proceeds.

The Division preserves the traditional role of authorizing SIRF prosecutions and brings its hands-on expertise to many of these cases.

Between October 12 and December 2014, the Department brought more than 725 SIRF prosecutions involving more than 1,400 individuals. Judges have imposed prison terms ranging from several years to more than a decade. The prosecution of SIRF's crimes is a national priority, and together with our Federal, State and local law enforcement partners, we will continue to look for ways to identify schemes, dismantle criminal operations and share real-time information with the IRS to improve its filters.

Combating offshore tax evasion also remains a top priority of the Tax Division. The Department has charged more than 100 U.S. account holders and dozens of individuals who have assisted account holders in evading their U.S. tax obligations.

We have reached resolutions with nine financial institutions, including the historic guilty plea in May of 2014 of Credit Suisse, second largest bank in Switzerland. These efforts have encouraged delinquent taxpayers to come into compliance. According to the IRS, since 2009 there have been more than 50,000 voluntary disclosures of offshore accounts resulting in the collection of more than $7 billion in taxes, penalties and interest.

It is important to keep in mind that not all of our law enforcement actions are public and lack of public disclosure should, in no way, be viewed as inaction on the part of our prosecutors. The Tax Division is currently investigating individuals and entities based on information derived from a wide variety of sources. We are following the evidence where it leads, and where warranted, we will prosecute the offenders to the fullest extent of the law.

In the civil arena, our trial attorneys spends 65 percent of their time defending cases brought against the United States, the majority of which are refund claims and save the Treasury hundreds of millions of dollars. Just this month, the District Court for the Middle District of Louisiana declared a victory for the government in a tax shelter case involving Dow Chemical Company. Over a 13-year period Dow claimed over $1 billion in improper tax deductions. The district court disregarded the transaction in its entirety and imposed a 40 percent penalty.

The Division also engages in affirmative litigation, such as filing collection suits and seeking injunctions against fraudulent tax return preparers and promoters of abusive tax schemes. I have only touched on a few of the many issues litigated by the Tax Division. Each case whether relatively straightforward or complex, can have a significant multiplier effect on voluntary compliance. Where an area of tax law may be susceptible to reasonable dispute, we advance positions that promote the sound development of the law.

And when individuals or entities engage in misconduct to avoid or evade their legal obligations, the Tax Division will use all available tools to firmly but fairly hold them accountable. Thank you for inviting me to appear before you this afternoon and I'm happy to answer any questions you may have.

[The prepared statement of Ms. Ciraolo follows:]

Department of Justice

STATEMENT OF

CAROLINE CIRAOLO

ACTING ASSISTANT ATTORNEY GENERAL
TAX DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

FOR A HEARING CONCERNING

OVERSIGHT OF THE TAX DIVISION

PRESENTED

MAY 19, 2015

Statement of Caroline Ciraolo
Acting Assistant Attorney General
Tax Division
U.S. Department of Justice
Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
May 19, 2015

Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee, thank you for inviting me here to testify about the work of the Tax Division.

The Tax Division's mission is to enforce the nation's tax laws fully, fairly, and consistently in federal and state courts throughout the country in order to promote voluntary compliance with the tax laws, maintain public confidence in the integrity of the tax system, and promote the sound development of the law. The Division functions, broadly, as four groups. The Division's 7 civil trial sections have, on average, about 6,000 cases pending in various stages, with anywhere from 2,500-4,000 being actively worked, and claims in those suits exceeding $9 billion. In any given year, the Tax Division's civil appellate attorneys handle about 650 civil appeals, about half of which are from decisions of the U.S. Tax Court. To help achieve uniformity in nationwide standards for criminal tax prosecutions, the Tax Division's criminal prosecutors are broken into 3 sections and authorize almost all grand jury investigations and prosecutions involving violations of the internal revenue laws. The Division authorizes between 1,300 and 1,800 criminal tax investigations annually. Alone or in conjunction with Assistant United States Attorneys, Tax Division attorneys prosecute these crimes after determining that there is a reasonable probability of conviction based on the existence of sufficient admissible evidence to prove all of the elements of the offense charged. And all criminal tax appeals are handled by our Criminal Appeals and Tax Enforcement Policy Section.

To carry out its mission, the Tax Division currently has approximately 340 attorneys, who are assigned either to one of sixteen sections and offices located in Washington, D.C., or to the Southwestern Civil Trial Section located in Dallas, Texas. Attorneys are supported by approximately 120 administrative support employees.

The President's Budget for the 2016 fiscal year ("FY") requests $113.1 million in funding for the Tax Division. This funding level will allow the Division to continue its enforcement efforts through its prosecutions, collections, and injunction actions -- all areas that are critical to the full and fair enforcement of the tax laws enacted by Congress.

Civil Litigation

Civil Trial. The Tax Division is responsible for litigating all matters arising under the internal revenue laws in all state and federal trial courts, except the United States Tax Court. Tax Division civil litigators enforce the Internal Revenue Service's ("IRS") requests for information in ongoing examinations, and collect and defend tax assessments when the examinations are completed. Tax cases filed *against* the United States comprise nearly 70% of the Division's caseload, both in the number of cases to be litigated and the number of attorney work-hours devoted to them each year. Each year, the Division's civil trial attorneys save the Treasury hundreds of millions of dollars through their representation of the government in defense of refund claims brought by taxpayers. As of September 30, 2014, the Division was defending tax refund cases worth approximately $9 billion to the Federal Treasury.

The Tax Division contributes significantly to closing the tax gap (the difference between the amount of taxes owed and the amount that is not paid on time) through its pursuit of those taxpayers that fail to truthfully and accurately comply with their federal tax obligations. The goal of the Tax Division's civil tax litigation is twofold: first, to enforce the tax laws and collect taxes that would otherwise go unpaid; and second, to assure honest taxpayers that those who choose not to pay their fair share will be pursued and penalized. Collection suits have a direct and positive effect on the Treasury. The Division consistently collects more each year than its entire budget. Over the past five fiscal years, the Division has collected in excess of $ 1.3 billion in unpaid tax debts. Given that the IRS only refers to the Tax Division tax debts that the IRS has been unable to collect administratively, the Division's efforts are a tremendous return on investment in collecting the most difficult debts.

The portfolio of Tax Division attorneys includes a wide array of procedural and substantive tax matters which can affect an individual taxpayer or business, a large number of similarly-situated individual taxpayers, or an entire industry. Transactions at issue can range from the proper reporting of income and deductions on a Form 1040 to the consequences of an investment in a complex corporate tax shelter. When a matter is referred by the IRS for defense or litigation, the Division independently analyzes the facts and applicable law to ensure that the tax system is being enforced uniformly and fairly across the country. As a result, the Division's civil trial attorneys are successful in more than 95% of the cases that they litigate to a decision each year.

Civil Appellate. Tax Division civil appellate attorneys are responsible for briefing and arguing civil federal tax cases before the United States courts of appeal. At any given time, civil appellate attorneys are responsible for approximately 650 cases. About half of the cases involve appeals from decisions of the United States Tax Court, with the balance arising from decisions of the United States district courts and the United States Court of Federal Claims. Civil appellate attorneys also assist the Solicitor General of the United States in drafting pleadings and briefs filed in civil federal tax cases considered by the United States Supreme Court. These include amicus curiae briefs in suits that present issues affecting the interests of the United States, or in which the Court invites the United States to provide its views on tax-related questions. When the government receives an adverse decision from a trial court, the Appellate Section closely evaluates the legal and policy implications of the decision and provides a recommendation to the Solicitor General, taking care to ensure that resources are spent wisely only on the most meritorious government appeals.

Criminal Investigation and Prosecution

Criminal Trial. In addition to our extensive civil practice, the Tax Division authorizes nearly all prosecutions arising under the federal tax laws except for excise taxes and criminal disclosure violations. In most cases, Tax Division prosecutors either conduct or supervise these prosecutions, often in partnership with prosecutors from the United States Attorneys' Offices. The Division's criminal goals are to prosecute criminal tax violations and to promote uniform nationwide criminal tax enforcement. In many cases, the Tax Division receives requests from the IRS to prosecute violations after the IRS has completed an administrative investigation. In other cases, the IRS asks the Tax Division to authorize grand jury investigations to determine whether prosecutable tax crimes have occurred. Tax Division prosecutors review, analyze, and evaluate referrals to ensure that uniform standards of prosecution are applied to taxpayers across the country. In the past few years, the Division has authorized between 1,300 and 1,800 criminal tax investigations and prosecutions each year. After tax charges are authorized, cases are handled by a United States Attorney's Office, by a Tax Division prosecutor, or by a team of prosecutors from both. Tax Division prosecutors also conduct training for IRS criminal investigators and Assistant United States Attorneys, and provide advice to other federal law enforcement personnel, such as the Drug Enforcement Administration ("DEA") and the Federal Bureau of Investigation ("FBI").

The crimes investigated and prosecuted by the Tax Division include attempts to evade tax, willful failure to file returns, and submission of false returns, as well as other conduct designed to violate federal tax laws. The crimes may be committed by individuals, business entities, or tax preparers and professionals. These cases often encompass tax crimes where the source of the individual or business income is earned through legitimate means – as examples, a restaurateur who skims cash receipts; a self-employed individual who hides taxable income or inflates deductions; or a corporation that maintains two sets of books, one reporting its true gross receipts and the other - used for tax purposes - showing lower amounts. Prosecutions in these cases often receive substantial attention in the local and national media, and convictions remind law-abiding citizens who pay their taxes that those who cheat will be punished.

It is not uncommon for tax crimes to be committed during the course of other criminal conduct, such as securities fraud, bank fraud, identity theft, bankruptcy fraud, heath care fraud, organized crime, public corruption, mortgage fraud, and narcotics trafficking. Tax Division prosecutors work closely with the United States Attorneys' Offices on these issues. In addition, Tax Division prosecutors investigate and prosecute domestic tax crimes involving international conduct, such as the illegal use of offshore trusts and foreign bank accounts used to conceal taxable income and evade taxes. As tax crimes have become more complex and international in scope, so has the workload of Tax Division prosecutors. In addition to the traditional cases involving unreported legal source income, over the last several years a greater proportion of our cases involve high net worth taxpayers and tax professionals who sell and implement dubious tax schemes. During FY14 Division prosecutors obtained 121 indictments and 134 convictions (not including the additional criminal tax prosecutions handled exclusively by United States Attorneys' Offices). The conviction rate for cases brought by Tax Division prosecutors generally exceeds 95%.

Criminal Appeals. The Tax Division Criminal Appeals and Tax Enforcement Policy Section (CATEPS) handles appeals in criminal tax cases prosecuted by Tax Division prosecutors, as well as some appeals from criminal tax cases handled by United States Attorneys' Offices. The Division also supervises appeals in matters prosecuted by the United States Attorneys' Offices. The appellate-level review provided by CATEPS attorneys plays a vital role in promoting the fair, correct, and uniform enforcement of federal tax law. CATEPS is also charged with developing criminal tax enforcement policy, and the section provides technical guidance on issues including the sentencing guidelines and restitution in tax cases. The section's international team serves as a resource to Division attorneys and IRS agents on international discovery matters arising in civil and criminal cases. CATEPS also plays a role in providing information and technical expertise on matters involving international tax information agreements and treaties.

It is apparent from this brief overview that Tax Division attorneys are involved in every facet of federal tax enforcement. While we continue to maintain a sizeable caseload of what may be considered "traditional" tax enforcement matters, we are also mindful of the need to identify and respond to ongoing, growing, and new trends in civil and criminal noncompliance. I would like to take a moment to highlight six areas of noncompliance that are among our highest enforcement priorities -- stolen identity refund fraud, abusive tax shelters, abusive promotions, offshore tax evasion, the Swiss Bank Program, and tax defiers.

Stolen Identity Refund Fraud

Investigating, stopping, and prosecuting individuals who engage in tax refund fraud have always been top priorities for the Tax Division. Using a variety of civil and criminal enforcement tools, the Division, along with our partners at the IRS and in the United States Attorneys' Offices, has successfully shut down hundreds of unscrupulous preparers and individuals who viewed the Federal Treasury as a personal bank account. Their schemes have included filing returns containing inflated, false deductions or false W-2 income statements, or preparing returns and failing to remit the refund to the taxpayer. In the past few years an even more aggressive scheme has cropped up across the country at an alarming rate -- stolen identity refund fraud ("SIRF").

SIRF schemes follow the same pattern: theft of social security numbers and other personal identifying information, filing tax returns showing a false refund claim, and then having the refunds electronically deposited or sent to an address where the offender can access the refund checks. In many cases, the taxpayer whose social security number has been compromised will later face difficulties when he or she files a tax return. In other cases, the false returns are filed using social security numbers of deceased taxpayers or others from whom no federal tax return may be due for filing. These schemes are usually implemented in early January, before the proper taxpayer is expected to file his or her return, with the goal of taking advantage of the IRS's efforts to pay out refunds quickly. In many cases, the most vulnerable in our society are the victims. Names and social security numbers have been stolen from medical firms, schools, prisons, and hospitals by dishonest employees who are often paid for the information. Postal workers have been robbed, and in one instance, murdered to gain access to refund checks.

The high potential for financial gain and low physical risk have made stolen identity refund fraud the new crime of choice for drug dealers and gangs. The scope and organization of these criminals is vast and growing, and in certain cases, the criminal proceeds of the crime have been used to purchase illegal narcotics for resale.

For taxpayers whose identities are stolen, the economic and personal consequences can be severe and often long-term. While the IRS has invested substantial efforts and resources to address identity theft concerns, those victimized face months, if not years, of overwhelming paperwork, credit problems, and inconvenience. And when a stolen identity is used to commit tax refund fraud, all taxpayers are victims, and all Americans are impacted by the loss to the Federal Treasury. In recognition of the severity of the problem, the Department and the IRS have devoted significant resources to the successful prosecution of individuals engaged in stolen identity refund fraud. Individuals engaged in this criminal conduct face a variety of charges, including aggravated identity theft, theft of government property, false claims for refund, false returns, and tax conspiracy.

In the last several years, the Department has successfully prosecuted and received significant sentences in cases in which a stolen identity was used to commit tax refund fraud. For example:

- In May 2014, a superseding indictment was returned against nine defendants for their roles in a $20 million dollar stolen identity refund conspiracy. All nine defendants have pleaded guilty and await sentencing. According to the allegations in the indictment, between 2011 and 2013, the defendants ran a large-scale identity theft ring in which they filed over 7,000 tax returns claiming false refunds. As part the scheme, one of the defendants stole identities from the hospital at Fort Benning, Georgia where she worked and had access to the identification data of military personnel, including soldiers who were deployed to Iraq and Afghanistan. Other defendants stole identities from an Alabama state agency and from the Alabama Department of Corrections.

- In June 2014, a Miami, Florida man was sentenced to 120 months in prison for stealing identities and then filing false returns that requested over $13 million in false refunds by fraudulently claiming gambling income and withholding from the Florida Lottery Commission. His co-conspirator opened approximately eighteen bank accounts to deposit these fraudulent refunds.

- In December 2014, a Tennessee woman was sentenced to 102 months in prison. She and her co-conspirators unlawfully obtained personal identifying information of victims, including high school students, and used the information to file false tax returns claiming millions of dollars of refunds. Two co-conspirators have been sentenced to 45 and 48 months in prison, respectively, and three others have pled guilty and await sentencing.

- In January 2015, a Maryland woman and former bank employee, was sentenced to 87 months in prison for her role in a massive and sophisticated identity theft and tax fraud network involving more than 130 individuals. She is among approximately a dozen people who have pleaded guilty in the U.S. District Court for the District of Columbia to charges in one of the largest prosecutions to date involving the use of stolen identifying information. The overall case involves the filing of at least 12,000 fraudulent federal income tax returns that sought refunds of at least $40 million.

- In April 2015, two Michigan women were sentenced to serve 24 months and 18 months respectively after pleading guilty to wire fraud and aiding and abetting identity theft. The women participated in a scheme in which stolen names and social security numbers of recently deceased individuals were used to prepare and file more than 700 fraudulent federal returns. In 2014 a co-defendant was sentenced to serve 30 months in prison and ordered to pay $410,949 in restitution to the United States.

- In April 2015, four Oregon residents were sentenced for their role in a multi-year scheme to defraud the United States of more than $1 million in tax refunds. The scheme involved the filing of over 200 false federal income tax returns that included fraudulent claims for refund between $3,000 and $9,000 per return. The defendants were sentenced to terms of imprisonment ranging from 12 months and a day to 60 months, and all four were ordered to pay restitution to the United States.

As these examples illustrate, SIRF crimes are different from the crimes typically addressed by the Tax Division. While the typical criminal tax case may involve willfully filed false returns, evading the assessment of tax due and owing or the use of sophisticated financial schemes which invariably require lengthy in-depth investigations, SIRF crimes generally involve garden variety theft and fraud. Moreover, SIRF prosecutions are often reactive to exigent circumstances; in many cases, the crime is discovered by local law enforcement officers who come upon a large cache of Treasury checks or debit cards loaded with fraudulent tax refunds.

Recognizing these fast-moving law enforcement needs, on October 1, 2012, the Tax Division issued Directive 144, which delegates to local United States Attorneys' Offices the authority to initiate tax-related grand jury investigations in SIRF matters, to charge those involved in SIRF crimes by complaint, and to obtain seizure warrants for forfeiture of criminally-derived proceeds arising from SIRF crimes, without prior authorization from the Tax Division. The Tax Division retains authority in connection with forfeitures if any legitimate taxpayer refunds are involved.

Directive 144 was the result of collaborative efforts among the Tax Division, the IRS, and the United States Attorneys' Offices to strengthen the law enforcement response to SIRF crimes. The Tax Division continues to work closely with the IRS and United States Attorneys' Offices across the country to ensure effective information sharing and investigative cooperation as permitted by law. And this approach is yielding significant results. Beginning with the implementation of Directive 144 (and the expedited review procedures) and ending March 31, 2014, the Tax Division authorized more than 1,000 SIRF investigations involving more than 1,750 subjects. During the same period the Tax Division and the U.S. Attorneys' Offices have authorized more than 775 prosecutions involving more than 1,500 individuals.

The prosecution of SIRF crimes is a national priority, and, together with our law enforcement partners, we will continue to look for the most effective ways to bring this conduct to an end and to punish these wrongdoers. While the goal is to stop fraudulent refunds at the door, the Tax Division will continue to prosecute these cases and, in doing so, send a clear message to those who engage in this conduct that they will be held accountable for their actions.

Abusive Tax Shelters

The proliferation of abusive tax shelters is a significant problem confronting our tax system. Abusive tax shelters for large corporations and high-income individuals cost the government billions of dollars annually, according to Treasury Department estimates.

Tax shelter litigation is among the most sophisticated and important litigation handled by the Tax Division. Tax shelters are designed to generate large purported tax benefits using multiple entities and complex financial transactions that lack a real business purpose or any real economic substance. Shelter cases often involve well-disguised transactions and tax-indifferent parties located in other countries, making case development and document discovery difficult and expensive. Successfully defending in federal trial and appellate courts the IRS's disallowance of sham tax benefits is critical to the government's efforts to combat abusive tax shelters. Because tax shelters typically involve enormous sums of money and often attract significant media attention, a coordinated and effective effort is essential to prevent substantial losses to the Treasury and deter future use of such tax shelters by other taxpayers.

The Tax Division plays a critical role in the government's efforts to combat abusive tax shelters. For example:

- The Dow Chemical Company engaged in a transaction in which it claimed approximately $1 billion in tax deductions that were generated by a partnership known as Chemtech. *Chemtech Royalty Assoc. LLP v. United States* (M.D. La. 2013). Dow sought to obtain deductions for making royalty payments to itself, and depreciation deductions for a previously depreciated chemical plant. In February 2013, the district court determined that Dow's transactions lacked economic substance and that the Chemtech partnership should be disregarded because it had no purpose other than to create tax benefits. The court also imposed penalties. The district court's opinion was affirmed by the Fifth Circuit in September 2014, and remanded to the district court for determination of the applicability of the 40% penalty.

- In August 2013, the Division successfully defended a favorable district court decision in *WFC Holdings Corp. v. United States* (8th Cir. 2013), a case involving a contingent-liability tax shelter. The Eighth Circuit found that the literal language of the Internal Revenue Code supported WFC's tax treatment of the transaction, but nonetheless disallowed WFC's asserted tax loss and resulting $82 million tax refund because the transaction lacked economic substance.

- The Tax Division recently prevailed in a case involving BB&T Corporation's claim for more than $660 million in tax benefits based on a tax-shelter transaction known as

Structured Trust Advantaged Repackaged Securities (STARS), which was designed and promoted to subvert the foreign tax credit rules and generate illicit tax benefits to be shared among the transaction's participants. *Salem Financial, Inc. v. United States* (Fed. Cl. 2013). The court ruled that BB&T was not entitled to the claimed tax benefits and imposed $112 million in penalties.

- In December 2013, in a case involving a COBRA shelter, the Supreme Court reversed an adverse Fifth Circuit decision and held that the 40% gross valuation misstatement penalty is applicable when a taxpayer engages in an abusive tax shelter transaction that is disregarded in its entirety for lack of economic substance. *United States v. Woods* (Sup. Ct. 2013). The decision also addressed a thorny partnership jurisdictional issue and held that the district court had jurisdiction to determine the applicability of the 40% penalty in a partnership-level proceeding, distinguishing between the "applicability" determination and the ultimate imposition of the penalty on partners. The *Woods* decision has favorably impacted several other tax shelter cases pending in various appellate courts.

- The Tax Division also recently prevailed in two cases involving "sale-in/lease-out" and "lease-in/lease-out" (SILO/LILO) tax shelters (abusive leasing schemes that are designed to transfer, for a fee, tax benefits from one entity that cannot use them, such as a foreign corporation or U.S. municipality, to a U.S. taxpayer). In October 2013, in *UnionBanCal Corp. & Subsidiaries v. United States* (Fed. Cl. 2013), the Court of Federal Claims issued a favorable opinion concerning a LILO transaction involving a public arena in Anaheim, California. UnionBanCal had sought a refund of approximately $91 million. In *Consolidated Edison Co. v. United States* (Fed. Cir. 2013), the Federal Circuit unanimously reversed the lone trial court decision that had upheld the purported tax benefits of the LILO shelter.

These are significant victories and the Tax Division will continue to vigorously defend the IRS's disallowance of the sham benefits claimed by taxpayers who seek to elevate form over substance and undermine the tax system to avoid paying their fair share.

Abusive Promotions

The Department also is actively in combatting those who promote the use of fraudulent schemes and promotions, including the use of domestic or foreign trusts, to evade taxes and hide assets. Promoters of these schemes often use the internet to aggressively market these trusts to the public, and rely upon strained, if not demonstrably false, interpretations of the tax laws. Employing what they often call "asset protection trusts" (ostensibly designed to guard an individual's assets from legitimate creditors, including the IRS), these promoters are in fact assisting taxpayers to fraudulently assign income and conceal ownership of income-producing assets in order to evade paying their taxes. The Tax Division and U.S. Attorneys' Offices are vigorously employing a range of criminal and civil tools, including injunctive relief, to target promoters and address these abusive activities.

- In October 2013, Paul Daugerdas was convicted by a jury of a multibillion-dollar criminal tax fraud scheme. Daugerdas, a lawyer, certified public accountant, and the former head of the tax practice at the Jenkens & Gilchrist law firm, designed, marketed, and implemented fraudulent tax shelters used by wealthy individuals to evade over $1.6 billion in taxes owed to the IRS. The twenty-year scheme generated over $7 billion of fraudulent tax losses and personally netted Daugerdas approximately $95 million in fees. In June 2014 he was sentenced to serve 15 years in prison, ordered to forfeit nearly $165 million in proceeds of the offenses, and to pay over $371 million in restitution to the IRS. Numerous other individuals connected to this scheme were also convicted and sentenced to prison. For instance, Donna Guerin, a former attorney at Jenkens & Gilchrist, pleaded guilty for her role in the scheme and was sentenced in March 2013 to eight years in prison.

- Since 2000, Tax Division attorneys have obtained injunctions against more than 500 tax-fraud promoters and return preparers. For example, in September 2014, the government filed eight civil injunction lawsuits across Florida against the owner and founder of Loan Buy Sell ("LBS") Tax Services and 10 of his franchisees. LBS operated at least 239 tax return preparation stores throughout the southeastern United States, and prepared more than 55,000 federal income tax returns. In the filed complaints the government alleges that LBS prepared tax returns that made fraudulent claims for, among other things, the American Opportunity Tax Credit, the Fuel Tax Credit, and the Earned Income Tax Credit. In February 2015, a court barred two of the defendants from preparing tax returns for others and from owning or operating a tax return preparation business. Litigation continues against the remaining defendants. Until the Division successfully stopped these schemes, they had cost the Federal Treasury more than $2 billion during the past several years and placed an enormous administrative burden on the IRS. If permitted to continue unchecked, these schemes would undermine public confidence in the integrity of our tax system, and require both the IRS and the Tax Division to devote tremendous resources to investigating the fraudulent schemes, seeking corrective action, and collecting the resulting unpaid taxes.

Through our injunction program, the Tax Division works closely with IRS agents and attorneys to ensure that misconduct is detected early, investigated fully, and referred quickly so that it can be stopped before it spreads further.

Offshore Tax Evasion

The Tax Division plays a lead role in investigating and prosecuting those who use foreign tax havens to evade taxes and reporting requirements. The increased technical sophistication of financial instruments and the use of the internet have made it all too easy to move money around the world instantly, without regard to national borders. Using tax havens facilitates evasion of U.S. taxes and related financial crimes, and fosters the perception that if people have enough money and access to unscrupulous professionals, they can get away with hiding money offshore.

Combatting the use of foreign bank accounts to evade U.S. taxes has been a long-standing enforcement priority for the Tax Division. Since 2009, when the Tax Division reached a ground-breaking deferred prosecution agreement with UBS, it has publicly charged more than 100 account holders, of which approximately 90 have pleaded guilty, 12 were convicted following trial, and five are fugitives. The Department's enforcement efforts have reached far beyond Switzerland, as evidenced by public actions involving banking activities in India, Israel, Liechtenstein, Luxembourg, and the Caribbean.

These high-profile enforcement actions created pressure on non-compliant taxpayers to correct their tax returns and report previously undisclosed accounts. According to the IRS, since the inception of the investigation against UBS, over 50,000 disclosures have been made of previously secret accounts through the IRS's offshore voluntary disclosure programs, and taxpayers have paid over $7 billion in back taxes, interest, and penalties. These enforcement efforts not only remedy past wrongdoing, but also bring into the system tax revenue from taxpayers who become compliant going forward.

The Tax Division also is committed to holding accountable foreign banks and individuals who facilitate the evasion of U.S. tax and reporting obligations. The Department has prosecuted more than a dozen facilitators, resulting in 12 guilty pleas and two convictions following trial. An additional 23 facilitators have been indicted and remain fugitives. And since announcing the UBS deferred prosecution agreement in February 2009, the Division has taken public action against four other banks, two in Switzerland, one in Liechtenstein, and one in Israel.

- In December 2014, Bank Leumi, a major Israeli international bank, admitted that it conspired to aid and assist U.S. taxpayers in the preparation and filing of false returns with the IRS by hiding income and assets in offshore accounts at Bank Leumi Group locations in Israel, Switzerland, Luxembourg, and the United States. The deferred prosecution agreement between Bank Leumi and the Department of Justice required the bank to pay $270 million to the United States, provide the names of more than 1,500 of its U.S. account holders, and cooperate with related ongoing investigations.

- In May 2014, Credit Suisse AG pleaded guilty to conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents with the IRS. The guilty plea by the Swiss corporation was the result of a years-long investigation by U.S. law enforcement authorities that also produced indictments of eight Credit Suisse executives since 2011; two of those individuals have pleaded guilty so far. The plea agreement, along with agreements made with other federal and state agencies, required that Credit Suisse pay a total of $2.6 billion.

- In July 2013, the Department announced that Liechtensteinische Landesbank AG, a bank based in Vaduz, Liechtenstein ("LLB-Vaduz"), agreed to pay more than $23 million to the United States and entered into a non-prosecution agreement. As noted in the agreement, before the government began the investigation, LLB-Vaduz voluntarily implemented a series of remedial measures to stop servicing U.S. account holders with undeclared accounts. The bank also assisted in changing the law in Liechtenstein retroactively, which enabled the Division to obtain account files of non-compliant U.S. account holders without having to identify each account holder whose information was requested.

- In January 2013, Wegelin Bank, the oldest private bank in Switzerland, pleaded guilty to conspiracy to defraud the United States for actions arising from its efforts on behalf of U.S. account holders. Wegelin was ordered to pay approximately $58 million to the United States and to forfeit funds in the amount of $16.2 million previously seized by the government from a correspondent account in the United States, for a total recovery to the United States of approximately $74 million.

The absence of public disclosure should not be construed as a sign of inactivity in this critical law enforcement area. The Tax Division has on-going criminal investigations in Switzerland and elsewhere concerning the cross-border activities of foreign financial institutions, domestic and foreign individuals who facilitated U.S. tax evasion and reporting violations, and U.S. accountholders who failed to report income on foreign assets and failed to disclose foreign accounts.

The Department is also successfully using a variety of law enforcement tools to gather information that we believe will lead to admissible evidence in future enforcement efforts. For example, in the last few years the Department obtained orders for John Doe Summonses to be issued for information about U.S. taxpayers held in the United States through correspondent accounts for banks based in Switzerland, India, the Bahamas, Barbados, the Cayman Islands, Guernsey, Hong Kong, Malta, and the United Kingdom. The Tax Division continues to work with the IRS and United States Attorneys to gather information about taxpayers who seek to avoid or evade taxes.

Swiss Bank Program

The investigation and prosecution of offshore tax evasion requires the IRS and the Tax Division to obtain foreign evidence, most often through a tax information exchange agreement or a mutual legal assistance or other treaty. A fundamental issue with respect to obtaining information about accounts located in Switzerland has been the degree to which Swiss law permits disclosure under the Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, signed on October 2, 1996. Swiss banks have often contended, in response to our investigations, that Swiss law prohibited meaningful cooperation (most notably, the disclosure of U.S. account holder identities). As part of our efforts to obtain information from these banks, the Department and the IRS engaged in a series of discussions with representatives of the Swiss government. Our central focus in these discussions was on obtaining information from the banks that would serve our law enforcement goals of encouraging voluntary disclosure by U.S. account holders, prosecuting account holders who fail to come forward, and learning where else in Switzerland and the world U.S. taxpayers attempted to use secret accounts to engage in tax evasion. We also sought to maintain the integrity of pending U.S. law enforcement matters and the ability to prosecute those persons who assisted U.S. taxpayers in evading the law.

On August 29, 2013, the Department announced the Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks (the "Program"), which is designed to encourage Swiss banks to cooperate in our ongoing investigations. The Program invited Swiss banks to come forward to provide cooperation and information in return for the possibility of a non-prosecution agreement or deferred prosecution agreement. Two significant points about the Program should be noted at the outset. First, the Program expressly excludes any bank authorized for investigation in connection with their Swiss banking activity related to U.S. account holders before the Program was announced. Second, the Program expressly excludes all individuals. No banker, professional advisor, or accountholder is offered any sort of protection or immunity under the Program.

Under the Program, banks that were under investigation at the time the Program was announced and therefore, ineligible, are referred to as "Category 1" banks. "Category 2" banks include eligible Swiss banks that self-identified as having committed tax-related offenses, or offenses relating to the filing of Reports of Foreign Bank and Financial Accounts ("FBARs"), in connection with U.S. related accounts. The information required to be provided by the cooperating banks is extensive, and includes full disclosure of their activities, the names of culpable employees and third party advisors, and the number of U.S. accounts. For those accounts that Category 2 banks closed after the Tax Division's investigation of UBS became public in mid-2008, the Program requires disclosure, on an account-by-account basis, of the number of U.S. persons related to the account, and the nature of that relationship, monthly balances, and monthly transfers into and out of the account. Category 2 banks must also cooperate in treaty requests for account records, which Switzerland has committed to process on an expedited basis.

The Category 2 banks are required to pay a penalty that is based on the maximum aggregate values of the undisclosed accounts, and that is calibrated to reflect both the magnitude of a bank's involvement in the misconduct as well as the willingness of the bank to continue to service undeclared accounts after our law enforcement activities became known. The penalty can be reduced to the extent that a Category 2 bank encouraged a U.S. accountholder to come forward and participate in an offshore disclosure program established by the IRS.

Category 2 banks were required to take the initial step of expressing their intent to participate in the Program no later than December 31, 2013. Prior to the execution of a non-prosecution agreement, each Category 2 bank must provide the required information and full cooperation under the terms set out in the Program. Upon execution of the non-prosecution agreement, each Category 2 bank must provide additional information regarding closed accounts, continued cooperation regarding its accountholders and related individuals, and payment of the required penalty. A significant number of banks not previously known to the Tax Division have come forward to accept responsibility for their actions and to offer their cooperation in our law enforcement efforts. Every Swiss bank that comes forward to cooperate under the Program represents an opportunity to obtain valuable law enforcement information from a source that is new to the Division's investigations.

On March 30, 2015, the Department announced that BSI SA, one of the 10 largest private banks in Switzerland, was the first bank to reach a resolution and sign a non-prosecution agreement under the Program. BSI admitted to helping its U.S. clients evade their U.S. tax obligations by, among other things, creating sham corporations and trusts that masked the true identity of its U.S. account holders. Pursuant to the terms of the Program, BSI provided all required information, agreed to cooperate in any related criminal or civil proceedings, demonstrated its implementation of controls to stop misconduct involving undeclared U.S. accounts, and paid a $211 million penalty. On May 8, 2015, Vadian Bank became the second bank to enter into a non-prosecution agreement under the terms of the Program. The Department is moving forward as expeditiously as possible, and hopes to reach agreements with the remaining Category 2 banks before the end of 2015.

The Program also provides for participation by two additional categories of banks. As defined in the Program, "Category 3" banks are Swiss banks that contend that they did not commit any violations of U.S. law but want a determination of their present status regarding their activities. These banks may seek a non-target letter from the Tax Division after providing a report by an independent examiner who conducted an internal investigation and additional information as required by the Program. "Category 3" banks must also verify the percent of U.S. related accounts held in the bank, and the existence of an effective compliance program. "Category 4" banks are Swiss banks that meet certain criteria for "a deemed Compliant Financial Institution" based on definitions in the Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of Foreign Account Tax Compliance Act ("FATCA") signed on February 14, 2013. These banks may also request a non-target letter after verification of their information and status. Category 3 and 4 banks were allowed to begin requesting participation beginning on July 1, 2014.

The Program is furthering our law enforcement goals in several important ways. At the outset, Swiss banks, aware that other Swiss banks might provide information under the Program concerning interbank transactions, came forward to participate. The Program also motivated culpable U.S. account holders, fearful that the Swiss banks would disclose their account information, to make voluntary disclosures to the IRS of their unreported income and undisclosed accounts. In addition, in an attempt to reduce the penalty imposed under the Program, Swiss banks made a concerted effort to encourage U.S. accountholders to participate in an announced IRS Voluntary Disclosure Program or Initiative. Finally, the Program requires cooperating Swiss banks to provide information regarding the movement of funds outside Switzerland. This sends a clear message to U.S. taxpayers that no haven is safe from the Department's offshore enforcement efforts.

While the Tax Division uses a variety of criminal and civil law enforcement tools to successfully investigate and prosecute offshore tax evasion, our efforts would be greatly enhanced by the ratification of the protocol signed on September 23, 2009 (the "Protocol"), amending the Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income. The Protocol has been waiting for the advice and consent of the Senate for more than five years. Once the Protocol is ratified, an account that remained in a Swiss bank after September 23, 2009 will be subject to a less restrictive standard of disclosure. The Protocol will enhance our ability to gather full, detailed information about the account from Swiss entities and better enable the Division to pursue the funds and the account holder. We are hopeful that the Senate will act on the Protocol as soon as possible.

Tax Defier Initiative

Tax defiers, also known as illegal tax protesters, have long been a focus of the Tax Division's investigative and prosecution efforts. For decades, tax defiers have advanced frivolous arguments and developed numerous schemes to evade their income taxes, assist others in evading their taxes, and frustrate the IRS, under the guise of constitutional and other meritless objections to the tax laws. Frivolous arguments used by tax defiers include, for example, spurious claims that an individual is a "sovereign citizen" not subject to the laws of the United States, that the federal income tax is unconstitutional, and that wages are not income. Schemes utilized include the use of fictitious financial instruments in purported payment of tax bills and other debts, as well as the filing of false liens and IRS reporting forms, such as Forms 1099, designed to harass and retaliate against government employees and judges. In the most extreme circumstances, tax defiers have resorted to threats and violence to advance their anti-government agenda.

Tax defiers are identified by the schemes in which they participate and the tactics they utilize. It is important to note that those who merely express dissatisfaction with the tax laws should not be, and are not, prosecuted. The Department cherishes the right to free speech, but recognizes that it does not extend to acts that violate or incite the imminent and likely violation of the tax laws.

Because a segment of the tax defier community may resort, and has resorted, to violence to advance their cause, it is essential that law enforcement be prepared to respond rapidly to threats against agents, prosecutors, and judges. The Tax Division has implemented a comprehensive strategy using both civil and criminal enforcement tools to address the serious and corrosive effect of tax defier and sovereign citizen activity. Led by a National Director, the Tax Division's Tax Defier Initiative facilitates coordination among nationwide law enforcement efforts. Increased coordination allows new and recycled tax defier and related schemes and arguments to be identified quickly, and a coordinated strategy to be developed.

Through the Tax Defier Initiative, the Division leveraged our expertise to develop a government-wide approach to monitoring and combating these crimes. As a result, our National Director for the Tax Defier Initiative, working with representatives of IRS Criminal Investigations, Treasury Inspector General for Tax Administration, the FBI Domestic Terrorism Operations Unit, and the Department's National Security Division, developed and implemented a national training program for prosecutors and investigators. The close working relationships fostered by our Initiative have enabled us to identify and respond more quickly and efficiently to trends in the tax defier community.

Recent cases demonstrate the scope and seriousness of tax defier misconduct:

- A New Jersey pilot and former chiropractor was sentenced to serve 54 months in prison, ordered to pay a fine and $48,199 in restitution after being convicted of filing false returns and attempting to obstruct the internal revenue laws. For example, the man demanded that a third-party financial institution not comply with an IRS levy, and attempted to pay credit card bills and other debts with fake financial instruments that claimed to draw on a U.S. Treasury account that did not exist.

- A Nebraska man was sentenced to serve 10 years in prison for conspiring to retaliate against several federal officials by filing liens claiming false interests in the officials' property for millions of dollars. Each of the targeted federal officials was involved in the criminal tax prosecution of a co-defendant or other associates of the defendants. A co-defendant was later sentenced to a term of 3 years in prison for his role in the conspiracy.

- A Utah certified public accountant was sentenced to serve 78 months and ordered to pay restitution to the IRS after being convicted of 18 counts of filing false claims for refund and one count of presenting a fictitious instrument. In addition to filing false personal returns, the man filed false returns for 16 clients, claiming federal tax refunds of $8.4 million.

- An Illinois man was sentenced to 46 months in prison after pleading guilty to obstructing justice and filing retaliatory liens against federal judges. In one instance the man sent letters to two federal judges in which he threatened to arrest them if they did not release his wife from prison. Additional retaliatory liens were filed against the United States Attorney, the Clerk of the Court, the assigned Assistant United States Attorney and the IRS Special Agent working the case.

Every prosecution and conviction sends a strong message that any attempt to promote or participate in a fraudulent tax scheme will not be tolerated. Those who engage in tax defier activity risk criminal prosecution resulting in conviction, substantial penalties and time in prison, as well as the collection of taxes, interest and penalties. Prosecution of tax defiers also reassures the vast majority of taxpayers that their voluntary compliance with the tax laws is justified and that everyone will be held accountable under the law.

Thank you again, Mr. Chairman for the opportunity to appear this morning to discuss the important work of the Tax Division. I am happy to answer any questions that you or the other Members of the Subcommittee may have.

Mr. MARINO. Thank you. I now have to declare a recess, we're down to the wire for voting. We will be back in about 15, 20 minutes.

[Recess.]

Mr. MARINO. The hearing will now come to order, Director White, we recognize you for your opening statement.

TESTIMONY OF CLIFFORD J. WHITE, III, DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES

Mr. WHITE. Thank you. Good afternoon, Mr. Chairman, Ranking Member, and Members of the Subcommittee. I thank you for the opportunity to appear before you this afternoon to discuss the actions of the U.S. Trustee Program to advance our mission as the watchdog of the bankruptcy system. We carry out broad, administrative, regulatory, and enforcement responsibilities to protect the integrity and the efficiency of the bankruptcy system for the benefit of all stakeholders—creditors, debtors, and the general public. The Program has fulfilled its core responsibilities of policing debtor abuse and ensuring that private trustees effectively administer estate assets. We also have demonstrated agility and responsiveness in protecting consumer debtors from fraud and abuse and enhancing the accountability of management and professionals in chapter 11 business cases. A core function of the USTP is to combat bankruptcy fraud and abuse. In fiscal year 2014, the Program took more than 35,000 formal and informal civil enforcement actions and made nearly 2,100 criminal referrals.

Many of these civil actions involve curtailing debtor abuse by ensuring compliance with a means test which requires that consumer debtors devote disposable income to the repayment of creditors. Importantly, we judiciously use our statutory discretion to decline to file motions to dismiss under the means test when we find exceptional circumstances, such as job loss. As a result, we uphold Congress' purpose of establishing an objective basis for consumer relief without creating unfair results in individual cases.

We also have devoted substantial attention to consumer protection and have reached numerous national settlements over the past few years with major creditors and others to resolve such matters as the improper release of privacy protected information, unlawful collection practices, and violations by major mortgage servicers that harmed homeowners in bankruptcy.

We remain actively engaged in policing mortgage servicer practices. We continue to find violations of bankruptcy law by large banks, as well as by newer and growing entrants into the servicing industry. We recently entered into a nationwide settlement with JPMorgan Chase Bank to rectify bankruptcy violations, such as continued robo-signing of court-filed documents, inaccurate accounting, and untimely noticing. We're actively policing the buying and selling of unsecured bankruptcy claims, such as credit card debt. We're reviewing the claims selling practices of banks that may result in debts discharged in bankruptcy remaining on credit reports. Two banks who were subject to USTP discovery orders very recently announced changes to their credit reporting practices. We also have obtained discovery orders so we can investigate high-volume claims buyers who may be robo-signing documents that are filed in bankruptcy court. Outside the consumer arena, the program also carries out significant responsibilities in business reorganization cases to ensure accountability by management of debtor corporations.

In the chapter 11 area, our role as watchdog is essential to vindicate congressional mandates and protections for creditors and other stakeholders. We do not substitute our business judgment for that of economic stakeholders, but we do ensure that the Bankruptcy Code and Rules are followed by all participants, including in matters of attorneys' fees and executive bonuses.

We promulgated new guidelines for attorneys' fees in large chapter 11 cases. Our guidelines are designed to promote greater transparency in billing practices and to ensure that fees do not exceed market rates outside of bankruptcy. It appears that at least some of the Nation's largest law firms have changed internal practices to satisfy the guidelines. But it's still a bit too early to judge the ultimate impact on bankruptcy practice. USTP also has sought to vindicate congressional restrictions on executive bonuses. Regrettably, many corporations continue to propose statutorily prohibited retention bonuses to their key executives after filing bankruptcy. Our most noteworthy success in this area was twice blocking bankruptcy court approval of a $20 million severance payment to the outgoing CEO of American Airlines.

Finally, we're requesting appropriations in fiscal year 2016 to maintain current operations without enhancements. USTP appropriations usually are offset by collections from filing fees and chapter 11 quarterly fees. We propose a change in the revenue structure to allow a higher fee in the largest chapter 11 cases to ensure that appropriations are fully offset by collections and the U.S. Trustee System Fund is replenished after 4 years of reduced revenues as a result of the decline in bankruptcy filings.

My prepared statement sets forth a more complete record of our accomplishments. Our 1,100 employees have demonstrated an unwavering commitment to our mission. I'm honored to work alongside such dedicated public servants. And I would be happy to answer any questions from the Subcommittee.

[The prepared statement of Mr. White follows:]

Department of Justice

STATEMENT OF

CLIFFORD J. WHITE III
DIRECTOR
EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES

BEFORE THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
U.S. HOUSE OF REPRESENTATIVES

AT A HEARING ENTITLED

"ONGOING OVERSIGHT: MONITORING THE ACTIVITIES OF THE U.S. TRUSTEE PROGRAM"

PRESENTED
MAY 19, 2015

Clifford J. White III
Director
Executive Office for United States Trustees
Before the Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
Washington, D.C.
May 19, 2015

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear before you to discuss the activities of the United States Trustee Program (USTP or Program). We are the component of the United States Department of Justice whose mission is to enhance the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders – debtors, creditors, and the general public.[1]

The Program employs more than 1,100 attorneys, financial analysts, and support staff in 93 locations across the country, as well as in the Executive Office in Washington, DC. We cover more than 300 court sites where bankruptcy judges conduct hearings and more than 400 sites where administrative proceedings are held.

The Program has steadfastly carried out its core statutory responsibilities of policing debtor abuse and ensuring that private trustees effectively administer estate assets. We also have demonstrated great agility and responsiveness in protecting consumer debtors from fraud and abuse, and enhancing the accountability of management and professionals in chapter 11 business cases. Among our accomplishments in these areas have been settlements with mortgage servicers who violate bankruptcy law and harm distressed homeowners, and the promulgation of new guidelines for attorneys' fees in large chapter 11 cases to ensure that bankruptcy lawyers do not charge above market rates.

The Program's success in fulfilling its mission of addressing threats to the integrity and efficiency of the bankruptcy system is a testament to the highly professionalized corps of dedicated professionals in our offices throughout the country who have exhibited extraordinary diligence and commitment to public service.

[1] The USTP has jurisdiction in all judicial districts except those in Alabama and North Carolina. In addition to specific statutory duties and responsibilities, United States Trustees "may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title." 11 U.S.C. § 307.

Civil Enforcement and Means Testing

A core function of the USTP is to combat bankruptcy fraud and abuse. We combat fraud and abuse committed by debtors by seeking denial of discharge for the concealment of assets and other violations, by seeking case conversion or dismissal if a debtor has an ability to repay debts, and by taking other enforcement actions. Similarly, we combat fraud and abuse committed by attorneys, bankruptcy petition preparers, creditors, and others against consumer debtors by pursuing a variety of remedies, including disgorgement of fees, fines, and injunctive relief.

In fiscal year 2014, the Program took more than 35,000 civil enforcement actions and inquiries with a potential monetary impact of $1.07 billion in debts not discharged, fines, penalties, and other relief. Since we began tracking our results in 2003, we have taken more than 654,000 actions and inquiries, with a potential monetary impact in excess of $15.1 billion.

Means Testing

One of the major responsibilities of the United States Trustees is to administer and enforce the "means test." Under the means test, all individual debtors with income above their state median are subject to a statutorily prescribed formula to determine disposable income.[2] The formula is based partially on allowable expense standards issued by the Internal Revenue Service for its use in tax collection. The primary purpose of the means test is to help determine eligibility for chapter 7 bankruptcy relief.

In fiscal year 2014, approximately 12 percent of chapter 7 debtors had income above their state median. Of the 68,000 cases filed by above median income debtors, about 3,900 (6 percent) were "presumed abusive" under the means test. Of those presumed abusive cases that did not voluntarily convert to chapter 11 or 13 or dismiss, we exercised our statutory discretion to decline to file a motion to dismiss in about 68 percent of the cases after consideration of the debtor's special circumstances, such as recent job loss, that justified an adjustment to the current monthly income calculation.

It is important to note that even if a case is not presumed to be abusive under the means test, the law permits the USTP to take action under a bad faith or a totality of the circumstances

[2] By statute, disabled veterans whose debts were incurred primarily while on active duty or while performing a homeland defense activity are excepted from the means test. In addition, the National Guard and Reservists Debt Relief Extension Act of 2011 exempts from the means test qualifying reservists and National Guard debtors called to active duty or to perform a homeland defense activity for not less than 90 days, although this exemption is set to expire on December 19, 2015.

analysis.[3] For example, the case of a debtor who retains luxury items, incurs debt on the eve of bankruptcy, or fails to disclose fully the information required by the Bankruptcy Code and Rules might be subject to dismissal.

Due to the USTP's judicious use of its statutory discretion, Congress' purpose of establishing an objective basis for allowing chapter 7 relief without creating unfair results for those with special circumstances has been largely achieved.

Consumer Protection

The United States Trustees are active in the Department's efforts to protect Americans from financial fraud and abuse. In fiscal year 2014, United States Trustees initiated more than 6,800 civil enforcement actions and inquiries against creditors, lawyers, bankruptcy petition preparers, and other parties who acted improperly towards debtors. Nearly 2,100 of these related to abusive conduct by creditors, including about 72 percent of which involved mortgage fraud and abuse.[4] Enforcement efforts have focused on the improper exposure of the personal information of debtors, attempts to collect on previously discharged debt, and other failures to comply with bankruptcy law.

In recent years, the USTP has addressed multi-jurisdictional violations with a coordinated enforcement approach. As a result, the Program has entered into ten nationwide settlements, including six settlements that protect consumer debtors against national creditors. These national settlements provide relief for victimized debtors, require systemic corrective actions so violations do not recur, and uphold the integrity of the bankruptcy system. In several of these settlements, the Program insisted upon an independent reviewer to verify compliance. One example of the success of this approach is the settlement reached with Citigroup Inc. (Citi), which concluded in December 2014 with the certification by the independent auditor appointed under the settlement that Citi had completed the required actions. The settlement involved the protection of the personal information of nearly 150,000 consumers in 85 jurisdictions that had not been properly redacted as required by the Bankruptcy Rules, including approximately 50,000 filings that were uncovered as a result of the verification process mandated by the settlement. In the nearly one year that it took to effectuate the appropriate redactions, the USTP worked with courts across the country and with Citi to ensure the improper disclosures were corrected.

[3] 11 U.S.C. § 707(b)(2) provides for dismissal under the means test. 11 U.S.C. § 707(b)(3) provides for dismissal under a "bad faith" or "totality of the circumstances" test.
[4] United States Trustees are frequently successful in reaching resolution of their creditor abuse inquiries without the need to take formal action in court.

Mortgage Servicer Violations

A centerpiece of the USTP's consumer protection efforts has been vigorous enforcement of the Bankruptcy Code and Rules against mortgage servicers who inflate their claims or otherwise fail to comply with requirements for accuracy, disclosure, and notice to their customers in bankruptcy. The Program holds mortgage servicers to the same standard of completeness and accuracy in their filings that we do the debtors who owe them money. In far too many cases, mortgage servicers have filed inflated proofs of claim or motions for relief from stay that are predicated upon faulty accounting. The consequences of their improper filings can be catastrophic to debtors who may lose their homes and unfair to other creditors who may receive a smaller distribution because of the mortgage company's unjustified claim.

Beginning in late 2006, the USTP launched its initial review of the mortgage industry's practices in bankruptcy. The fruits of that resource-intensive project grew over time, and the USTP moved from simply requiring servicers to correct their mistakes in a case at bar to seeking nationwide settlements to address systemic misconduct by mortgage servicers, their attorneys, and their agents. Noteworthy among these efforts are the $100 million nationwide settlement with Countrywide Home Loans that the USTP negotiated in conjunction with the Federal Trade Commission in 2010, as well as the integral role the Program played in reaching the historic $25 billion National Mortgage Settlement (NMS) involving numerous federal agencies and 49 state Attorneys General against the five largest mortgage servicers in the country. Importantly, beyond providing monetary compensation, both of these settlements put in place stringent mortgage servicing standards, including special rules for servicing loans in bankruptcy.

The USTP remains actively engaged in the mortgage servicing area and employs a multi-pronged enforcement strategy. First, we continue close oversight of the servicers who are signatories to the NMS. The Program serves as the federal co-chair of the NMS Monitoring Committee and, in that capacity, works with federal and state agencies to ensure that the banks satisfy their obligations under the settlement. The Committee also oversees the independent Monitor established by the NMS who verifies compliance by the settling servicers.

Second, we address the conduct of banks that are not a party to the NMS. For example, the USTP assisted the Consumer Financial Protection Bureau and other federal and state partners in negotiating a settlement with Ocwen that was announced in December 2013. The agreement included monetary relief to homeowners and imposition of servicing standards similar to those in the NMS. In addition, the USTP was a critical player in the federal-state agreement announced by the Attorney General in June 2014 with SunTrust bank to settle allegations of wrongdoing by SunTrust in its mortgage securitization and servicing practices. Under the agreement, SunTrust will pay nearly $1 billion and adopt the servicing standards imposed under the NMS. The USTP amassed evidence of SunTrust's practices, assisted in the negotiations on servicing, developed an additional metric to protect customers' privacy protected information from disclosure in bankruptcy filings, and will ensure that SunTrust implements the bankruptcy specific servicing standards.

The third prong of our enforcement strategy is to focus additional attention on the newer entrants into the mortgage servicing industry. In recent years, specialty servicers have created or greatly expanded their operations by purchasing the servicing rights to billions of dollars of mortgages, including those of distressed homeowners in and outside of bankruptcy. Our investigations and enforcement actions strongly suggest that at least some of these servicers exhibit the same kinds of flawed servicing systems that we uncovered within the largest banks. To this end, we have established special litigation teams within the USTP to handle litigation against these servicers. This will ensure a coordinated approach and will allow us to more effectively identify patterns of noncompliance. It also provides our field offices with the expertise required to investigate and litigate as needed against this growing segment of the mortgage servicing industry.

Settlement with JPMorgan Chase Bank, N.A.

The most recent illustration of the USTP's continued focus on compliance by mortgage servicers is a nationwide settlement reached by the USTP with JPMorgan Chase Bank, N.A. (Chase) that was approved by the bankruptcy court on March 9, 2015. The settlement addressed issues uncovered by the USTP involving the robo-signing of payment change notices filed in bankruptcy court, as well as Chase's failure to timely and accurately provide payment change notices and escrow statements to their customers in bankruptcy. Under the agreement, Chase agreed to pay more than $50 million, primarily through cash payments and credits to homeowners in bankruptcy; to change internal procedures and systems to prevent a recurrence of the violations; and to submit to independent monitoring to ensure compliance with the settlement for a minimum of 18 months. This is the single largest settlement negotiated solely by the USTP in our history.

The bad conduct exhibited by Chase was uncovered by the United States Trustee's office in Detroit and similar conduct was identified by other USTP offices. In the Detroit case, Chase filed a payment change notice that more than tripled the debtors' monthly mortgage payment (from about $500 to nearly $1,700), without explanation. When the debtors inquired with Chase about the increase, Chase could provide no justification for the increase and would not allow the debtors to speak with the person whose name appeared on the payment change notice filed with the court. Upon investigation by the United States Trustee's office, it was discovered that Chase had affixed the signature of a former employee who did not review or sign the document that was filed with the bankruptcy court under penalty of perjury.

Ultimately, as a result of the United States Trustee's investigation, Chase acknowledged that it had robo-signed more than 50,000 payment change notices filed in bankruptcy courts across the country from December 2011 to November 2013. These notices–which are signed under penalty of perjury–were signed by former employees, current employees, and employees of contractors who had nothing to do with reviewing the accuracy of the debtor's account. Chase further acknowledged that it had failed to provide timely or accurate payment change notices and escrow statements as required under the Bankruptcy Rules to more than 25,000 homeowners. The notice requirement, which went into effect on December 1, 2011, was imposed in the aftermath of revelations that mortgage companies were failing to properly account for payments and impermissibly imposing fees on homeowners during their bankruptcy cases.

Unsecured Creditor Violations

In addition to our mortgage servicer enforcement efforts, the USTP also has undertaken a review of claims filed by unsecured creditors to collect consumer debt in bankruptcy. Bankruptcy Rules that went into effect on December 1, 2012, set forth required disclosures in proofs of claim filed by holders of unsecured credit card and other revolving consumer debt. The Rules are designed to assist debtors and their case trustees in associating a claim with a known account and to provide a basis for assessing the accuracy of a claim. Thus, debtors and trustees are better able to determine if claims objections are warranted.

Among the matters currently under investigation by the USTP are practices related to claims trading in consumer debt. The USTP is seeking discovery related to two key areas. First, we are reviewing bank practices in selling debt. The investigation is partially in response to debtor allegations that some banks fail to provide information to credit reporting agencies to show that the debts were discharged in bankruptcy, thereby indirectly encouraging the violation of the bankruptcy injunction against the collection of these debts. Second, the Program is reviewing the practices of some claims buyers to determine if they routinely robo-sign proofs of claim that are filed in bankruptcy court under penalty of perjury and with an attestation as to the accuracy of the claim. The USTP has documented in court filings evidence of an enormous volume of claims signed by a single individual at two major consumer claims buying companies.

As we continue to review the compliance and practices of unsecured claimants, we are mindful that, as the only national enforcer of the Bankruptcy Rules, we have a unique perspective to identify and address systemic abuse, and our interpretations of the requirements and our actions should be consistent and predictable throughout the country. Consistent government enforcement can be a major benefit to any business, including to creditors of debtors in bankruptcy.

Criminal Enforcement

Criminal enforcement is another key component of the Program's efforts to uphold the integrity of the bankruptcy system. In fiscal year 2014, the Program made 2,080 bankruptcy and bankruptcy-related criminal referrals. The Program is an active member of the President's Financial Fraud Enforcement Task Force and two national workings groups sponsored by the Department of Justice's Criminal Division. In addition, our offices participate in more than 80 local bankruptcy fraud working groups, mortgage fraud working groups, and other specialized task forces throughout the country. We conduct extensive training for federal prosecutors and law enforcement personnel, USTP staff, private trustees, and others; and we publish internal resource documents and training videos. In addition, Program staff–including attorneys, bankruptcy analysts, and paralegals–are frequently called upon to assist with investigations and to provide expert or fact testimony at criminal trials.

The following case illustrates the important work of the USTP in combatting fraud and ensuring the integrity of the bankruptcy system. In October 2014, in the District of New Jersey, a husband and wife were sentenced to 41 months and 15 months in prison, respectively, along with forfeiture and fines. The couple earlier had pleaded guilty to bankruptcy fraud by concealment of assets, bankruptcy fraud by false oaths, bankruptcy fraud by false declaration, and conspiracy to commit mail and wire fraud. The husband also had pleaded guilty to failure to file a tax return. From September 2001 through September 2008, the couple submitted fraudulent applications and supporting documents to lenders to obtain mortgages and other loans, falsely representing that they were employed and/or receiving substantial salaries. In their 2009 chapter 7 bankruptcy case, the debtors intentionally concealed and made false oaths and declarations about businesses they owned; income they received from a rental property; and the wife's true income from a television show, Web site sales, and personal and magazine appearances. The husband also admitted that for tax years 2004 through 2008, he failed to report nearly $1 million in individual income. The United States Trustee's Newark office referred the matter to the United States Attorney and assisted in the investigation. The office also filed a civil enforcement action seeking to prevent the couple from discharging debts exceeding $7.1 million; the couple agreed to waive their bankruptcy discharge prior to the civil trial.

Chapter 11 Issues

The Program carries out significant responsibilities in business reorganization cases. These responsibilities include such matters as appointing official committees of creditors and equity security holders, objecting to the retention and compensation of professionals, reviewing and objecting to disclosure statements to ensure adequate information is provided to stakeholders, appointing trustees and examiners when warranted, enforcing the statutory limitation on insider and executive compensation, and moving to dismiss or convert about twothirds of chapter 11 cases each year because they are not progressing towards financial rehabilitation.

Business reorganization cases often raise highly complex questions of law and require sophisticated financial analysis. As a result, they can be extremely time intensive for Program staff. Two of our main objectives in chapter 11 have been to restore balance to the fee review process and to ensure accountability by the management of debtor corporations.

As the USTP has stepped up its enforcement in the chapter 11 arena, it has become increasingly clear that our role as watchdog is essential to vindicate congressional mandates in the Bankruptcy Code. Even when debtor companies and some of their major creditors agree on a course of action, the interests of other stakeholders often are implicated. The USTP's watchdog role allows it to present issues for judicial decision even where parties either will not, or lack the financial wherewithal to, litigate. Although the USTP should never substitute its business judgment for that of economic stakeholders, it is our job to ensure that the Bankruptcy Code and Rules are followed by all participants in the bankruptcy system. This view of our role has led us to oppose both debtors and creditors on issues such as payment of attorney fees, executive bonuses, and other matters of corporate governance.

Review of Professional Fees

United States Trustees have an express statutory responsibility to review applications for professional compensation in bankruptcy cases. Congress amended that obligation in the Bankruptcy Reform Act of 1994 by imposing a mandate on the Program to establish uniform guidelines for reviewing fee and expense applications. The guidelines were intended to foster uniformity in the fee application preparation and review process.

The role of the USTP in policing professional fees is a perfect example of how the Program frequently must act alone to vindicate the strictures of the Bankruptcy Code. It is generally recognized that private parties and their counsel are reluctant to challenge each other's fees. As a result, the USTP often is the only party in a case to raise objections to the reasonableness of fees charged by professionals.

In 1996, the Program published its initial Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330. Though not mandatory by statute, they were adopted in whole or in part by bankruptcy courts in many jurisdictions and are followed with various degrees of rigor in districts throughout the country. Among the reforms achieved through these guidelines were threshold disclosure requirements, task-based billing, and standards for reimbursement of certain expenses.

In November 2013, the USTP promulgated new guidelines for attorneys in large cases with assets and liabilities each of $50 million or more. The guidelines were designed to reflect significant changes in the legal industry and the complexity of business bankruptcy reorganization cases since the guidelines were first published, as well as to enhance transparency and public confidence in the integrity and soundness of the bankruptcy compensation process. Generally, the new guidelines provide that attorney applicants should demonstrate that rates charged in bankruptcy reflect market rates outside of bankruptcy; develop budgets and staffing plans; use "efficiency counsel" for routine tasks that can be performed less expensively by other firms; and submit billing records in an open, searchable electronic format.

Given the recent decrease in filings, only about 100 cases have been filed since the new guidelines became effective, and fee applications trail the date of an appointment by at least four months, although frequently longer. Even though there is a paucity of hard data with which to analyze the impact of the guidelines, certain anecdotal evidence is mounting. By and large, counsel have agreed to abide by the guidelines; large firms have improved internal billing practices and processes; and firms are providing greater discounts and taking cost-cutting measures that heretofore were rarely provided in bankruptcy cases.

Management Accountability and Corporate Governance

The Program has focused significant efforts on the appointment of trustees and examiners in cases in which management may have engaged in wrong-doing, and we have objected to management bonuses that exceed the bounds set forth in the statute.

Trustees and Examiners

Although the Bankruptcy Code generally allows company management to retain control during the chapter 11 process, that right is conditioned upon their faithful discharge of fiduciary responsibilities and compliance with various statutory requirements. Section 1104 of the Bankruptcy Code provides for the United States Trustee's appointment of a chapter 11 trustee to replace management that engaged in, among other things, gross mismanagement or wrongdoing specified in the statute. Section 1104(e) further provides that the United States Trustee must file a motion to oust management if there are "reasonable grounds to suspect" that current management participated in fraud, dishonesty, or other criminal acts in the debtor's management or public financial reporting.

In cases involving gross mismanagement or possible fraud, the USTP will file a motion to replace management in favor of an independent chapter 11 trustee to run the business or an examiner to conduct an independent investigation. These motions, however, generally face considerable resistance. In many cases, the board of directors of a failed company, either on its own or at the behest of a large institutional creditor, will attempt to avoid a trustee or examiner by appointing a chief restructuring officer (CRO) as an alternative.[5] In addition, case law in certain districts impedes the Program's ability to successfully prosecute motions for the appointment of a trustee. For example, some courts hold that management is allowed to remain in control of the debtor corporation unless there is "clear and convincing evidence" of gross incompetence or wrongdoing. The USTP has consistently argued that this heightened burden of proof is incorrect as a matter of law, and the correct legal standard is "preponderance of the evidence."[6] Some courts also take a broad view of their discretion in adjudicating examiner motions and limit the scope of examinations in favor of allowing other constituents, often the unsecured creditors' committee, to conduct what we believe is, in many cases, more expensive discovery and litigation.

When the court grants a motion to appoint a trustee or examiner, the USTP appoints one disinterested individual subject to limited court review. In rare instances, creditors may choose to elect a trustee. Increasingly, the USTP has worked to expand the pool of candidates for these fiduciary appointments. Given the multiplicity of interests present in a bankruptcy case, it is important to appoint trustees and examiners who are not unduly influenced by either the debtor or a faction of creditors. The heightened burden of proof, frequent reluctance of bankruptcy professionals and insiders to accept an independent fiduciary, and other factors render trustee and examiner appointments somewhat infrequent.[7]

[5] In many instances, the retention of CROs by distressed companies may increase the likelihood of a positive turnaround and financial rehabilitation. The USTP's objection pertains to the selection of a CRO by a tainted board of directors to avoid a trustee or to empower a CRO to act contrary to applicable standards of corporate governance.

[6] *Compare In re Keeley and Grabanski Land Partnership*, 455 B.R. 153 (B.A.P. 8th Cir. 2011) (preponderance of the evidence); *Tradex Corp. v. Morse*, 339 B.R. 823, 829 (D. Mass. 2006) (same), *with In re Adelphia Communications Corp.*, 336 B.R. 610 (Bankr. S.D.N.Y. 2006) (clear and convincing evidence); *Official Comm. of Asbestos Claimants v. G-I Holdings, Inc. (In re G-I Holdings, Inc.)*, 385 F.3d 313 (3rd Cir. 2004) (same). Note that the final report of the American Bankruptcy Institute Commission to Study the Reform of Chapter 11 recommended that the burden be preponderance of the evidence and that contrary authority be statutorily overturned. ABI Commission to Study the Reform of Chapter 11, *Final Report and Recommendations*, at 26 (Dec. 8, 2014), http://commission.abi.org.

[7] Examples of cases in which the USTP unsuccessfully sought a trustee include *In re Solyndra, LLC*, Case No. 11-12799, Dkt. 266 (Bankr. D. Del. Oct. 21, 2011) (court allowed the debtor to select its own CRO); *In re AgFeed USA, LLC*, Case No. 13-11761, Dkt. 409 (Bankr. D. Del. Oct. 4, 2013) (the court denied the USTP's motion, even though it stated that the "concerns raised by the Office of the United States Trustee . . . appear well-founded, legitimate and supported by, at least, the record thus developed that there was fraudulent conduct that needs to be investigated . . .".).

Management Bonuses

In another important area of management accountability, the USTP is often the only party to enforce statutory restrictions on executive compensation. Section 503(c) of the Bankruptcy Code restricts a company's ability to pay bonuses to senior executives through Key Employee Retention Plans (KERPs). The intent of this section is to prevent the same management that brought the company into bankruptcy from paying itself large cash awards while shareholders and employees suffer financially. Regrettably, many corporate debtors continue to propose retention bonuses to insiders in contravention of section 503(c), often disguising these retention awards as "performance bonuses" that are allowed under a more flexible standard, or hiding them in other agreements, such as sales documents and employment contracts.

In fiscal year 2014, the USTP formally challenged 40 proposed KERPS in court. In addition, many USTP objections are resolved informally through voluntary modification of the debtor's initial bonus proposal. The kinds of changes sought by the USTP include eliminating top executives from the list of bonus recipients or imposing more stringent performance milestones that must be met prior to payment of the bonus.

The highly publicized case of American Airlines perhaps provides our most noteworthy success in enforcing executive compensation restrictions.[8] In that case, the debtor and creditors' committee twice attempted to obtain bankruptcy court approval of a $20 million severance payment to the outgoing Chief Executive Officer (CEO). The court sustained our first objection in which the United States Trustee argued that the CEO bonus was impermissible under section 503(c)(2) of the Bankruptcy Code. The debtor and creditors' committee then sought approval of the bonus through the plan of reorganization. On September 12, 2013, the bankruptcy court again sustained the United States Trustee's objection and struck the CEO bonus from the plan as a violation of section 503(c). This ruling is particularly important because it has implications for policing other provisions of the Bankruptcy Code when companies attempt to circumvent the law through the plan confirmation process.

American Bankruptcy Institute (ABI) Commission to Study the Reform of Chapter 11

The ABI Commission to Study the Reform of Chapter 11 recently issued a report making far-reaching recommendations on chapter 11 practice. It is noteworthy that the recommendations include several provisions that would strengthen the role of the USTP in carrying out its duties and clarify the law to support long-standing legal positions the USTP has

[8] *In re AMR Corp.*, 497 B.R. 690 (Bankr. S.D.N.Y. 2013).

asserted in bankruptcy litigation on issues related to corporate governance and integrity of the bankruptcy system.[9] Among those proposals are:

(1) Make uniform the "preponderance of the evidence" standard for the burden of proof required for ordering the appointment of a chapter 11 trustee to replace incumbent management. The Second and Third Circuits currently follow a heightened "clear and convincing" standard that makes it more difficult to oust tainted management.

(2) Clarify the limited role of the courts in approving the USTP's appointment of trustees and examiners in chapter 11 cases. Under current law, the court may order that management be displaced in favor of a trustee, or order an independent investigation of the debtor by an examiner. Trustee and examiners, however, are selected and appointed by the USTP. The ABI recommendation endorses the USTP position that the judicial role in approving the selection is limited to a narrow review of such matters as disqualifying conflicts of interest, and that the court may not substitute its judgment for that of the USTP in choosing the most qualified candidate.

(3) Prohibit the practice of structured dismissals whereby debtors and controlling creditors may evade the chapter 11 process and protections at the expense of other stakeholders. The USTP has objected to structured dismissals that included distributions contrary to the priorities set forth in the Bankruptcy Code, payment of professional fees without court review, and impermissible releases from liability of insiders and professionals.

(4) Prohibit "gifting" where payments are made by the debtor, senior lender, or purchaser of estate assets to junior creditors ahead of other creditors who have priority under the Bankruptcy Code. This practice evades the priority scheme established in statute, promotes the buying of votes for a plan of reorganization, and inevitably decreases the value to distributions to other creditors because estate funds are directly transferred or the purchase price is decreased so that the payments can be made.

(5) Require that disclosure statements and plans of reorganization specify the terms of post-confirmation trusts, including governance matters such as how the trustee will be selected and compensated, as well as future operation of the business and how claims, recoveries, and distributions will be handled post-confirmation. This information is

[9] The Director of the USTP served as a non-voting member of the Commission. Other senior USTP officials served on ABI working groups addressing corporate governance and related topics. The USTP provided technical advice and perspectives on issues under discussion but takes no position on the Report's legislative recommendations.

important to provide before confirmation to ensure all constituencies are afforded due process and other protections.

Appellate Practice

One of the most important roles the Program plays in the bankruptcy system is to identify and raise issues for review on appeal, thereby ensuring that the law is shaped, interpreted, and applied evenly in all judicial districts. Our view is that our mission often is achieved by obtaining a well-considered appellate decision that will advance consistency in bankruptcy law.

The Program has participated in more than 370 appeals to bankruptcy appellate panels, district courts, courts of appeals, and the Supreme Court in the past three fiscal years. Many of the appeals we participate in arise from enforcement actions we have prosecuted, but we also intervene as amicus in many other cases.

Importantly, many of our appeals address challenges to the integrity of the Bankruptcy Code. For example, the USTP won an appeal in the case of *U.S. Trustee v. Elliot Mgmt. Corp. (In re Lehman Brothers Holdings Inc.)*, No. 13-2211, slip op. (S.D.N.Y. Mar. 31, 2014). In that decision, the United States District Court for the Southern District of New York agreed with the Program's position and vacated a bankruptcy court order awarding $26 million to individual members of the unsecured creditors' committee for their personal attorneys' fees associated with their committee work. The district court reversed the bankruptcy court's order overruling our objection to a provision in the confirmed chapter 11 plan authorizing payment of those fees in contravention of section 503(b)(3)(F) and (4) of the Bankruptcy Code. The ruling is significant, particularly in the chapter 11 context, because it reaffirms–in the words of the district court–that "interested parties and bankruptcy courts" cannot "tweak the law to fit their preferences." In a very thoughtful opinion, the district court rejected the bankruptcy court's view and adopted our argument that parties' purported consent through a plan cannot circumvent the Bankruptcy Code. The implications of this decision go far beyond the issue of fees. The district court correctly observed that confirming a plan that contravenes the Code can lead to "serious mischief," and gave as an example plan terms providing for "gifting" to junior creditors in contravention of the order of payment priority established by Congress.

It is worth noting that the United States Supreme Court has heard five bankruptcy cases during its current term, including three in which the United States participated as *amicus*. The USTP provides assistance to the Solicitor General in analyzing bankruptcy cases before the high Court and was listed among the government's counsel in two of the briefs filed during this term. Among the issues to be decided are the constitutional authority of bankruptcy courts, *Wellness Int'l Network, Ltd. v. Sharif*, No. 13-935 (S. Ct.); standards for determining the finality of bankruptcy court orders, which might affect not only the denial of proposed consumer debt repayment plans at issue in the case, but also many other matters (*e.g.*, USTP motions to disqualify counsel and objections to their fees), *Bullard v. Hyde Park Sav. Bank*, No. 14-116 (S. Ct.); and the right of attorneys to obtain additional fees for defending objections to their fee applications, *Baker Botts, L.L.P. v. ASARCO, L.L.C.*, No. 14-103 (S. Ct.).

These and other cases illustrate the importance of the USTP's participation in appeals to promote the coherent and consistent development of case law and ensure compliance with the commands of the Bankruptcy Code.

Private Trustee Oversight

One of the core functions of the United States Trustees is to appoint and supervise the private trustees who administer consumer bankruptcy estates and distribute dividends to creditors. The Program also trains trustees, evaluates their overall performance, reviews their financial accounting, and ensures their prompt administration of estate assets.

In fiscal year 2014, more than 900,000 consumer cases were filed under chapters 7, 12, and 13 of the Bankruptcy Code in the 88 judicial districts covered by the Program. The United States Trustees oversee the activities of approximately 1,300 private trustees appointed by them to handle the day-to-day activities in these cases. With distributions by these trustees of approximately $10.2 billion in fiscal year 2014, the Program's effectiveness in this area is critical.

We continually evaluate our trustee oversight activities and implement changes as appropriate. For instance, over the past few years, we have modified our chapter 7 trustee banking policy to improve transparency and move toward a more market-based approach to services; enhanced efficiency by automating trustee interim reports to streamline the review of chapter 7 trustee final and distribution reports; formalized procedures for reporting the loss or potential loss of consumers' personally identifiable information by private trustees; and revised our *Handbooks* for chapter 7 and for chapter 13 trustees to establish or clarify the USTP's position on trustee duties and responsibilities.

Chapter 7 Trustee Compensation

We are aware that the National Association of Chapter 7 Trustees (NABT) has requested that Congress amend title 11 to provide for an increase in chapter 7 trustee compensation. The USTP agrees, in principle, with such an increase. The basic compensation system for chapter 7 trustees has not changed since 1994. Chapter 7 trustees receive $60 for each case and an additional amount in cases with assets based upon a percentage of the distributions made to creditors. Despite an amendment to section 330 of the Bankruptcy Code made in 2005 providing that chapter 7 trustee compensation should be paid "as a commission" calculated under section 326 of the Bankruptcy Code as a percentage of distributions, many courts still do not allow the percentage fee, but instead only allow a lower amount calculated by hourly rate. The USTP's position is that the commission should be awarded absent extraordinary circumstances. In the first appeal to a circuit court addressing this issue, the Fourth Circuit Court of Appeals on April 18, 2014, agreed with the USTP, acting as amicus, that the 2005 amendments to the Bankruptcy Code created a presumption that, absent extraordinary circumstances, chapter 7 trustees should receive the maximum fee under section 326. *In re Rowe*, 750 F.3d 391 (4th Cir. 2014).

Nationwide, total chapter 7 trustee compensation from all sources–including no-asset case fees, commissions on distributions in asset cases, and fees to the trustee as professional in a case–declined about 3.9 percent in fiscal year 2014 from fiscal year 2013. As a percentage of total receipts, trustee compensation remained about the same at 10 percent. While there is a wide variation in compensation among trustees, the 2005 amendments to the Bankruptcy Code required chapter 7 trustees to do more work in each case. Accordingly, we believe an increase is appropriate, but do not endorse any specific proposal for achieving this increase.

Credit Counseling and Debtor Education

Individual debtors must receive credit counseling before filing for bankruptcy relief and personal financial management instruction before receiving a discharge of debts. These requirements are intended to ensure individuals make informed financial decisions before entering bankruptcy and to provide debtors with the tools to avoid future financial catastrophe when they exit bankruptcy. United States Trustees are responsible for the approval of providers who meet statutory qualifications to offer credit counseling and debtor education services to debtors. There currently are about 140 approved credit counseling agencies and 220 approved debtor education providers.

Debtor Audits

To help ensure that the Program effectively carries out its statutory duties and achieves its mission, the USTP has substantially enhanced its data collection and internal evaluation activities. Among other projects, and as required by statute, the Program contracts with private auditors to verify the financial information provided by consumer debtors in their bankruptcy filings. Reports of any "material misstatements" are then filed with the court.

In fiscal year 2014, 23 percent of consumer debtor cases with completed audits contained material misstatements. The rate of material misstatements has not changed appreciably in the past six years. In cases selected for audit because a debtor's income or expenses vary from the norm ("exception" audits), the rate of material misstatements is 10 to 15 percent higher than in random audits. Due to budgetary constraints, the number of audits conducted each year has varied and debtor audits have been suspended at various times over the past few years.

Fiscal Year 2015 Appropriation and Fiscal Year 2016 Appropriation Request

The USTP is self-funded through user fees paid by bankruptcy debtors. All revenues are deposited into the United States Trustee System Fund (the "Fund"). Approximately 61 percent of the Program's revenue is derived from quarterly fees in chapter 11 reorganization cases; 38 percent from filing fees paid in chapters 7, 11, 12, and 13; and one percent from interest earnings and miscellaneous revenues.[10] At the end of fiscal year 2014, the USTP System Fund held a balance of $172 million. Monies from the Fund are not available without appropriations from Congress.

The USTP was appropriated $225.9 million for fiscal year 2015, an increase of 0.7 percent over fiscal year 2014. The USTP also is authorized to use carryover funds from prior year appropriations. The President's budget request for the Program for fiscal year 2016 totals $228.1 million.

Over the past three years, the USTP has sustained a net loss of more than 100 employees or about 10 percent of total staff. The restoration of vital funding in the 2014 and 2015 appropriations allowed us to begin to backfill critical headquarters and field staff at all levels. In addition to our primary goal of hiring new staff, we also have looked to invest in areas that had been cut back, but which now require additional funding to ensure the efficient and effective continuation of Program operations, including information technology; oversight of trustees, credit counseling agencies, and debtor education providers; and staff training.

The Program has taken a number of important steps over the past few years to achieve our mission with fewer resources. We have achieved considerable savings by streamlining operations; utilizing an alternative case review system, thereby reducing the Program's costs for use of the Public Access to Court Electronic Records (PACER) system by more than 50 percent; returning underutilized space; and reducing space allocations as leases have expired. We also piloted and implemented nationwide a number of work process changes, including consolidating functions such as the financial review of trustees, with the goal of improving consistency and quality control and, over time, achieving economies of scale.

[10] Revenues fluctuate with the number of filings each year. Filings in USTP jurisdictions reached a peak of nearly 1.7 million cases in fiscal year 2005, plummeted for the next two years, and then rose precipitously for three years before beginning a four year decline. In fiscal year 2014, approximately 921,000 cases were filed in USTP districts. Although some commentators had predicted filing would rebound beginning in 2014, filings continued to decline. Filings in the first quarter of fiscal year 2015 remain below filings for the same period in fiscal year 2014.

In addition, in keeping with the Executive Branch's efforts to reduce the federal "physical footprint," after conducting a cost-effectiveness study on combining offices that were close in proximity to one another and that had leases coming due, we proceeded with plans for three office consolidations. After move-related costs, we estimate the three consolidations will save the Program about $1 million annually. In addition, the Executive Office for United States Trustees relocated in January 2013 from two commercial leases into one federal space, reducing its footprint by 21,000 square feet, for an estimated annual savings of $1.8 million.

Revenue Proposal

After a historic rise in the number of bankruptcy filings from fiscal year 2007 to fiscal year 2010, filing rates have declined for the past four years and have not followed traditional patterns. Based upon trend analysis, and without regard to changes in external economic conditions, the USTP projects continued filing decreases and a resultant decline in revenues from filing and quarterly fees. In the past, revenues have exceeded appropriations in most years. At the end of fiscal year 2014, the balance in the Fund was $172 million, but projected declines in filings and revenue could exhaust the Fund in fiscal year 2017.

To address the shortfall in the Fund, the USTP proposes to increase revenues by raising quarterly fees paid by the largest companies in chapter 11 for a period of three years. Consumer debtors and essentially all small businesses would be unaffected by the increase. Under the proposal, the USTP would be able to increase the quarterly fees for large chapter 11 cases with at least $1 million in quarterly disbursements. The new rate cannot exceed one percent of disbursements and likely would be set at 0.5 percent of disbursements, which still is less than the percentage currently paid by nearly all small business debtors. The fees would continue to constitute a very small portion of the administrative costs incurred by large companies that seek chapter 11 relief, including the fees of professionals. The proposed increase would expire after three years, but would allow the USTP to fund ongoing operations, rebuild the Fund, and assess filing trends to determine if a longer term increase would be necessary.

Conclusion

The United States Trustee Program has assembled a substantial record of accomplishment in carrying out its statutory duties, responding to emerging issues, and addressing threats to the integrity of the bankruptcy system. Employees at all levels throughout the Program–in headquarters and in offices throughout the country–have upheld the highest standards of the Department of Justice for professionalism and dedication to duty. Their team spirit and unwavering commitment to our mission of protecting the integrity and ensuring the efficiency of the bankruptcy system is unmatched. I am honored to work alongside them.

Mr. MARINO. Thank you, sir. The Ranking Member is back. And the Chair is now going to recognize the Ranking Member of the full Committee, the Judiciary Committee, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman. I would like unanimous consent to put my statement in the record.

Mr. MARINO. Without objection.

[The prepared statement of Mr. Conyers follows:]

Statement of the Honorable John Conyers, Jr. for the Hearing on "Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax, and Environment and Natural Resources Divisions and the U.S. Trustee Program" Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Tuesday, May 19, 2015, at 1:00 p.m.
2141 Rayburn House Office Building

The Department of Justice plays a critical role in enforcing our Nation's laws and protecting the rights of all Americans. Today, four components of the Justice Department—namely the Civil Division, the Environment and Natural Resources Division, the Tax Division, and the U.S. Trustee Program—will report to us about their work and accomplishments.

As many of you know, the Judiciary Committee is the authorizing committee for the Justice Department and we must ensure that the agency has sufficient resources and funding from Congress so the Department can perform its critical duties on behalf of the American people.

It is particularly heartening that each of the Justice Department components appearing before us today recovers or saves far more in taxpayer dollars than is spent to keep them operating.

For example, the Environment and Natural Resources Division, just in the last year, saved American taxpayers *more than $2 billion* by defending the United States against unmeritorious claims. And, the Division obtained more than $400 million in civil and stipulated penalties, cost recoveries, natural resources damages, and other civil relief.

For every dollar invested in a Tax Division attorney, $14 in tax collections is generated for the Nation's Treasury. In fact, the Tax Division collects more each year than its entire budget.

Unfortunately, however, the House has routinely passed appropriations legislation in recent years that fails to include some of the Administration's requested increases to fully fund each of these Divisions' critical programs.

This penny-wise, dollar-foolish approach irrationally prioritizes budget cuts, when, in fact, those cuts may prevent these agencies from doing the jobs that Congress statutorily mandates that they perform, namely, safeguarding public health and safety, protecting the environment, and ensuring the integrity of our nation's financial and bankruptcy systems.

Second, with respect to the U.S. Trustee Program, I believe it could do more to lessen its paperwork burdens on consumer debtors.

For years, consumer bankruptcy advocates have observed that while the Program has historically acted as a neutral monitor of the bankruptcy system, it appears to focus on "abuses by debtors."

Previous recommendations by the Appropriations Committee bolster these concerns. In 2007, that Committee recommended a substantial reduction in the Program's funding. Among the problems it cited was the Program's burdensome debtor documentation requests that do not materially affect the outcome of bankruptcy cases.

Accordingly, I want assurances that the Program will meaningfully address this concern and fully perform its mission to protect *all* stakeholders in bankruptcy.

Finally, I anticipate that the Majority may question the Justice Department's use of settlement agreements and consent decrees.

Clearly, the Department has ample authority to negotiate and enter into settlement agreements and consent decrees.

Yet, some of my colleagues on the other side of the aisle assert – without any credible evidence – that the Department somehow conspires in secret by entering into consent decrees and settlement agreements.

As it has in the last two Congresses, our Committee earlier this year reported the so-called Sunshine for Regulatory Decrees and Settlements Act, a bill that would severely constrain the use of consent decrees and settlement agreements by the Department.

Should this legislation become law, the Department would be forced to litigate more cases, which would generate millions of dollars of additional transaction costs.

Not surprisingly, the Congressional Budget Office finds that the bill would cost millions of dollars to implement given the fact that "additional costs would be incurred because litigation involving consent decrees and settlement agreements would probably take longer under the bill and agencies would face additional administrative requirements."

And, guess who is going to bear the expense of these litigation costs? Of course it will be the American taxpayer.

My strong doubts about this legislation were also confirmed by a recent Government Accountability Office report finding consent decrees and settlement agreements are important to the ability of the Department to enforce non-discretionary statutory deadlines with respect to rulemakings.

So I hope the government witnesses will help ally the concerns of my colleagues who question the Department's use of consent decrees and settlement agreements.

And I look forward to hearing the testimony from all of today's witnesses.

Mr. MARINO. Is that it, sir?

Mr. CONYERS. That's it.

Mr. ISSA. I love that man.

Mr. MARINO. This is the way it should be done. This is the way it should be done. I'm going now to recognize myself for 5 minutes of questioning. And, Mr. Mizer, you drew the short stick because of my relationship and my love for the Justice Department as a U.S. Attorney. I would like to ask you some questions that I think need some explanation, if you don't mind, sir.

So in two recent cases, judges found apparent serious misconduct by Civil Division attorneys. And you heard me read what the judge said about that. How frequently, and has this occurred before, do judges find potential serious misconduct by Civil Division attorneys?

Mr. MIZER. I'm sorry, could you repeat the question? I didn't hear the last part.

Mr. MARINO. Yes. How frequently do judges find potential serious misconduct by Civil Division attorneys?

Mr. MIZER. My understanding, Congressman, having only been in the Civil Division for a couple of months, is that these are very rare occurrences. But we take them very seriously. As a member, a former member of the Justice Department, I'm sure you understand that we view our obligation of the duty of candor and professional responsibility to the courts very highly and take those obligations with extreme seriousness. In the two cases that you mentioned in your opening statement, Mr. Chairman, we are aware of these cases. In neither case, do we believe that any misconduct occurred. And those cases are in ongoing litigation. We have responded to the judges and papers filed in those cases, taking the position that no misconduct did occur on behalf of the Civil Division attorneys.

Mr. MARINO. When you say ongoing litigation, is that with a court in determining whether there was misconduct or not?

Mr. MIZER. Each case is different. In the Texas case that you referenced, the judge has requested additional materials to determine whether or not any such misconduct occurred, and we have contested any such allegation. And in the other case that you referenced, proceedings are ongoing with a special master.

Mr. MARINO. So with your statement here, my next two questions are moot because you're saying you disagree with the misconduct. So my next question would have been what steps were taken and what, if any, disciplinary action? What if the court rules that there was misconduct and hands that down, will there be disciplinary action taken?

Mr. MIZER. The Justice Department, as you know from your time in the Department, has internal mechanisms for dealing with questions of conduct by attorneys. And we would, without question, deploy those internal mechanisms.

Mr. MARINO. Thank you. We know that senior DOJ officials met with activist groups seeking mandatory donations in the mortgage settlements. By contrast, mortgage investors say that substantial portions of the reported settlements are funded not by defendant banks, but by innocent bond holders who were not even consulted.

Did DOJ meet with mortgage investors or consumers actually harmed about what the settlement terms should be?

Mr. MIZER. If your question is about the residential mortgage-backed security settlements, I was not part of the negotiations of those settlements. I'm generally aware of those settlements, but can't speak with specificity to those concerns. I do know that the Judiciary Committee has posed additional questions to the Justice Department about those terms in the settlements and about the negotiation process for those settlements. And I know that the Justice Department is working hard on providing additional information with respect to those questions.

Mr. MARINO. Okay. What can the Division do to include investors and consumer representatives in negotiations where investors' and consumers' rights are substantially affected?

Mr. MIZER. Congressman, again, I was not part of the negotiation of those settlements. But my understanding is that no outside parties were involved in any of the negotiations.

Mr. MARINO. What would you do in the future in having that position now?

Mr. MIZER. Sure. In the future, only the Justice Department or Federal entities would be involved in any negotiation process. And any settlement that would be entered during my time in the Civil Division would fully and fairly represent the best interests of the United States.

Mr. MARINO. Do we have a situation where, in the past, where investors have been affected by this, would they have a chance to speak up?

Mr. MIZER. Certainly we are acutely aware of the concerns of investors and of the harm that was done to investors by fraud, not only in the residential mortgage-backed securities context, but in any context in which fraud is committed against the public or against the United States. And we take those interests very much into consideration when we enter settlements or when we sue in order to fully discharge the interests of the United States.

Mr. MARINO. So I guess I'm going to go out here on a leap of faith and say at some point, those individuals will have an opportunity to bring up their issues concerning what took place with DOJ?

Mr. MIZER. Yes. In fact, the False Claims Act provides an opportunity for relators themselves to bring claims. And then the fraud division, the fraud section of the Civil Division also will often work with those relators.

Mr. MARINO. So I see my time has almost run out. I will yield back the remainder of my time. And the Chair now recognizes the Ranking Member of the Subcommittee, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman. Mr. Mizer, the Justice Department is vested with broad authority to conduct litigation and to settle matters in the interest of the United States, correct?

Mr. MIZER. That's correct.

Mr. JOHNSON. Does the Miscellaneous Receipts Act limit the Justice Department's ability to enter into such settlements?

Mr. MIZER. I am not an expert on the Miscellaneous Receipts Act. I do know that it places certain limitations on the kind of arrangements that the Justice Department can enter. But I can't speak with specificity to what those limitations might be.

Mr. JOHNSON. Thank you, sir. Mr. Cruden, Andrew Grossman, a witness on our second panel, has cited a concurring opinion and a dissenting opinion in two recent cases involve the ENRD's support of the conclusion that the ENRD's litigation strategies on the issue of credential standing are undermining the government-wide litigation efforts. What is your response?

Mr. CRUDEN. I have not read in any detail that testimony. But I did look at the two cases that both occurred before I returned to the Department of Justice. I found it interesting that in both cases, the Department of Justice's positions prevailed. I believe he was commenting on a standing issue in two cases. But it kind of overlooks the hundreds of times that the Environment Division actually brings standing to the attention of the court and vigorously litigates that issue.

Mr. JOHNSON. Thank you. Mr. Grossman also argues in his written testimony that the ENRD's litigation practices merit further investigation because Environmental Protection Agency officials and environmental groups collaborate with ENRD attorneys. What is your response to that allegation?

Mr. CRUDEN. I don't actually understand what his allegation is. If he says that we are communicating with those agencies that we represent, yes, we do. On the other hand, at the end of the day, the position that we present in court is the position that the Department of Justice has decided is in accordance with law and facts. Clearly, we receive input from all of the agencies that we represent in that process.

Mr. JOHNSON. Thank you, sir. Andrew Grossman also has cited a debunked U.S. Chamber of Commerce report to conclude that the ENRD is colluding with third-party organizations through a sue-and-settle, phenomenon that predetermines the outcome of settlements and skirts the Administrative Procedure Act rulemaking process, or actually rulemaking requirements. Can you respond to that allegation?

Mr. CRUDEN. To the extent that I know what has happened in the Division, which includes this year and then many years beforehand when I was a career attorney in the Division through several different Administrations. I have not seen a collusive lawsuit. I would not accept a collusive lawsuit and would not do anything like that during my tenure as Assistant Attorney General.

Mr. JOHNSON. And how long have you been in this position, sir?

Mr. CRUDEN. I've been in this position since January, but my total time in the Division exceeds 20 years.

Mr. JOHNSON. Thank you, sir. And please explain how consent decree practices have resulted in beneficial settlements for all parties, including corporations, and produced good environmental outcomes.

Mr. CRUDEN. We bring a number of cases alleging violations of Clean Air or Clean Water to protect the citizens of the United States and very often we're able to resolve those cases with a consent decree. Under those, our standards are very clear: that is, if the consent decree is going to be better for the U.S. than litigating the case to conclusion, we should do that. That is very often where we're getting not only the kind of penalties that I described in my opening statement, we're also getting the injunctive relief that is very scientific, very engineer-oriented, that is going to restore the environment to where it would have been but for the polluting event. Consent decrees not only get the communities involved. They not only get the public involved, but they also clean up the mess that was made initially by someone breaking the law.

Mr. JOHNSON. Thank you. I wish I had time to hear from you, Ms. Ciraolo, before time expires about how the budget cutting has severely impacted your ability, your agency's ability to perform. But perhaps one of the other witnesses, one of the other panelists might ask you that question. So thank you. I yield back.

Mr. MARINO. Thank you. The Chair recognizes the Chairman of the full Judiciary Committee, Congressman Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. Mr. Mizer, the Committee still has not received the documents we requested on November 25, 2014. When are we going to receive those documents?

Mr. MIZER. Mr. Chairman, I know that an additional request was received very recently by the Justice Department.

Mr. GOODLATTE. No. No. A partial response of about 60 pages, out of a much larger body of documents, was requested a long time ago. And that's all we got. And we wrote again, it wasn't a supplemental request, it was a request saying whoops, you didn't send us all the documents we've asked for, now where are they? We sought all communication relating to the controversial mandatory donation terms in the Bank of America and Citigroup settlements. The Department has sent a paltry 60 pages of email between the Department of Justice and outside groups, no internal Department of Justice emails. And those are critical. We sent a follow-up request last week. Last night, the DOJ responded without answering any of the questions and without providing any date when we could expect the documents. It's been nearly half a year. When will we get those documents?

Mr. MIZER. I don't know the specific timing of the response. But I know that the Justice Department is working hard on responding to your questions.

Mr. GOODLATTE. Who is making the decision on when we're getting the response? You're the head of the Division.

Mr. MIZER. The settlement agreements that the questions relate to relate to the residential mortgage-backed security settlements. Those occurred before, the settlements were entered before my time in the Civil Division. And they also implicated multiple offices within the Justice Department. So the Justice Department is coordinating a response. And I'm sure we'll respond timely.

Mr. GOODLATTE. Timely has gone by already. But quickly will avoid a subpoena.

Mr. MIZER. Thank you.

Mr. GOODLATTE. During the Reagan administration, the Department of Justice Civil Division Chief, Richard Willard, routinely refused to sign off on case settlements—and this goes to your statement too, Mr. Cruden—mandating the funding of agency-favored activities for which Congress had failed to appropriate money. The Citibank and Bank of America settlements provide money for a HUD home counseling program that Congress specifically cut spending for. How does Mr. Willard's example affect your analysis of this issue?

Mr. MIZER. Mr. Chairman, the settlement agreements that you've referenced were, again, entered before my time in the Civil Division. But I'm generally aware of the provisions that you're citing.

Mr. GOODLATTE. So it's going to be your policy now to follow Mr. Willard's example and not include in settlements people who do not have standing in the lawsuit, who are not parties to the lawsuit?

Mr. MIZER. The policy of the Civil Division will be, under my leadership, to fully and fairly negotiate settlements that are in the best interests of the United States. And the——

Mr. GOODLATTE. How about following this little document here, too, which says that the Congress appropriates funds, not the Justice Department.

Mr. MIZER. We certainly will, in all instances, follow the Constitution as our lodestar and enter settlement agreements that are consistent with all laws passed by the Congress.

Mr. GOODLATTE. Dr. White——

Mr. WHITE. Yes, sir.

Mr. GOODLATTE [continuing]. At the time you negotiated the JPMorgan settlement, were you aware that the required donation to the third party would nearly double that third party's net assets.

Mr. WHITE. I'm not aware of the specific balance sheet situation of the American Bankruptcy Institute.

Mr. GOODLATTE. $7.5 million, my understanding is that the net worth today is a little over $11 million.

Mr. WHITE. Yeah, I'm not sure of the precise accuracy of those numbers. It's a 501(c)(3) organization. It doesn't exist for purposes of building its balance sheet. It recently took over the Credit Abuse Resistance Education Program, which is the main object.

Mr. GOODLATTE. I think their objectives are very good. But where do you come off funding them as opposed to the Congress funding them.

Mr. WHITE. Because of our effort in the settlement discussions with JPMorgan Chase to ensure two important objectives, accountability by the bank, and remediation for the——

Mr. GOODLATTE. Was the American Bankruptcy Institute a party to that lawsuit?

Mr. WHITE. No, it's not.

Mr. GOODLATTE. So why were they the beneficiary of, effectively, appropriations that bypassed the Congress when they received those funds?

Mr. WHITE. As I said, if you could bear with me just a moment, Mr. Goodlatte. For the purposes of accountability as well as remediation, the offenses committed by Chase Bank in this case included both monetary and non-monetary offenses, including against the integrity of the bankruptcy system. There's $43 million of direct remuneration to homeowners, either through credits or direct payments. In addition to that, there's $7.5 for the——

Mr. GOODLATTE. Presumably, homeowners were the injured party?

Mr. WHITE. No, I would suggest to you, very importantly, our job is watchdog of the bankruptcy system and that responsibility is codified in titles 11 and 28 of the U.S. Code. The integrity of the bankruptcy system was injured here in a very direct way. So it's part of the negotiations. And, of course, as you know, there are many moving parts in a negotiation. All parts have to go together. An essential part of that negotiation also was getting the correct amount that should be set for the payments by Chase Bank for accountability. Now, in the statute that we're dealing with in the Bankruptcy Code, we're dealing with an offense——

Mr. GOODLATTE. Excuse me, Director. My time has already expired. But I want to follow up on the very point you're making. Because the Congressional Research Service, when we asked them to look into this, said that the connection with the American Bankruptcy Institute was tenuous at best. Now let me ask you this: Whose idea was the $7.5 million payment? The bank's or the government's?

Mr. WHITE. It's all the product of a negotiation. But I own this provision lock, stock, and barrel because——

Mr. GOODLATTE. I understand it was your idea.

Mr. WHITE. Excuse me, sir?

Mr. GOODLATTE. I said my understanding, it was your idea.

Mr. WHITE. Yes. I would say——

Mr. GOODLATTE. That would be a more straightforward answer.

Mr. WHITE. I'm not walking away from this provision at all. I think it was an important——

Mr. GOODLATTE. At the time you were negotiating the JPMorgan settlement, did anyone make you aware that the Judiciary Committee was very concerned about third-party payment terms subverting Congress' appropriation power?

Mr. WHITE. To go back in my mind at the time I was negotiating this with Chase, it was sometime deep into negotiation when I believe there had been a hearing some months ago.

Mr. GOODLATTE. And you didn't think that that would be cause to hold up and say maybe we shouldn't go down an avenue that is controversial under the separation of powers under the United States Constitution?

Mr. WHITE. I believe that the statute that we were operating under, Mr. Goodlatte, and the objectives we had set here, this is a perfectly proper provision. And with regard to the object of the third-party payment, it has a nexus with the bankruptcy system. And it is the largest organization of bankruptcy professionals that is a 501(c)(3). It doesn't take Federal money. It doesn't lobby.

Mr. GOODLATTE. Reclaiming my time which has expired. Director White, did you consider coming to the United States Congress for $7.5 million for that purpose?

Mr. WHITE. I did not——

Mr. GOODLATTE. If it has all the merit that you describe, why not ask for an appropriation from the Congress for that purpose?

Mr. WHITE. Because I was looking for accountability.

Mr. GOODLATTE. You were looking for money and going around the Congress and this was a convenient way to do that, wasn't it?

Mr. WHITE. I respectfully disagree entirely with that statement. I was looking for accountability by Chase Bank for robo-signing 50,000 documents filed in bankruptcy court.

Mr. GOODLATTE. You get the accountability by turning it over to the government. And you could also, at the same time, say I recommend to the Congress that we——

Mr. WHITE. If I may explain our statute.

Mr. GOODLATTE [continuing]. Appropriate $25 million of that for the Bankruptcy Institute.

Mr. WHITE. May I have a moment to explain the statute that I——

Mr. GOODLATTE. That's up to the Chairman. I will subsist from asking further questions. If you want to allow the witness to respond, I would be happy to listen.

Mr. MARINO. Yes. You can do it briefly, sir.

Mr. WHITE. Thank you, Mr. Chairman. The creditor abuse practices that we were addressing in this settlement aren't subject of a specific penalty provision in the Bankruptcy Code. We're using the equitable powers of the bankruptcy court to fashion an appropriate remedy. So in the course of that, we're trying to ensure that there's full accountability by the bank that also ensures full remediation for the aggrieved homeowners. I believe we achieved that by the dollar remediation that is provided there for the homeowners, as well as the additional payment by Chase. Also, in order to suggest that this somehow is a penalty that otherwise would have been paid to the Federal Treasury is I think, at best, highly speculative, given the statute that we're operating under.

Also in our agreement, Chase admits to conduct throughout the agreement. It doesn't admit to particular liability. So to suggest that there otherwise would have been a penalty, that we could somehow dissect the provisions of the agreement, take out the $7.5 million, instead of going to a third party would have gone to the Federal Treasury, I would suggest, respectfully, is at best highly speculative. The bank admitted to conduct. It didn't admit to specific liability. And the Bankruptcy Code does not provide for creditor abuse, specific fines, or penalties. It's the equitable power of the court.

I appreciate the time.

Mr. MARINO. The Chair now recognizes the ranking Committee of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I want to begin by yielding to the distinguished gentleman from Georgia, Mr. Johnson, for his very penetrating question that he wasn't able to get to you.

Mr. JOHNSON. Thank you. And so as not to repeat myself and waste any time, would you care to respond to the question that I said that I would have raised?

Ms. CIRAOLO. Thank you, Mr. Johnson.

The Tax Division appreciates the budget and the resources its been given to pursue its tax enforcement efforts. I think that you might be referring to the sequestration that we were under in the past, and that was a very difficult process for the Tax Division.

Mr. JOHNSON. It's an ongoing process as well.

Ms. CIRAOLO. We appreciate the resources we've been given now, and we are using those resources to the best of our ability.

In the last few years, there was a hiring freeze. We lost a lot of senior attorneys to attrition. We are in the process of hiring new attorneys, but that obviously had an impact on our ability to pursue tax enforcement and tax administration.

Mr. JOHNSON. Thank you.

What percentage of your attorney force has been decimated by the tax cuts?

Ms. CIRAOLO. During the budget difficulties, we lost 20 percent of our experienced attorneys. That, coupled with the hiring freeze at the time, put us at a disadvantage in terms of pursuing tax enforcement. The men and women of the Tax Division are bright and hard-working, and they will do what it takes to pursue the cases that they have. But further cuts to the budget would be devastating to the Tax Division.

Mr. JOHNSON. Thank you.

And I'll yield back to the Chairman.

Mr. CONYERS. Thank you so much, sir.

Director White, are you aware of a concern voiced by attorneys for consumer debtors that some trustees make burdensome document demands that well exceed what's required by law? And if this concern is valid, what do you recommend that the program do in response to it?

Mr. WHITE. Yes, sir. I do think overall that our trustees do an outstanding job with regard to efficiently administering and fairly administering bankruptcy cases. But I have been made aware from time to time that there have been concerns with regard to whether document production requests made on a routine basis by certain trustees is excessive. And we take that seriously for purposes of the efficiency of the bankruptcy system.

Similar, and actually related to this matter as well, is that we sometimes become frustrated and pay some resource enforcement attention to the fact that debtors' counsel do not always respond in a timely and complete fashion to legitimate requests for document production, whether it be pay advices, tax returns, and so forth that are needed in order to properly administer an estate.

So we believe there's a common interest here with efficiency of the system on the part of both trustees who need the information and debtors' counsel who provide the information.

A couple of years ago, in response to these concerns, we decided what we would do, in light of the fact that it is a decentralized system, local rules are different, local practices vary from district to district, we issued some best-practices guidelines for trustees that could be used as a training tool by trustees as well as by debtors counsel to try to ensure that document production requests were not excessive. There would be some guidelines for what's appropriate, given various fact scenarios.

Recently, after 2 years of these guidelines being out——

Mr. CONYERS. Okay. I'm running out of time, sir.

Mr. WHITE. Okay. We've been doing something about it, Mr. Conyers, is the bottom line.

Mr. CONYERS. I get your drift.

Let me turn to Mr. Cruden now.

Would you, please, explain how consent decree practices have resulted in beneficial settlements for all parties, including corporations, and produced good environmental outcomes?

Mr. CRUDEN. As you all know, Ranking Member Conyers, the consent decree process comes in litigation. So when there has been a lawsuit, there has been a complaint, and the consent decree is resolving that dispute. The consent decree process also gives the court authority to look over and make sure that promises are carried out.

So one particular advantage of a consent decree is it ends the litigation, and it ends attorneys fees. So all of the parties, in fact, can spend their money, in my case, doing positive things for the environment as opposed to funding additional litigation. So that's a positive step right away.

Second very positive thing, very often corporations are coming to us right away and saying: We are interested in settling. We know that we have made mistakes. They don't have to admit liability, but they can, again, look at how to correct that activity. Sometimes they are increasing the training of their individuals. Very often, they're taking steps, and then the local community is going to stop a polluting event, and correct any environmental problem that occurred there.

So the consent decree has a positive economic effect but it also has a positive environmental effect.

Mr. CONYERS. Thank you so much.

And thank you, Mr. Chairman.

Mr. MARINO. Thank you.

The Chair now recognizes Congressman Trott.

Mr. TROTT. Thank you, Mr. Chairman.

Director White, thank you for being here today.

And as you may know, the American Bankruptcy Institute recently issued some recommendations relating to chapter 11 bankruptcies, particularly relating to concerns over trusts that are established post-confirmation and the lack of transparency and disclosure and governance with respect to those trusts.

I wonder if you have any of those same concerns as it relates to trusts that are created post-confirmation and what your thoughts are regarding that recommendation?

Mr. WHITE. Yes, sir. In recent years, we've heard increasingly from creditors and then also through the chapter 11 Commission that you referred to the fact that there has been a proliferation of post-confirmation trusts and entities created in chapter 11 reorganization cases that are really vital to the success of the plan. They deal with efforts to bring money in a litigation trust distribution but concern about transparency.

Now, we have limited authority with regard to post-confirmation after a plan is confirmed and a case emerges from bankruptcy. Where we do have a role is in the disclosure statement process, which is what the commission looked at specifically. Where issues of corporate governance need to be set out in who is going to control the trust, issues of how the claims are going to be processed, issues with regard to if a stakeholder has a question or a problem or an objection to the administration of the trust, ensuring there's a mechanism to get to the court so that the judge can resolve that.

So I believe that an important issue is raised. Under current statute, we try to act to bring greater transparency and fairness to the system. It's an integrity system for us, and it is something we've been sensitive to. We should probably be more sensitive to it, and I share your concerns.

Mr. TROTT. Thank you.

There's some feeling in the mortgage servicing industry that sometimes the U.S. Trustee, you know, places more emphasis on form over substance. Within your staff, are there any quotas or rewards given to folks for the number of investigations or the number of complaints they bring against mortgage servicers?

Mr. WHITE. No, nothing of that. We, of course, measure—try to measure various enforcement activities in numerous categories so we can see, for example, if an area we should shift resources, but absolutely not.

And the cases that we've brought with regard to mortgage servicers, we're dealing with things—to use Chase or other examples in other national settlements—where I think one would agree these were significant and required action, robo-signing, inaccurate accounting, and so forth. But there's no room for quotas in a legitimate enforcement system, and we don't have them.

Mr. TROTT. It's pretty clear banks like Citi, Chase, Wells, B of A are exiting or working to exit the servicing space because it's really not profitable, nor is it good for a reputational risk. Do you view the rise of specialty servicers as a good or bad things for consumers?

Mr. WHITE. I don't know that I view it either way. I will say that we have—and I amplify this a bit in the full statement—we have tried to look at the newer and boutique entrants into the servicing industry because we've seen that they were making the same kinds of errors that we saw 5 years ago before the national mortgage settlement. So we want to be very concerned that the progress we made with regard to the traditional banks is not lost as those loan portfolios are sold off to the newer entrants into the system.

Mr. TROTT. Thank you, sir.

Mr. Mizer, I know you are relatively new to your position. Congratulations. Do you have any numbers of how the nonprofit housing groups like NeighborWorks and others that received in excess of $150 million as part of the settlement, how are they doing? How many loan workouts and modifications have they helped borrowers complete? How many homes have been saved, and how many foreclosures have been avoided? Do you have any numbers internally on that?

Mr. MIZER. I don't have any numbers on that. I do know that there's consumer relief provisions, that those agreements are independently monitored and that those independent monitors have reporting obligations, but I don't have numbers with respect to your specific question.

Mr. TROTT. Director White, a few minutes ago, talked about the Trustees' Office working to ensure timely discovery and disclosure of information. So can you sort of understand—and it wasn't under your watch, but can you sort of understand why this Committee would be highly suspicious of mandatory payments in excess of $150 million as part of some settlement to potentially politically motivated nonprofits, and it takes 6 months for us to get incomplete answers to questions in that regard? Do you sort of understand why that gives us pause.

Mr. MIZER. I certainly understand the concern, Congressman. I would note that the consumer relief provision that you've identified provides the banks with a menu of options from which to choose, and then if the banks——

Mr. TROTT. So they were given incentives to funnel money into potentially a slush fund for these politically motivated nonprofits. That's the concern. So they have choices, but they have bonus credit points if they choose certain choices. You're familiar with that part of the settlement, right.

Mr. MIZER. I'm generally familiar with it.

Mr. TROTT. One last question.

And I'm out of time, Mr. Chairman.

In hindsight, wouldn't it have been better, instead of opening up a can of worms of politically motivated nonprofits, to direct that money, which in some cases $150 million would be an incredible amount of money to State bar programs, to have mediation programs that have a much greater chance of success or State housing development authorities that have a very accurate and process that is full of integrity, that wouldn't be susceptible to this kind of attack? I mean, wouldn't that be a better way to help borrowers?

Mr. MIZER. Congressman, I can't speak to the decisionmaking that went before. But what I can say is that in the future, in any settlement that we enter, we will consider the concerns that you've identified and other concerns in making sure that the public fisc is restored for some of the harm done to it by fraudsters and that some measure of relief is given to those who deserve it.

Mr. TROTT. Thank you, sir.

I yield back my time.

Mr. MARINO. Thank you.

The Chair recognizes Congressman Peters.

Mr. PETERS. Thank you, Mr. Chairman.

I will start by asking, ma'am, can you tell me how to pronounce your name?

Ms. CIRAOLO. Ciraolo.

Mr. PETERS. Ciraolo. Ms. Ciraolo, thank you for being here. Thanks to all the witnesses for being here.

I had a question on two topics in the tax provision. One is bad tax preparers. I wonder what you could do—well, you could tell me about what you are doing to take bad tax preparers off the street.

Ms. CIRAOLO. Sure. Thank you. And we share your concern regarding fraudulent tax preparers.

The Tax Division has a twofold approach to fraudulent tax preparers. One is our civil injunctions. These are immediate actions to put the preparers out of business when they are identified. And on the criminal side, we prosecute fraudulent preparers that are engaged in willful conduct, willfully preparing and filing fraudulent tax returns.

Mr. PETERS. Those are options open to you. But do you have any sense for what's being effective, how often you're seeing it? Can you give me sort of a sense? I understand those two avenues as possible procedures. How is that working?

Ms. CIRAOLO. It's a significant problem, and we are bringing all of our resources to bear. Since 2000, we brought over 500 civil injunctions against fraudulent return preparers and abusive promoters of schemes.

On the criminal side, we're prosecuting, we're identifying fraudulent return preparers, prosecuting them. We're working with our law enforcement partners both within the IRS and within the U.S. Attorney's Office to identify these and prosecute.

Mr. PETERS. Do you perceive that you're having a positive effect on this, or are you just kind of treading water or——

Ms. CIRAOLO. Well, the criminal element doesn't seem to go away, but we are there. And we're getting significant sentences in these cases. Anyone out there that's contemplating this type of behavior should take a look at the cases we've brought to date. And it's our obligation to the honest return preparers—and there are many honest return preparers out there—to pursue this on behalf of them and on behalf of the American public.

Mr. PETERS. Okay. The other issue is, I'm still on identities. So I saw the New York Times' report on instances where criminals have electronically filed tax returns using stolen IDs, and then they would get a fraudulent return but with money back to them.

So I was sort of curious about how substantial or widespread you see that this problem is, and then what efforts you're making in the division to address this issue.

Ms. CIRAOLO. Thank you. Again, we share your concern. This is a growing problem. Stolen identify refund fraud is essentially a street crime, and it's a growing problem. We are working with the IRS and the U.S. Attorneys' offices along with State and local law enforcement partners to identify these offenders, dismantle the operations, and prosecute the offenders.

As we pursue these cases, we are not only prosecuting the offenders, but we are sharing information gathered in the investigation in realtime with the IRS so we can improve its filters to stop the refunds at the door. We have over 100 prosecutors in the Tax Division, many of whom are working on these cases. We've also delegated authority to the U.S. Attorneys' offices so they can act quickly to impanel SIRF grand juries charged by criminal complaint and obtain seizure warrants for illegal proceeds in SIRF cases.

In February 2014, we established a SIRF advisory board. This board works with U.S. Attorneys' offices and with the IRS to offer training in these cases to better spot the offenders and deal with the problem. So we are bringing all of our resources to bear in this area.

Mr. PETERS. And do you feel you have adequate tools in this area, or is there anything Congress should be doing for you to help assist these efforts?

Ms. CIRAOLO. Thank you for raising that issue.

We are using all the resources that we have available. We're using all available tools. We welcome any ideas to combat this significant problem.

Mr. PETERS. I think that the idea is that you would have more of an idea what you need than we would. So that's why I'm asking you.

Is there something that—I understand the financial or the monetary aspect of it. But is there something in terms of tools, particularly with respect to the Internet, that you would need help with from this Committee or from Congress as a whole?

Ms. CIRAOLO. We have a variety of tools we use. Right now we're sharing information in realtime with the IRS. And the IRS——

Mr. PETERS. You're saying you have what you need in terms of tools or——

Ms. CIRAOLO. We're always open to more ideas on how to combat this problem.

Mr. PETERS. But don't have any ideas. Okay. Okay. Just maybe in the last 30 seconds that I have, can you share a sense for what the sequester meant in terms of your ability to prosecute tax fraud and particularly if you have some sort of numbers in terms of the return that we are losing on getting money back from people who are cheating on their taxes?

Ms. CIRAOLO. Yes. Thank you. Sequestration was extremely difficult for the Tax Division. We had a reduction in the funds for litigation expenses, for travel expenses. That put our attorneys at a severe disadvantage when they were going up against other counsel in cases, both in civil cases and criminal investigations. We had a hiring freeze. We had to limit outside training. We lost 20 percent of our experienced attorneys.

We have been working very hard to hire up, but the morale dropped during that period of time. With limited resources and with sequestration, we're less able to pursue additional cases. Our men and women are working very hard. They're going to do what it takes to get these cases done, to pursue the offenders. And I don't want anyone out there thinking that, you know, with limited resources, we're not going to identify and pursue these offenders.

Mr. PETERS. Thank you very much.

Mr. Chairman, thank you.

Mr. MARINO. Thank you.

The Chair recognizes Congressman Ratcliffe.

Mr. RATCLIFFE. Thank you, Mr. Chairman.

I want to thank all the witnesses for being here today. Effective oversight is one of the most important duties that we have as a Committee, and I appreciate the willingness of each one of you to be here to assist us in that regard.

I also want to thank you, Chairman Marino, for holding this hearing today, to examine the activities of the four Justice Department components within this Subcommittee's jurisdiction.

As a former U.S. Attorney like you, Mr. Chairman, I had the great privilege of serving with many great men and women at the Department of Justice, and I care a great deal about the reputation of the DOJ with the American people.

With that context, Mr. Mizer, many of the 700,000 Texans that I represent are deeply concerned about Operation Choke Point and the role of DOJ with respect to that operation. Many of the folks that I represent viewed the operation as a, frankly, a blunt weapon which targets and stigmatizes entire industries that the Administration doesn't like.

I recently met with a number of folks in the gun industry, and a number of these law-abiding citizens had, in fact, been targeted by this program.

In July of 2014, this Subcommittee held a hearing on Operation Choke Point. After the hearing, the FDIC announced that it would rescind its list of high-risk merchants. This move seemed to be an apparent recognition of the fact that Operation Choke Point was inflicting an unacceptable level of collateral damage on legitimate businesses.

So my question to you is, what specific steps has DOJ taken to mitigate the collateral damage of Operation Choke Point subpoenas?

Mr. MIZER. Thank you, Congressman.

My experience with Operation Choke Point only extends to the 2 months or so that I have been in the Department. But I can say that we are pursuing only fraudsters and those banks that knowingly allow fraud to occur. And in my time in the division, we've settled two significant cases that make clear what we're doing and what we're not doing.

What we're not doing is targeting the kind of gun retailers that you have identified. What we are doing is going after banks that are ignoring very serious red flags and ignoring the legal obligations that they have not to do business with fraudsters who are defrauding American consumers of their money by stealing bank account information and essentially stealing money.

So, in one of the cases that we have settled, one of the banks had boxes full of affidavits in which consumers were telling the bank that, in fact, the charges against them had never been authorized and, nonetheless, the bank continued to allow the charges to occur. So we are only going after those kinds of unlawful practices and not the lawful gun retailers who have expressed concern to you. And we want to make that abundantly clear.

Mr. RATCLIFFE. Thank you.

So can you tell me, and maybe you can't, but I'd like to know whether the Justice Department has sent any additional Operation Choke Point subpoenas since the Subcommittee hearing last summer.

Mr. MIZER. I don't believe that the division did. During my time in the division, which has only been the past couple of months or so, I have not signed off on any additional subpoenas in this regard.

Mr. RATCLIFFE. Okay. Thank you, Mizer.

I'd like to use my remaining time to quickly turn to another issue that is on top of the mind for many of my constituents.

As you know, in February, Judge Andrew Hanen of the United States District Court for the Southern District of Texas enjoined the executive amnesty announced by the Administration back in November of 2014. He later discovered that DOJ lawyers had misled the court by saying that no action would be taken on the November executive amnesty policy until a certain date when, in fact, the Administration had, in fact, already begun carrying out the new amnesty policies.

Mr. Mizer, as you know, those types of misrepresentations are unacceptable and extremely serious. And in some instances, I would have expected maybe other Federal judges to consider striking the government's pleadings in their entirety.

Again, with that context, what steps are you aware of that DOJ is taking to mend its credibility with the court?

Mr. MIZER. Congressman, like you, we, in the Civil Division and in the Justice Department take extremely seriously the high obligation that the Justice Department has and duty of candor to the courts. And we vigorously dispute any suggestion that we engaged in misrepresentations or misconduct in front of any court, including the Judge Hanen. We have filed papers in that court demonstrating that, in fact, no misconduct occurred, and we continue to discharge our obligations of candor to that court.

Mr. RATCLIFFE. Well, my time has expired, so we'll just have to agree to disagree on that issue, Mr. Mizer.

I thank you and yield back.

Mr. MARINO. The Chair recognizes Congressman Jeffries.

Mr. JEFFRIES. I thank the Chair for convening this hearing as well as all the witnesses for your participation here today and your service to the country.

If we can just start with Mr. Mizer. I wanted to just kind of explore, again, the context by which the Department of Justice has gone after some of the financial institutions responsible for participating in the greatest collapse of the United States economy since the Great Depression.

It is my understanding that we're in the midst of an appropriate oversight hearing. It was referred to earlier as a pattern-and-practice hearing. I think there was a pattern and practice of fraudulent behavior, whether that included mortgage-backed securities and no-document loans and targeting of vulnerable individuals, credit default swap market that was completely unregulated and out of control, all of which collectively led to the Great Recession.

And so I think, responsibly, the Department of Justice has taken action against many of the financial institutions that broke the law and should be held liable and accountable for their actions. And it's my understanding that in this context, several settlements have been reached, of course, and that the Department of Justice really pursued five different types of areas where consumer relief was provided? Is that correct?

Mr. MIZER. Those settlement agreements were entered before my time in the Civil Division, so I don't know if the five different types is exactly the right number. But I do know there are consumer relief provisions included.

Mr. JEFFRIES. So my understanding that there were loan modifications as part of DOJ settlements; refinancing assistance provided to individuals who were trapped in high-interest mortgages—that would be two; three, closing cost and down payment assistance; four, financing for affordable housing; and then, five, donations to community organizations. And I think the fifth one, donations to community organizations, seems to be a matter of some controversy. I have yet to understand why, but I get that it's a matter of some controversy. So we can hone in on that for a moment.

In terms of the overall totality of the settlement, if we just take settlement related to JPMorgan, the settlement related to Citigroup, the settlement related to Bank of America, the aggregate settlement amount seems to be in excess of $30 billion to $35 billion. Is that correct?

Mr. MIZER. The aggregate settlements were over $35 billion. That is correct.

Mr. JEFFRIES. Okay. In terms of the assistance to community organizations, am I correct that that number was about $100 million?

Mr. MIZER. I believe it was a small fraction. I think it was between 100 and 150 million. But, again, because the settlements were entered before my time, I'm not specifically familiar.

Mr. JEFFRIES. Okay. $100 million is, in and of itself, in isolation, a substantial number. But, clearly, in the context of the overall amount of consumer relief or settlements that were generated, it is a very small fraction. But can you just elaborate for me on what was the rationale in the context of these different areas where consumer relief was found, the majority of which went into other areas, what was the rationale behind entering into sort of these partnerships between the financial institutions and the community organizations?

Mr. MIZER. My understanding is that the purpose of the provisions was the banks who had engaged in unlawful conduct to direct some of the money to individuals who had suffered as a result of their unlawful practices and for some measure of relief to be given to individuals who either lost their homes or who suffered as a result of the unlawful practices of these large financial institutions that resulted in such severe harm to our economy.

Mr. JEFFRIES. Now, are you also involved in sort of overseeing operation choke hold?

Mr. MIZER. I believe it's Operation Choke Point.

Mr. JEFFRIES. I'm sorry. We had a police violence hearing earlier today. I'm getting my talking points mixed up. But Operation Choke Point. And I guess there's some controversy about certain financial institutions perhaps being targeted that were involved in some way in gun running. Is that correct?

Mr. MIZER. I'm aware of reports that some businesses that are engaged in lawful practices, including gun retailers, alleged have been affect by Operation Choke Point. But those allegations are unfounded. We are targeting only lawful business. We are not targeting gun retailers. We are only going after those businesses that are engaged in illegal conduct and fraud against American consumers. I'm happy to provide more information, but I see my time has expired.

Mr. JEFFRIES. Yeah. Thank you for that.

If I could just have an additional point of the observation.

Mr. MARINO. Yes.

Mr. JEFFRIES. Very briefly. I would just say that, you know, we've got 5 percent of the world's population but 50 percent of the world's guns. And we believe there are more than 285 million guns in circulation right now in America. It seems to me reasonable that something should be done to keep those guns out of the hands of individuals that would do us harm.

I yield back.

Mr. MARINO. Thank you.

The Chair now recognizes Congressman Issa.

Mr. ISSA. Thank you.

Mr. Mizer, I really appreciate the opportunity to pick up right where we left off. During your answer, you actually said "lawful business." I assume you meant unlawful business?

Mr. MIZER. If I misspoke, I apologize. We are targeting——

Mr. ISSA. Because you sure did send subpoenas to a lot of lawful businesses. Now, you do you remember the name Ray Donovan from your history books?

Mr. MIZER. Yes.

Mr. ISSA. Okay. What department do these people go to get their reputation back, famously the Secretary of Labor said after he was exonerated. You've sent out countless subpoenas. You've caused banks to drop lawful businesses by the scores, particularly payday lenders, not just ammunition sales. And now they want to know where to go to get their reputation and, by the way, their bank's relationship back. What do I tell them?

Mr. MIZER. Congressman, many of the subpoenas that you've identified——

Mr. ISSA. I can't identify them because you haven't delivered us the list of them. For example, since November, sorry, July 28 of 2014, how many subpoenas have you sent out? I know you've only been there 2 months, but——

Mr. MIZER. What I can say is we are not——

Mr. ISSA. Have you sent out subpoenas?

Mr. MIZER. Congressman, in the 2 months that I have been in the Civil Division, I have not authorized any subpoenas in relation to this set of concerns.

Mr. ISSA. Okay. So when the FDIC printed this rather interesting semi-retraction of we were misunderstood when we said target these high risks and cause banks to drop all kinds of lawful businesses and you followed up, you're going to tell us that there was no political agenda even though the gentleman made it very clear that the political agenda of the President is consistent with this: Get these people their banking relationships dried up and you can stop them from being in business.

So the question once more is, after this kind of use of power, where do they go to get a clean bill of health? Are you participating in this? Are you willing to be part of remediation, as the FDIC has said, as the FDIC Chairman has said he is doing but hasn't shown us yet?

Mr. MIZER. Congressman, I can't speak to what the FDIC is doing. What I can say is that——

Mr. ISSA. Are you doing anything?

Mr. MIZER. Congressman, we are trying to make abundantly clear that we are not targeting——

Mr. ISSA. Are you doing any remediation of those who have had their reputations destroyed by Operation Choke Point?

Mr. MIZER. Congressman, we have not received any financial institutions communicating to us that involuntary bank closures were on account of Operation Choke Point. And so——

Mr. ISSA. Operation Choke Point put companies out of business, took away their bank relationships. You're aware of that, right?

Mr. MIZER. Congressman, the unlawful conduct that we are targeting should have not resulted in any lawful business losing a bank account.

Mr. ISSA. But it did. Let me go on to a little different, but it's on my list of shakedown is the title that my people gave me on all this. In a case of—filed by the ACLU, the *Lopez v. Johnson* case, you entered into a settlement, right?

Mr. MIZER. I am not specifically familiar with that case.

Mr. ISSA. Okay. So the fact that in a settlement, the ACLU was able to get the United States Government, not through Congress, to agree to advertise in and hold a campaign in Mexico to encourage people who had voluntarily deported themselves, voluntarily departed, to let them know that they could come back and fight it. You're not aware of any of this?

Mr. MIZER. I am not aware of that case. But I would be happy to continue to confer with the Committee.

Mr. ISSA. I would be thrilled if you would come back to us. Because we, quite frankly, do not understand on what basis you agree to spend money campaigning to tell people that are, in fact, illegals, who have voluntarily left, that they should come back and fight deportation. Director White, you answered sort of questions of the Chairman, but I'm going to try and ask it a different way.

Mr. WHITE. Sure.

Mr. ISSA. You have, at times, taken penalties into the Federal Treasury from entities such as the ones that—such as JPMorgan Chase, is that correct?

Mr. WHITE. I'm not sure that any——

Mr. ISSA. You have had settlements in which the Treasury received money?

Mr. WHITE. I'm not sure any settlement that we were solo, without other Federal entities, has ever had a penalty go in. Where we get penalties—and we, actually, in our annual report, list penalties that——

Mr. ISSA. Let me just ask a question.

Mr. WHITE. Sure.

Mr. ISSA. Is there any prohibition on the nonprofit known as the United States of America receiving the $7.5 million, "voluntarily," so that the United States Government would have specific funds to go out for a grant program openly and transparently to entities to do the remediation that you're talking about, is there any prohibition in law that would have prevented you from bringing it in and allowing a grant program? And I'll just give you a followup question.

Isn't it true the Department of Justice does, in fact, have grant program authority, as do other parts of the government, that could have done some of these, if you will, informational grants?

Mr. WHITE. My expertise is in the Bankruptcy Code and those parts of title 28 that deal with us. And in order for the money to have gone to the taxpayer or more money to the homeowner, then we would have needed two other things to occur, which I suggest are highly speculative. One, Chase agreeing to it.

Mr. ISSA. Chase was going to agree to whatever you said, or they wouldn't have given that $7.5 million otherwise.

Mr. WHITE. From your mouth to God's ears.

Mr. ISSA. Inshallah.

Mr. WHITE. I mean, I think it's speculative to suggest that the agreement could have been done without—the way it was fashioned, both with the remediation that went to the homeowners in the amounts that was to the homeowners and additional accountability imposed through the third-party payment. I believe it was an essential part of the agreement.

Mr. ISSA. So you would support, then, legislation that would keep you from, in fact, bypassing Congress, bypassing the appropriation process, and selecting what might very well be considered to be partisan 501(c)(3) groups with an agenda, if you will, to do this work?

Mr. WHITE. Respectively, Mr. Issa, I don't believe that we in any way bypassed the Congress, nor do I believe in any way we sent it to an organization that is in the least bit controversial.

Mr. ISSA. Well, I appreciate that you don't think they're the least bit controversial.

Mr. WHITE. I'm talking about, I can only——

Mr. ISSA. Look, we put a community organizer in the White House. The American people made that decision. But when you make a decision to direct funds toward organizations and you double their financial base as a result, you make a real difference in their ability to do things which, in fact, is fine if it's done through an open and transparent process, which it doesn't appear to be.

Mr. WHITE. Perhaps, Mr. Issa, if I may——

Mr. Issa. Of course.

Mr. WHITE [continuing]. I may have misunderstood your question, sir. I thought you were referring to the Chase settlement that U.S. Trustee Program entered into in March. In that case, the only recipient was the American Bankruptcy Institute, which is the largest professional association of bankruptcy professionals. It does not lobby. It does not litigate on behalf of private clients. It does not accept Federal money and so forth. So what I'm testifying to—I thought the question went to—the ABI grant. That's the one that I can speak to. And I must say that I have viewed it as an unassailable provision of that agreement.

Mr. ISSA. And unappropriated.

I thank the Chairman.

Mr. MARINO. Seeing no other witnesses for this panel, you are excused. I want to thank you so much for being here this afternoon.

And we will impanel our next witnesses. Thank you.

Mr. WHITE. Thank you.

Mr. MARINO. Good afternoon. The meeting will be, the hearing will come to order again. I would like to thank our panel for waiting and for testifying.

And I want to begin by asking you to please stand, raise your right hand to be sworn in.

Would you please stand and raise your right hand to be sworn in?

Do you swear that the testimony you're about to give is the truth, the whole truth, and nothing but the truth so help you God?

You may be seated. And let the record reflect that all the witnesses have responded in the affirmative.

I'm going to introduce the panel. And I will begin with Mr. Horowitz. Am I pronouncing that correctly?

Mr. HOROWITZ. Yes.

Mr. MARINO. Thank you, sir.

Mr. Horowitz is the CEO of Twenty-First Century Initiatives and serves as senior fellow for the Hudson Institute. Mr. Horowitz served as general counsel for the Office of Management and Budget under the Reagan administration. For nearly two decades, Mr. Horowitz has run the Religious Liberty Project at the Hudson Institute, playing a lead role in the shaping and passage of such wide-ranging legislation as the International Freedom Act, the Sudan Peace Act, the Prison Rape Elimination Act, the North Korea Human Rights Act, and the Trafficking Victims Protection Act. Mr. Horowitz served in the United States Marine Corps Reserves. He is a graduate of City College of New York and the Yale Law School.

Good afternoon, sir.

Mr. Daniel Epstein is the executive director of the nonpartisan, public advocacy and legal reform organization Cause of Action. Prior experience includes having served at the U.S. House of Representatives as a counsel for oversight and investigations at the Committee on Oversight and Government Reform, where he specialized in tax, labor, nonprofit, and Federal grant-spending investigations and oversight. Mr. Epstein has been cited by a variety of media outlets, including the National Journal, the Chicago Tribune, and the Washington Post. He is a graduate of Emory University Law School and Kenyon College in Gambier, Ohio.

Good afternoon, sir.

Mr. Grossman is an associate at the firm Baker & Hostetler, LLP, and an adjunct scholar at the Cato Institute. He has filed several high-profile amicus curiae briefs in Supreme Court cases and in the Federal courts. Mr. Grossman has been a frequent legal commentator on radio and television, having appeared on Fox News, CNN, MSNBC, CNBC, NPR, CBN, and in print publications, such as The Wall Street Journal, USA Today, The Washington Post, The Washington Times, and many others. He has testified before the House and Senate Judiciary Committees numerous times on issues of constitutional law and legal policy, and frequently advises Members of Congress. Mr. Grossman is a graduate of George Mason's School of Law and the University of Pennsylvania master's program. He holds an undergraduate degree from Dartmouth College.

Welcome, sir.

Ms. Saunders is the associate director at the D.C. branch of the National Consumer Law Center, where she serves as its managing attorney. Ms. Saunders specializes in the area, including the Consumer Financial Protection Bureau, prepaid cards, mobile payments, and small-dollar loans, credit cards, bank accounts, and preemption. Prior to working with the NCLC, Ms. Saunders directed the Federal Rights Project of the National Senior Citizens Law Center and was an associate at Hall & Phillips. Ms. Saunders is a graduate of Harvard Law School where she was an executive editor of the Law Review. She also holds a master's degree from Harvard and an undergraduate degree from Stanford University.

I want to thank each of you. Each of the witness' written statements will be entered into the record in its entirety. I ask each witness to summarize his or her testimony in 5 minutes or less. And to help you stay within the time, there is a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired. Mr. Horowitz, you are recognized for your 5 minutes or less opening statement. Thank you, sir.

TESTIMONY OF MICHAEL HOROWITZ, CEO, TWENTY-FIRST CENTURY INITIATIVES

Mr. HOROWITZ. Thank you, Mr. Chairman.

Thank you, Mr. Chairman.

Thank you, Mr. Ranking Member.

It is a distinct pleasure to be here as you begin a hearing on some of the most fundamental issues that face government. They are, first, the relationship of means to ends, as government pursues its objectives. And, second, the role of the rule of law in the government's process. I've wrestled with those questions a great deal. I've seen others wrestle with those questions. And I've done so particularly at two important moments in American history. The first was the battle against segregation in Mississippi and throughout the South. And the second is as OMB general counsel.

When I was in Mississippi, Mr. Chairman, I saw lots of people who placed policy preference over law. They created a crisis for the United States. They did not help the State of Mississippi, nor did they help their cause. I also saw men who were indifferent to the issue of segregation. I think of Judge Claude Clayton of the Northern District of Mississippi. He probably was comfortable with the culture as it was. But it was a matter of indifference to him when he saw the law being violated. That, to him, took precedence over policy objectives at all times. And he, more than anyone, ended segregation. And it was the rule of law, despite one's personal views or personal preferences in policy, that was the feature that did it.

I saw the same thing in the Reagan administration, Mr. Chairman. We, as senior attorneys, said no to the President and to agencies. We often hurt presidential policy. We often hurt the President politically. I remember being with the White House Counsel, being the subject of newspaper ads, being attacked because we opposed a conservative so-called "defund the left" movement. We thought that grants should be given based on the quality of the grant application, not the politics of the grantee.

Mr. Goodlatte, you had mentioned Richard Willard. We fought like tigers against those sweetheart settlements, not only when moneys were given to favored parties but also when government agencies were told to perform functions and given money outside the appropriations process. The mechanism here is, of course, the judgment fund. The judgment fund is a permanent, indefinite appropriation. And if a court signs a piece of paper, Congress has no say in the matter. And infinite amounts of money can be spent. That's what the judgment fund means. So use of the judgment fund as a means of circumventing the constitutional appropriations process. I remember the bittersweet moment when independent counsel came to me and complimented me for defeating Ollie's Army. It was quite a bittersweet moment because I had issued a ruling saying that Congress had passed a law that didn't allow the White House to manage the Iran—the Contra campaign. And we had to turn it over to the State Department, whose policies were not the policies of the President.

Many of us would tell people who came to us and said that we have policies that we prefer, and by the way, one of the beneficiaries will be this fellow who has given a lot of money to campaigns. We had a pretty standard tactic: We said do it again, and we refer you to the FBI.

I tried to propose tort reforms, which I thought were constitutionally permissible. And my colleagues said, No, it can't be done. And I went to my colleagues and said: But, you know, the tort lawyers are creating all this difficulty. And if we don't do the reform at the Federal level, it won't be done.

Nobody, as the President regularly does now, said: Well, if we don't do it, it won't happen. And we've got to do it, come what may.

The issue was on the Federalism component. And I was shot down by my colleagues.

Now, when we did it, Mr. Chairman, I felt badly. Ed Meese was heartsick when he brought to public attention the fact that money was being paid to the Contras by—and there were financial arrangements with Iran. The President had said that we weren't giving money to Iran in the course of negotiating with terrorists. And it turns out we were. He got the evidence, and he went public immediately on that evidence.

And, yet, Mr. Chairman, when I look back in retrospect, what I realize is that what we helped do was create a Presidency which stood for more than its own self-interest, which stood for principle. People said regularly: Well, I don't agree with Reagan, but he stands for something and I will support him. And it was a Presidency that really counted because it was respect for the rule of law.

And if there is, what are we going to do, Mr. Chairman, with this incredulous performance of this Administration, Executive orders that repeal whole systems, Executive orders that create whole statutory frameworks, these settlement matters of which we could talk some more.

There is no way, Mr. Chairman, I can say this definitively, that confronted with a statute that says billions of dollars shall go out to support a healthcare system—and it said that there are two classes of beneficiaries, only one of whom shall get money—there is no way, Mr. Chairman, we would have allowed money to go to a second class of beneficiaries, which is what has happened, nor would we have permitted deadlines to be ignored, nor would we have permitted the waiver of tax moneys, no matter what our feelings on the matter.

Now, I don't blame the President so much on this, Mr. Chairman. He may be a lawyer, but he's a client in this case. And I do say that we have a group of lawyers who never say no. That's outrageous. We depend on them. We don't—what they do is what the southern segregationists did: Hey, we can do anything we want. If you don't like it, sue us. And at the end of litigation, if we get a court order, at that point, we'll change. That's what the Administration is doing. And in the process, it's hostaging the courts. Because it's now saying to the courts: If you rule and follow the law here and say that ObamaCare benefits shall not go to everybody, if you tell those immigrants that you don't have a clear path, even though you're illegal, enough time has passed, we've created the fait accompli, that you're going to be politically at fault.

Mr. MARINO. Sir, can you sum up? Could you please sum up? And then we'll get to the questions.

Mr. HOROWITZ. Yes. I see the Congressman is back, and I would say I'm sorry Mr. Johnson is gone now——

Mr. MARINO. He'll be back.

Mr. HOROWITZ [continuing]. Because I think there are things Congress must do. I've tried to spell out a couple of options for Congress to consider. But if there were bipartisan support for a rule of law regime that would be in the interests, politically, of this Administration, we wouldn't need to go down that road. And I hope that Democrats will come to understand that.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Horowitz follows:]

TESTIMONY OF MICHAEL HOROWITZ
BEFORE THE HOUSE JUDICIARY SUCOMMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
May 19, 2015

Chairman Marino, Vice Chairman Farenthold, Ranking Member Johnson and Members of the Subcommittee:

Thank you for inviting me to testify this afternoon at a hearing I believe to be of great and special importance.

As most of what I wish to say about the role of lawyers in a democracy, and the role played by lawyers in the Reagan administration, is set forth in the attached essay I recently wrote for National Review Online, my written statement will be brief.

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It has been my great fortune to have participated in two of the great and formative American experiences of the 20th century: the fight against racial segregation and the fights for market freedom and against Communist rule conducted during the Reagan administration. In the former instance, I was a Professor at the University of Mississippi Law School during the first years it became racially integrated; in the latter instance, I was OMB General Counsel during the first Reagan term.

What ties the experiences together is what they taught about the crucial need for governing policies in a democracy to be based on an abiding respect for the rule of law.

While in Mississippi I saw the destructiveness wrought by public officials who sought to subordinate the clear commands of law to their policy and personal preferences – and saw the historic progress that came when other officials recognized that the well-being of society came from following the law, no matter the seeming cost of doing so.

While serving as a senior lawyer in the Reagan administration, I and my fellow attorneys often felt badly when our legal opinions blocked our colleagues – and at times the President -- from adopting policies that they (and we) strongly felt to be badly needed. In doing so however, we recognized – and recognize even more clearly today – that our efforts ensured that the President's reforms were based on principle rather than raw power or expediency, and thus helped gain for them the respect and lasting effect they have enjoyed.

People regularly said of President Reagan that they respected him and what he did even though they often disagreed with his views, and I believe it clear that his respect for the rule of law was essential to the respect he enjoyed from the American people.

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For this reason, and as the attached essay makes clear, I believe it urgent for Congress to take action against the administration's repeated failures to comply with the clear terms governing statutes and with other requirements of law.

I and others who served in senior legal positions in the Reagan administration:

- have watched with incredulity as traditional Executive Branch enforcement discretion has been converted by the administration into a claimed right to effectively repeal integrated sets of governing statutes;
- know that no political or policy claim should have allowed the administration to distribute billions of dollars in Federal subsidies to two classes of beneficiaries under a statute that expressly restricted the subsidies to but one of the classes;
- are deeply troubled to hear of the use of back-door means of negating Congress' constitutional power of the purse by sweetheart case settlements that mandate the funding of agencies, programs and groups;
- find it hard to imagine – as did a unanimous Supreme Court – that in clear derogation of the Senate's constitutional confirmation authority, recess appointments were made by the administration during Congressional sessions;
- find unworthy of his office the President's blithe "we've expanded my authorities" and "I've got my pen" claims that send the clear message that his policy discretion is subject to restraint only by politics or court rulings made after years of extended litigation. (Of note, the latter

conduct was a common part of "massive resistance" tactics that sought to extend racial segregation as long as possible.)

- find equally unworthy administration efforts to convert the legally dubious dependencies and expectations it has created for millions of Americans into political pressure on the courts to rule in its favor.

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Just as the South's resistance to racial justice led to permanent limitations on various forms of state action, the administration's conduct has made it sadly proper for Congress to now consider ways of limiting Presidential authority in order to ensure that meaningful legal reviews accompany major White House and agency conduct. While Congress will be greatly challenged to do so in ways that serve the public interest, the administration's conduct poses a challenge to rule of law governance that must be met.

Here are some options that the administration's conduct has brought into play:

- Insisting that Congress be provided with greater and more rapid access to Executive Branch legal memoranda that authorize major policy actions;
- Scheduling regular Judiciary Committee oversight hearings at which agency General Counsels and senior Justice Department officials are required to identify and openly defend their major statutory constructions;
- Creating "action freeze" procedures that bar Executive Branch statutory constructions from being put into effect pending further Congressional review – a process worth carefully examining where such constructions lead to significant public or private expenditures;
- Creating limitations on the effect of Executive Orders – a major concern in light of the fact that the current size and reach of the Federal government gives orders that "merely" govern agency conduct the same effect to govern private conduct as do general purpose statutes;
- Modifying the presumptions of legality that now attach to agency constructions of statutes;
- Modifying standing doctrines that limit judicial challenges to Executive Branch action;

- More carefully considering the wisdom and character of legislative authorizations of Executive Branch waiver authority, and in some cases enacting laws with explicitly defined limitations on management flexibility in the administration of laws.

To be sure, many of the above options could transfer excessive decision-making power to the courts, and others could further rigidify and bureaucratize government decision-making. That said however, the need to end the administration's practice of reading statutes in whatever manner serves its policy preferences and the need to ensure that future administrations will not do the same, is an overriding priority now before this Committee and Congress.

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A final word, addressed to the Minority Members of this subcommittee. I have lived and practiced law in Washington for many years and understand the political need to support the administrations of one's party, especially when its actions result in policies that one supports. In the face of that reality, however, I urge restraint in the defense of the administration's conduct as you consider the means versus ends questions that are at the heart of today's hearing. Defense of sweeping Executive Orders that repeal disfavored statutory systems is an inescapable defense of greatly increased Executive Branch powers at the expense of those given to Congress. And Executive Orders that with the stroke of a pen bring about sweeping changes that one favors invite equally sweeping changes that one will later abhor.

Bipartisan opposition to the administration's stroke of the pen practices is the surest means of resolving the current crisis without the need to make high risk Executive Branch structural changes. I hope that this will be possible.

ADDENDUM

NATIONAL REVIEW

Reagan Would Be Appalled by Obama's Corps of Yes-Men Lawyers

White House attorneys weren't always so politicized.

By Michael Horowitz — March 17, 2015

The growing number of court cases challenging the legal authority of a series of Obama-administration actions brings to mind my experience as general counsel of the Reagan administration's Office of Management and Budget.

In the Reagan White House, senior lawyers operated and lived under an aggressive system for monitoring adherence to the rule of law. The contrast could hardly be greater between the conduct we authorized and what the Obama administration is now doing in areas ranging from taxes to law enforcement, from health care to labor relations, from employment discrimination to environmental policy to recess appointment powers.

For starters, Reagan-administration lawyers needed to deal with our avenging monitor Ted Olson, who, as head of the Justice Department's Office of Legal Counsel, exercised a roving commission to ensure compliance with statutes and court decisions on a political-consequences-be-damned basis. Few agency general counsels, myself included, escaped an Olson charge that we had engaged in "expedient" lawyering, and none would have dreamed of defending a warped reading of the law on the ground that it facilitated administration policies.

We were also monitored by a very small group of then-young White House attorneys that included two later-appointed Federal Circuit judges, a cadre of current Washington super-lawyers, the CEO of a Fortune 25 company, and — just to keep us on our toes — the current chief justice. No failure to comply with clear statutory language and no claim of enforcement discretion as an excuse for the wholesale repeal of statutorily regulated systems would have been possible, or even tried, under their watch.

The lawyers who served Ronald Reagan were good and, as I hope to show in this essay, often exceptional, and we served him effectively and well. But the Reagan White House culture meant that at times we were obliged to stand in the way of actions and policies thought to be of great value to the administration.

There was Treasury general counsel and later White House counsel Peter Wallison who, in one of many actions, closed down a federally created bank for want of statutory authority. Boyden Gray, counsel to then-vice-president Bush, sought to undo federal regulations but enforced compliance with them when the regulations remained in force. Richard Willard, head of the Justice Department's Civil Division, routinely refused to sign off on case settlements mandating the funding of agency-favored activities for which Congress had failed to appropriate monies. White House Counsel Fred Fielding made short and savage work of efforts to base federal-grant decisions on the "defund the Left" principles demanded by many administration supporters.

As OMB general counsel, I had significant responsibility for clearing executive orders, and I blocked a number of them for want of legal authority — doing so despite cries of pain from colleagues on the policy and political sides. Of special note, I recall the time when the Iran-Contra independent counsel thanked me for "defeating Ollie's Army" — a bittersweet moment based on my finding that an appropriations-act provision barred White House officials, including Oliver North, from exercising control over the military component of the president's initiative against the Sandinista junta. Even though my reading of the law turned over effective control of U.S.-Nicaragua policy to State Department officials who were openly hostile to the president's policies, my position was respected and sustained once I made the case that only legal sophistry could undermine the terms of the applicable statute.

In special ways, my colleagues and I were committed to implementing at least four additional, major principles.

First, we engaged in heightened scrutiny of proposed actions when, as in the Sandinista case, judicial review was unlikely. Rather than feeling freer to act on extra-legal grounds when courts would not be looking over our shoulders, we took special care to examine the legality of proposals when ours was likely to be the last word.

Second, we made as certain as we could — often personally — to sternly treat any effort to link past or promised financial or political support to the president or the Republican party with favorable treatment of policy proposals. To the surprise of lobbyists, we ended discussion of such proposals as soon as they put the links on the table. On at least two occasions, I made clear that word of further efforts to convert campaign contributions into policy support would result in FBI referrals.

Third, we worked especially hard to ensure the consistent application of constitutional principles. In a particular case — the president's commitment to restore a robust federalism and ensure that states were not treated as middle managers of D.C.–based policies — what we did often hit hard at the president's supporters. Many grassroots conservatives praised our federalism initiative in the abstract but were stunned when, to cite one example, we opposed using the Department of Education to regulate textbooks whose leftward bias was palpable. In another instance, I had worked hard to gain support for a tort-reform initiative that I believed consistent with federalism principles, but lost the battle to colleagues who argued that states should decide the matter. We all agreed that tort law had become economically and socially destructive, and we knew that the tort bar had become a prime financial supporter of the Democratic party, but my colleagues won the argument, even though they also conceded that prospects for state-based reforms were remote.

Finally, we did whatever we had to do to ensure that the president's Article II, Section 3 obligation to "take care that the laws shall be faithfully executed" was taken seriously — even to the point of enforcing it directly against President Reagan, at great cost to his public standing.

There was the notable time when Counsellor to the Attorney General Brad Reynolds and Olson's successor Chuck Cooper were assigned to examine voluminous files to ensure the accuracy of testimony that the administration would shortly be required to offer regarding its relations with the Iranian regime. While doing so, Reynolds found a document that not only demonstrated that arms had been provided to the regime but also revealed that monies from the effort had unlawfully funded anti-Sandinista activities. Rather than return the document to the mountain of papers before him, which he easily could have done with no one the wiser, Reynolds immediately brought it to Cooper's attention, and the two then immediately brought it to Attorney General Meese. After conducting an intensive one-day follow-up investigation that confirmed the document's accuracy, Meese went directly to the president and told him what had been found. The next day, at a press conference with the president that Meese largely conducted, the politically damaging arms shipments to Iran and its Contra connection were publicly disclosed. Thus began the Iran-Contra investigation — triggered by three of the highest-ranking White House lawyers who felt obliged to comply with the law's mandate to seek and preserve incriminating documents and to scrupulously enforce the law. And that is how Meese, Reynolds, and Cooper served a president they loved, although they would have given almost everything not to have done what they felt obligated to do.

At the time, it troubled Ronald Reagan's lawyers that we frequently caused political problems for his administration and often denied it the ability to trump Congress, the courts, and (in the eyes of the president and all of us) counterproductive laws. Yet the immediate difficulties we caused now seem blips of the past, while the manner in which we were empowered to operate seems increasingly connected to the historic achievements of the Reagan presidency. Success of the sort that President Reagan achieved always involves the periodic sacrifice of short-term advantages; it requires a readiness to make principled conduct more important than immediate gain.

How different this is from the "I've got my pen" ease with which the Obama administration now ignores statutes it dislikes and promulgates laws that Congress declines to pass. The actions of the Obama White House are in such contrast to my experience that I feel more incredulous than angry when looking at the long list of abuses: ignored statutory deadlines, deliberately uncollected taxes, unauthorized distributions of federal subsidies, appointments made without Senate confirmation, open refusals to enforce criminal and other statutes, and the blithe conversion of standard enforcement-discretion authority into an assumed right to repeal statutes.

My incredulity extends to the Obamacare case now before the Supreme Court, *King v. Burwell*. Whatever the political or policy consequences would have been, there is no way that the Reagan administration's senior lawyers would have allowed billions of dollars to go to two classes of beneficiaries under a statute that expressly restricted the subsidies to only *one* of the classes. (This view is made all the more certain by the fact that earlier drafts of Obamacare had authorized *both* classes to receive the subsidies, while — in what we can clearly read as a legislatively bargained deference to state decision-making — the final draft expressly restricted the subsidies to state-endorsed beneficiaries.)

Anger, however, is the only proper reaction to one particular aspect of the president's "we've expanded my authorities" claim. Now that Obamacare has made many

Americans dependent on multibillion-dollar payments whose legality the Supreme Court has yet to determine, and now that the administration has raised the hopes of millions of illegal aliens that their status has been effectively legalized, the administration is pressuring the courts to rule in its favor by arguing it would be too disruptive to do otherwise. In addition, the administration is threatening to make political scapegoats of the Supreme Court for the dislocation that an adverse ruling would cause

Having already used a State of the Union address to condemn a captive Supreme Court sitting before him for a campaign-finance ruling it had made, the president continues to treat the courts as he would political adversaries. The political threats the president is now making are especially egregious because they are taking place *before* the courts have decided the lawsuits that challenge his conduct. Such conduct crosses the line from "I hope the courts rule in our favor" to "the courts *better* rule in our favor." This conduct, if engaged in by private litigants, would raise serious contempt-of-court issues. What's even worse is that the threats to the courts come from the president himself, the very man who is sworn to protect the constitutional balance of power.

By one reckoning, however, it is hard to blame the president for his behavior. He is a lawyer and was a law professor, but as president he is a *client* entitled to do what his lawyers fail to restrain or deem unlawful. On the other hand, the president is responsible for the lackluster and compliant corps of lawyers who have turned a blind eye to conduct that few serious attorneys would have allowed. He is responsible as well for creating a White House Counsel's office that has been little more than a political unit.

Most of all, the president is responsible for his choice of Eric Holder — the most lawless attorney general since John Mitchell.

I taught the University of Mississippi Law School's first racially integrated classes more than 40 years ago and lived in a world where law was often subordinated to cause. That effort rightly failed, as will the Obama administration's comparable attempt. But just as the South's resistance to racial justice led to permanent limitations on all forms of state action, so will the administration's conduct be likely to limit presidential authority — often in ways that will disserve the public interest on a long-term basis. New constitutional limits on executive-branch action may be put in place, of which the Supreme Court's 9–0 invalidation of the administration's effort to make at-will recess appointments may be the first. Before the dust settles, "standing" doctrines that limit judicial challenges to executive-branch action may also be eroded, as perhaps will the presumption of legality that now attaches to agency constructions of statutes. Congress may refuse to authorize statutory waivers and could draft laws with language that explicitly precludes administrative flexibility. While these steps could transfer excessive decision-making power to the courts, and could rigidify and bureaucratize government decision-making, they would also ensure against the greater evil of executive-branch indifference to the rule of law.

One can hope that only limited means of negating the Obama administration's conduct will be applied. But however achieved, overturning the administration's practice of reading statutes in whatever manner serves its policy preferences, and ensuring that future administrations will not do the same, has become an urgent priority for Congress and the courts.

— *Michael Horowitz is CEO of the human-rights think tank Twenty-First Century Initiatives.*

Mr. MARINO. Thank you, sir.

Mr. Epstein.

TESTIMONY OF DANIEL Z. EPSTEIN, ESQ., EXECUTIVE DIRECTOR, CAUSE OF ACTION

Mr. EPSTEIN. Good afternoon, Chairman Marino, Ranking Member Johnson, Members of the Subcommittee.

My name is Daniel Epstein. And I'm the executive director of Cause of Action, a nonprofit, strategic oversight group that is committed to ensuring the regulatory process is transparent, fair, and accountable.

Cause of Action uses various investigative tools and legal tools to educate the public about the importance of transparency and accountability of the Federal Government. We consider our efforts to be a vital form of public oversight that supplements the important efforts of Congress.

I appreciate the opportunity to testify today about oversight of the Department of Justice, particularly its Tax Division. As a matter of both law and principle, when it comes to Americans' tax information, Federal Government attorneys must keep it secret, even if the President asks them to divulge it.

Since 2009, the White House has run a program where attorneys from the Tax Division at the U.S. Department of Justice, go on "detail" or temporary leave of absence from DOJ to spend a year as a legal adviser to the President. Cause of Action is concerned that this program may be a manner for which the President can be armed with information that may benefit him politically.

To illustrate, Andrew Strelka, a former IRS attorney who was allegedly involved in the targeting of conservative groups, later joined the Tax Division of the Justice Department, where he defended the IRS in a targeting against one such group, Z Street. This was, as former Oversight Committee Chairman Darryl Issa called it, a conflict of interest. But that was only half the story.

Mr. Strelka went on leave from DOJ Tax to join the White House Counsel's Office, the legal advisers to President Obama, where he did background checks on potential nominees, accessing their tax information and providing recommendations to the President. Mr. Strelka, who is one of several DOJ tax attorneys who served on detail at the White House, obtained confidential information from the IRS, from the Department of Justice, and from the White House, and had the opportunity to share information obtained from one government employer with any other. Not only would such sharing be a violation of the Tax Code, it is fundamentally at odds with legal ethics. To be sure, Congress has granted the President the authority to access the return information of any nominee so long as reports of such requests are submitted to Congress.

The legislative history of the Tax Reform Act of 1976 and both Treasury Department and Department of Justice guidance indicate that Congress sought to balance the President's broad access to taxpayer information by requiring transparency. However, Congress has never received reports of the President conducting tax checks on nominees. The concern here is that the detailing of DOJ tax attorneys to the White House allows for the circumvention of a congressionally mandated process for the President to access taxpayer information of potential nominees or, for that matter, any individual. Indeed, the Treasury inspector general for tax administration was ordered by the U.S. District Court of the District of Columbia to disclose the existence of 2,500 records of alleged unauthorized disclosures by the IRS to the White House of tax information.

Cause of Action has submitted numerous requests to the DOJ's Tax Division seeking answers on how individuals, like Andrew Strelka, were screened and the information they accessed properly safeguarded to prevent the White House from accessing tax information held by the Justice Department and vice versa. As we sit here today, DOJ Tax has failed to fully respond to Cause of Action's requests. In light of these concerns, on April 15, Cause of Action requested the DOJ inspector general, who is also named Michael Horowitz, to investigate the Tax Division's practice of detailing attorneys to the White House. To date, the inspector general has not responded to Cause of Action's request. Cause of Action's examination of records reveals no policies, no procedures, no rules, no guidelines to ensure that Tax Division attorneys detailed to the White House are appropriately screened and the information safeguarded to prevent confidential tax returns or return information from being unlawfully accessed or disclosed. The American people deserve answers as to whether their most private information may have been shared with the White House for political gain.

Thank you, again, Mr. Chairman, for the opportunity to discuss the work of Cause of Action. And I'm happy to answer any questions that you or any other Members of the Subcommittee may have.

[The prepared statement of Mr. Epstein follows:]

TESTIMONY OF DANIEL Z. EPSTEIN, ESQ.
EXECUTIVE DIRECTOR, CAUSE OF ACTION

CAUSE of ACTION

Advocates for Government Accountability

BEFORE THE HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

"Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environmental and Natural Resources Divisions and the U.S. Trustee Program"

May 19, 2015

Rayburn House Office Building
Washington, DC 20515
Room 2141

Good afternoon Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee. My name is Daniel Epstein and I am the Executive Director of Cause of Action, a non-profit, nonpartisan strategic oversight group committed to ensuring that the regulatory process is transparent, fair, and accountable.[1] Cause of Action uses various investigative and legal tools to educate the public about the importance of transparency and accountability in the Federal government. We consider our efforts to be a vital form of public oversight that supplements the important efforts of Congress.

I appreciate the opportunity to testify today about oversight of the Department of Justice ("DOJ"), particularly its Tax Division. For the better part of a year, Cause of Action has examined the legal and ethical concerns raised by the detailing of DOJ Tax Division attorneys to the Office of White House Counsel, in order to advise the President. Cause of Action, through a number of Freedom of Information Act ("FOIA") requests, has found that the detailing of Tax Division attorneys to the White House has been unique to the current Administration where, since 2009, these attorneys, many involved in controversial matters involving confidential tax records, have served the President as "clearance counsel" – that is, vetting the President's nominees by examining their tax records. During our examination of these White House details, we found no evidence of policies, procedures, rules and/or guidelines that exist to ensure that detailed attorneys are appropriately screened to prevent confidential taxpayer returns and/or return information from being unlawfully accessed or disclosed. This means Americans' most private information may be inappropriately disclosed to the White House.[2]

Detailing of DOJ Tax Attorneys to the White House Raises Serious Concerns

Federal law permits employees of any "department, agency, or independent establishment of the executive branch" to be detailed to the White House in order to assist and advise the President.[3] Cause of Action's examination of available records concerning Department of Justice attorney details to the White House indicate that the White House has historically sought detailees outside the DOJ's Tax Division. However, the current Administration appears to rely primarily upon Tax Division attorneys as the source for its detailed clearance counsels.[4] In 2004 and 2005, for example, Logan E. Sawyer and Ann L. Loughlin were detailed to the White House.[5] These individuals were employed in the Office of Consumer Litigation, Civil Division,

[1] CAUSE OF ACTION, http://www.causeofaction.org (last visited May 15, 2015).
[2] Press Release, Cause of Action Statement on White House and IRS Targeting (Nov. 25, 2014) (reporting that the Treasury Inspector General for Tax Administration admitted there exist nearly 2,500 potentially responsive documents relating to investigations of improper disclosures of confidential taxpayer information by the IRS to the White House), *available at* http://causeofaction.org/cause-action-statement-white-house-irs-targeting/; Paul Bedard, *Revealed: 2,500 new documents in IRS/W.H. harassment cases*, WASH. EXAM'R (Nov. 25, 2014), http://goo.gl/31zINY; *see also, e.g.*, Vicki Needham, THE HILL (Feb. 24, 2015), http://goo.gl/kG9IjN.
[3] 3 U.S.C. § 112-13; *see, e.g.*, Robert F. Diegelman, Acting Ass't. Att'y Gen. for Admin., Memorandum to the Heads of Department Components Concerning the Approval of and Reimbursement for White House and Other Details (Aug. 30, 2002), *available at* http://goo.gl/2IhRoN.
[4] *See* Exhibit 1 (based on information from President's Annual Report to Congress on White House Staff, compilation of individuals described as attorney-detailees during past two Administrations).
[5] *2004 White House Office Staff List – By Title*, WASH. POST, http://goo.gl/3boLyX (last visited May 15, 2015); *2005 White House Office Staff List – By Salary*, WASH. POST, http://goo.gl/CwJH5w (last visited May 15, 2015).

and the Employment Litigation Section, Civil Rights Division, respectively.[6] Despite a FOIA request submitted in October 2014, the Tax Division has failed to provide any records of attorneys detailed to the White House during the Bush administration (from January 20, 2001, as requested by Cause of Action's FOIA request).[7] In contrast, Cause of Action has identified at least ten attorneys who have been detailed between April 2009 and the present.[8] These individuals typically serve as "clearance counsel," vetting potential candidates for appointment by the President to high-ranking government posts.[9] All of these detailed attorneys came from the Tax Division.

The detailing of Tax Division attorneys to the White House is of serious concern to Congress because these lawyers, while at the Justice Department, obtain unique access to the confidential taxpayer information of parties under investigation or in litigation with the United States; then, while at the White House, they obtain access to the confidential tax information of the President's nominees for executive and judicial appointments. Indeed, taxpayer confidentiality laws prohibit the President from accessing the information accessed during a DOJ lawyer's official duties, even if that lawyer is later detailed to the White House.[10]

Cause of Action has, to date, not been able to obtain a single record evidencing the existence of safeguards to protect information obtained by DOJ from being accessed by the White House. On April 15, 2015, Cause of Action submitted a FOIA request to the Professional Responsibility Advisory Office, which provides prompt, consistent advice to Department attorneys with respect to professional responsibility.[11] We sought records evidencing the existence of safeguards against disclosure of confidential, sensitive, or proprietary information by DOJ attorneys, whether obtained prior to or during the course of a detail.[12] Ignoring its statutory obligation to respond within 20 days, the Professional Responsibility Advisory Office has yet to produce a single responsive record.[13]

Cause of Action additionally sent an April 15, 2015 FOIA request to DOJ's Office of Professional Responsibility ("OPR"), which is responsible for investigating allegations of misconduct involving Department attorneys.[14] Cause of Action sought records of complaints or allegations of misconduct in connection with the improper disclosure of tax information by DOJ

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[6] *See, e.g.*, Resume for Logan Everett Sawyer III, *available at* http://goo.gl/CXDnVv (last visited May 15, 2015); Compl. at 4 (signature line), *Jane Doe III, et al. v. District of Columbia*, No. 02-2340, *available at* http://goo.gl/RVtycM.

[7] *See* Exhibit 2 (Letter from Carmen M. Banerjee, Tax Div., Dep't of Justice, to Cause of Action at 2 (Mar. 17, 2015)) (DOJ identifying nine individuals in response to FOIA request).

[8] *See id.*; *see also* LinkedIn Profile of Carina Federico (Tax Division attorney currently on detail as Deputy Associate Counsel of Presidential Personnel) (on file with Cause of Action).

[9] *See generally* Mary Anne Borrelli, *et al.*, THE WHITE HOUSE TRANSITION PROJECT: THE WHITE HOUSE COUNSEL'S OFFICE NO. 2009-29 at 32 (2009), *available at* http://goo.gl/Nxn3KX.

[10] I.R.C. §§ 6103(g), (h)(2).

[11] PRAO, DEP'T OF JUSTICE, http://www.justice.gov/prao (last visited May 15, 2015).

[12] *See* Exhibit 3 (Letter from Michael Kingsley, PRAO, Dep't of Justice (May 13, 2015; though dated March 13 by DOJ in error)); *see also* Press Release, Cause of Action, *CoA Uncovers Questionable Practice between the DOJ and White House* (Apr. 15, 2015), *available at* http://causeofaction.org/coa-uncovers-questionable-practice-between-the-doj-and-white-house/.

[13] *See* 5 U.S.C. § 552(a)(6)(A)(i).

[14] OPR, DEP'T OF JUSTICE, http://www.justice.gov/opr (last visited May 15, 2015).

attorneys detailed to another department or agency. The Office of Professional Responsibility responded that its search revealed no responsive records.[15]

Tax Division Attorneys Involved in Targeting Litigation were Subsequently Detailed to the White House

To illustrate the importance of appropriate screens and the risks presented through the process of detailing attorneys who access confidential and potentially politically-sensitive information, consider Norah E. Bringer, a trial attorney in the Tax Division, and Andrew C. Strelka, a former Tax Division attorney. Ms. Bringer was detailed to the White House as a "clearance counsel" for the President in June 2014 and recently returned to DOJ as Counsel to Caroline Ciraolo, the Acting Assistant Attorney General for Tax – who is responsible for overseeing the entire Tax Division.[16] Mr. Strelka, who is currently in private practice, preceded Ms. Bringer as the Tax Division's detailee at the White House.[17]

Prior to their details, Ms. Bringer and Mr. Strelka served as trial attorneys involved in litigation concerning the IRS's targeting of political groups. Specifically, they represented IRS Commissioner John Koskinen in a lawsuit against Z Street, Inc., an organization dedicated to public education activities, which was subject to "extra scrutiny" when it applied for 26 U.S.C. § 501(c)(3) tax-exempt status.[18] During recent oral argument for *Z Street, Inc. v. Koskinen*, the D.C. Circuit took issue with the IRS for implying that it could subject Z Street to heightened scrutiny in connection with its application for tax-exempt status for approximately 270 days, in order to force Z Street to exhaust an administrative remedy before obtaining constitutional relief.[19] During the course of Ms. Bringer's representation in this and other cases, she accessed confidential taxpayer return information, and it is reasonable to assume that Mr. Strelka did the same.[20] Yet, based on responses to FOIA requests received to date, there is no evidence that any ethical or legal safeguards were in place to ensure that private information was not disclosed – even inadvertently – to the White House.

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[15] *See* Exhibit 4 (Letter from Lyn Hardy, OPR, Dep't of Justice, to Cause of Action (Apr. 24, 2015)). This response leaves open the question of whether responsive records actually exist, but that such records fall into one of the three discrete categories of law enforcement or national security records excluded from FOIA. *See id.*; Dep't of Justice, FOIA Guide: "Exclusions" (May 2004), *available at* http://goo.gl/jfd7KR (discussing exclusions under FOIA).
[16] *See* Exhibit 2 (Banerjee Letter).
[17] *Id.*; *see also* LinkedIn Profile of Andrew Strelka (on file with Cause of Action).
[18] *E.g.*, Ama Sarfo, *IRS Can't Dodge Israel-Centric Org's Discrimination Suit*, LAW360 (May 29, 2014), http://goo.gl/1Zbn6Z; *see also* Answer at 10, *Z Street v. Comm'r*, No. 12-401 (D.D.C. filed June 26, 2014) (Andrew Strelka original trial attorney assigned by DOJ), *available at* http://goo.gl/fa7qfQ. Ms. Bringer also represented the Treasury Inspector General for Tax Administration and the IRS in a pair of related FOIA lawsuits concerning the unauthorized disclosure of § 6103 information by the IRS and unauthorized access of that information by the White House. This representation lasted until she withdrew to begin her detail at OWHC. *See* Notice of Withdrawal of Appearance of Norah E. Bringer, *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (D.D.C. June 6, 2014).
[19] *The IRS Goes to Court*, WALL ST. J. (May 6, 2015), http://goo.gl/vXTKHM.
[20] Mem. Op., *Life Extension Found., Inc. v. Internal Revenue Serv.*, 915 F. Supp. 2d 174 (D.D.C. Jan. 15, 2013), *available at* https://goo.gl/NcYtDW (identifying Norah Bringer as trial attorney); *see also* Notice of *In Camera* Submission by Treasury Inspector Gen. for Tax Admin., *Cause of Action v. Treasury Inspector Gen. for Tax Admin.*, No. 13-1225 (D.D.C. notice filed Nov. 18, 2013) (requesting *in camera* treatment of numerous records, including those protected by § 6103).

Tax Division Attorneys Participate in Legally Questionable "Tax Checks"

After Ms. Bringer served her detail as clearance counsel at the White House, she returned to the Tax Division as Counsel to Caroline D. Ciraolo, the Acting Assistant Attorney General for Tax. This fact raises another issue: the lack of safeguards to protect confidential taxpayer information are especially troubling because those Tax Division attorneys detailed to the White House as "clearance counsel" accessed confidential tax information when conducting "tax checks." There is no evidence, however, that any safeguards exist to protect the confidential information accessed by the detailee when he or she returns to his/her position with the Tax Division, or moves to another position (whether in the government or in the private sector).

Section 6103(g)(2), in relevant part, permits the President to access to tax information regarding an individual under consideration for appointment to a position in the executive or judicial branch. This is known as a "tax check." The information disclosed, however, is limited; for example, the White House is not allowed to obtain "taxpayer returns," but only itemized "return information."[21] When the President accesses information in this manner, it is required to be reported.[22] In contrast, under § 6103(c), the IRS is allowed to disclose returns and return information to the designee of a taxpayer subject to the taxpayer's consent, but without any formal reporting requirements.[23]

The White House uses clearance counsel to conduct tax checks on *potential* nominees via consent – § 6103(c) – instead of § 6103(g), even though Congress specifically required the President to go through a formal process to obtain information. Indeed, no President in modern times has ever made a § 6103(g) request, in large part because it is inefficient – White House consents are made via a signed form whereas § 6103(g) requires a letter from the President – and it is risky – whenever the President accesses tax information outside of consents, Congress is entitled to know whose information he looked at (which is not so under consents).[24] Moreover, when clearance counsel return to the Tax Division, there is no evidence of any safeguards to protect the confidential information they obtained from being disclosed to others. In fact, any notion that the use of consents is an authorized manner for the President to access tax information is a farce. For one, § 6103(c) allows for disclosure to a "person or persons as the taxpayer may designate," whereas the current consent process distributes tax information to multiple individuals in the White House. Second, records reveal that the White House submits

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[21] *See* 26 U.S.C. § 6103(g)(2) (authorizing disclosure of "return information" which "shall be limited" to four items); *see also* J. COMM. ON TAXATION, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976 at 318 (1976) (legislative history of 1976 Tax Reform Act demonstrating Congress's intent to limit President's access to confidential taxpayer returns and return information to mechanisms provided in § 6103(g)).
[22] 26 U.S.C. § 6103(p)(5).
[23] *See* 26 U.S.C. § 6103(c) (authorizing disclosure of "return and return information" to designee of taxpayer); *see also* 26 C.F.R. § 301.6103(c)-1(b)(1) (explaining requirements for such disclosure, including definition of "permissible designees" that may receive confidential returns and return information by taxpayer consent).
[24] *See* Office of Tax Policy, Dep't of the Treas., *Report to the Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions* 72 (Vol. I: Study of General Provisions) (Oct. 2000), *available at* http://goo.gl/p9eo0w; *Tierney v. Schweiker*, 718 F.2d 449, 456 (D.C. Cir. 1983) ("In light of [§ 6103's] legislative history, the IRS cannot use the consent exception of § 6103(c) as a 'catch-all' provision to circumvent the general rule of confidentiality established by Congress."); J. COMM. ON TAXATION, STUDY OF PRESENT-LAW TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS AS REQUIRED BY SECTION 3802 OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998, vol. 1, at 228 (2000) (warning IRS about potential for abuse).

the tax check record of a nominee to the appointing agency, which means that such information is disclosed to an unauthorized entity without the taxpayer's consent.

In light of these concerns, on April 15, 2015, Cause of Action requested that the DOJ Inspector General investigate DOJ's practice of detailing attorneys to the White House.[25] To date, the Inspector General has not responded to Cause of Action's request. Further, Cause of Action's requests to the Tax Division, the Professional Responsibility Advisory Office, and other subdivisions of the DOJ have failed to be fully responded to, despite the statutory deadline of FOIA having passed.

It is the Tax Division's responsibility to ensure that tax information – which is at once many Americans' most private information yet the source of the Federal Government's most direct control over citizens – is adequately safeguarded and that the officials who have access to it are lawfully authorized to have such access. The vigilant oversight of this Committee is necessary to ensure that these most basic protections are preserved. Thank you for the opportunity to testify today and I am available to answer your questions.

[25] Letter from Cause of Action to Michael E. Horowitz, Inspector Gen., Dep't of Justice (April 15, 2015), *available at* http://causeofaction.org/assets/uploads/2015/05/261966294-CoA-DOJ-OIG-Letter.pdf.

Mr. MARINO. Thank you, sir.
Mr. Grossman.

TESTIMONY OF ANDREW M. GROSSMAN, ADJUNCT SCHOLAR, CATO INSTITUTE, ASSOCIATE, BAKER & HOSTETLER L.L.P.

Mr. GROSSMAN. Mr. Chairman and Members of the Subcommittee, thank you for holding this hearing today and inviting me to testify. My statement will focus on the potential conflicts that arise when Federal agencies' relationships with outside special interests lead them to adopt litigation positions that may differ from those of the rest of the government. The Department of Justice litigates on behalf of the entire government. The positions it takes must not only be effective but also coherent across the field of government litigation. In general, it performs this task admirably. But sometimes it falls short.

In a recent opinion, D.C. Circuit Court Judge Laurence Silberman faulted the Department's Environmental and National Resources Division for, in his words, acting to subordinate governmentwide litigation interest to the desires of one agency, the EPA. While his immediate complaint was the division's failure to raise meritorious standing defenses, his concern was stated in much broader terms. The division's litigating practices, he said, have led to dramatic contrasts with positions taken by the Civil Division.

Reading between the lines, Judge Silberman's opinion raises two important points: The first is that these litigation lapses likely reflect EPA's political views. In particular, EPA's close relationship with environmentalist groups is leading it to compromise its litigating positions, such as by foregoing defenses that might undermine those groups' ability to participate in future cases against the agency. There is, in order words, at least a whiff of collusion.

And the second is that ENRD countenances this, undermining its ability to ensure uniformity and sophistication in government litigation. These serious charges by a well-respected jurist raise a number of questions worthy of investigation. For example, when has the EPA directed the Justice Department to forego arguments that the government would raise in similar circumstances involving other agencies? To what extent do outside groups participate in the formulation of the EPA's litigation strategies? And are those groups also in contact with ENRD attorneys? And what is the litigation impact of the revolving door between EPA and environmentalists groups? Are agency officials properly recusing themselves when their former employers seek to spur the agency into action through litigation or otherwise? Congress should demand answers.

Judge Silberman's observations also throw new light on the phenomenon of sue and settle, another instance of collusion between agencies and outside groups. The Subcommittee is already familiar with the problems that arise when settlements between agencies and special interests are used to set agency priorities and duties. These include lack of transparency, lack of public participation, rushed and sloppy rulemaking, and, above all, the evasion of proper accountability and oversight. These things are all well understood. But what is new is recent pushback by those claiming that the issue is overblown and that such settlements have only a limited impact on agency action. That view is mistaken. First, the facts speak for themselves. For example, EPA rushed out its mercury rule subject to the terms of a settlement. And it has since been required to amend, correct, and reconsider that rule on numerous occasions. And that rule may be struck down by the Supreme Court due to EPA's failure, in its haste to regulate, to properly consider the costs of doing so.

EPA is once again rushing to finalize the Brick MACT rule after its first one, which was also rushed out the door to meet its settlement deadlines, was struck down. The Judiciary Committee has heard testimony showing how the timing crunch for the Brick MACT rule provided the Agency an excuse to avoid serious consideration of flexible alternatives that may ease compliance burdens while providing the same environmental protections.

A final example is the Fish and Wildlife Service's 2011 settlements committing to rush out Endangered Species Act listing determinations for 251 species by September 2016 while abandoning its discretion to find that a listing may be warranted but is precluded by higher priorities.

These are just three current examples. There are many more. The second point is that between 2008 and June 2013, 14 of the 17 major nondiscretionary rules issued by EPA resulted from deadline lawsuits. On the horizon are rules setting performance standards for new and existing powerplants. This impact is by no means limited. And a third point is that the proof is in the pudding. Special interests wouldn't bring lawsuits destined for settlement if it didn't work. Unfortunately, it does.

The problem will only get worse in the waning days of the Obama Presidency. At this point, agency officials have every incentive to sign settlements that help them rush rules out the door and that attempt to bind their successors in the next Administration. This has happened before. Vigorous oversight will be necessary to ensure the next Administration, which may have very different priorities than this one, is not bound by its predecessor's unwise policy choices.

Let me conclude with a word on solutions. The Sunshine for Regulatory Decrees and Settlements Act would provide important procedural reforms to ensure that settlements setting agency priorities do not compromise transparency, accountability, and the public interest. As I discuss in my written testimony, Congress should also address the problem at its root by reforming unrealistic agency deadlines and rethinking citizen suit provisions for suspensions that allow outside groups to coerce agency actions. Even if these reforms are unlikely to be signed by the current President, they should be readied now for the possibility that the next Administration may have an appetite for serious regulatory reform.

Again, I thank the Committee for the opportunity to offer these remarks. And I look forward to your questions.

[The prepared statement of Mr. Grossman follows:]*

***Note:** The supplemental material submitted with this witness statement is not printed in this hearing record but is on file with the Subcommittee. The statement, in its entirety can be accessed at: *http://docs.house.gov/meetings/JU/JU05/20150519/103476/HHRG-114-JU05-Wstate-GrossmanEsqA-20150519-U1.pdf*.

Ongoing Oversight: Monitoring the Activities of the Justice Department's Environment and Natural Resources Division

Testimony before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, United States House

May 19, 2015

Andrew M. Grossman
Adjunct Scholar, Cato Institute
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My name is Andrew Grossman. I am an Adjunct Scholar at the Cato Institute and a litigator in the Washington, D.C., office of Baker & Hostetler LLP. The views I express in this testimony are my own and should not be construed as representing those of the Cato Institute, my law firm, or its clients.

Alexis de Tocqueville famously observed, "There is hardly a political question in the United States which does not sooner or later turn into a judicial one."[1] That goes double for environmental policy. There is just about no question regarding the regulation of air and water quality, wildlife, and other natural resources that is not, or has not been, the subject of litigation. The Environment and Natural Resources Division of the Justice Department plays the central role in the bulk of those cases. Its policies and performance are therefore also central to the making and enforcement of environmental policy at the federal level, as well as the concomitant federalism and economic impacts of that regulation.

While ENRD does have an agency "client" in its cases, its position as a Department of Justice component reflects Congress's judgment that litigation over environmental law be carried out by an entity that is independent of the agencies principally responsible for policymaking and enforcement of that law and that is capable of exercising independent judgment when necessary to uphold the law and to promote broader governmental interests. In short, the idea is to avoid agency parochialism. This is not to say that the relationship between ENRD and the agencies it represents should be antagonistic, but only that the Division must be willing and able to exercise its judgment in litigation, rather than simply defer to the wishes of the agencies in every instance and pursue agency priorities at all costs.

My testimony today identifies two areas of concern that merit oversight by this panel. First, in a recent decision, Judge Silberman of the United States Court of Appeals for the District of Columbia Circuit questioned whether ENRD is suffering what he called "litigation lapse[s]" to advance "the political views of its major 'client' (the EPA)" at the expense of broader governmental interests.[2] A federal judge, of course, does not raise such questions lightly, and Judge Laurence Silberman's statement therefore raises a serious red flag abut ENRD's performance and priorities and whether it is deferring unduly to its agency clients.

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[1] Alexis de Toqueville, Democracy in America 248 (J.P. Moyer and Max Lerner eds., Harper & Row 1996) (1832).

[2] *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F. 3d 667, 678 (D.C. Cir. 2013) (Silberman, J., concurring).

Second is the "sue and settle" phenomenon, which raises similar concerns about the conduct and resolution of litigation that seeks to set agency regulatory priorities and (in some instances) actually influences the content of those regulations. Since the House Judiciary Committee first directed its attention to the problem of collusive settlements in 2012,[3] there have been a myriad of hearings and reports focusing on this problem, as well as the introduction of legislation to constructively address it. This is heartening. But the response from some in government and from the outside groups that pursue settlements has not been to debate the merits or discuss solutions, but simply to assert that there is no problem and that litigation brought for the very purpose of setting agency priorities has no real impact. That is not so. Recent examples show that the problem is real, it is serious, and it is, if anything, getting worse. Based on precedent and the incentives faced by agencies in the waning months of a presidency, there is a real risk over the next year and a half that the current administration may attempt to employ collusive settlements and consent decrees to bind its successor. Continued oversight by this subcommittee and those with jurisdiction over the relevant agencies will be crucial in the months ahead.

The final topic of this testimony is how to alter the incentives and the legal environment that facilitate collusive settlements. Over the past three years, Members of the House and Senate have developed several bills that seek to carry out the principles identified in my 2012 testimony on abuses of settlements and consent decrees. The most comprehensive of those bills, the Sunshine for Regulatory Decrees and Settlements Act, passed the House in the previous Congress, and (as reintroduced this Congress) has drawn strong support in the Senate. Although there is little prospect that any substantial regulatory reforms will become law in this Congress, now is the time to lay the intellectual and political groundwork for an aggressive first-one-hundred-days regulatory reform agenda for the next administration.

I. EPA v. DOJ?

The Department of Justice is a formidable adversary in litigation. It speaks for the federal government, which gives it great credibility. It has deep

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[3] *See generally* The Use and Abuse of Consent Decrees in Federal Rulemaking: Hearing before the Subcommittee on the Courts, Commercial and Administrative Law, Committee on the Judiciary, United States House of Representatives, 112th Congress (Feb. 3, 2012), *available at* http://judiciary.house.gov/_files/hearings/Hearings%202012/Grossman%2002032012.pdf (written testimony of Andrew M. Grossman, Visiting Legal Fellow, The Heritage Foundation) [hereinafter "2012 Testimony"].

institutional knowledge. And it is a repeat player, working with the courts over the long haul to develop doctrines that apply across the range of the law and its activities. In the same way that the Solicitor General is often regarded as the "tenth justice," the Justice Department's litigating components play a special role in court, particularly in agency cases and particularly in the D.C. Circuit, due to its specialized docket. When the Justice Department speaks—for example, when it says that application of a particular doctrine would have consequences for other governmental activities—the D.C. Circuit listens, avidly.

And when the Justice Department *doesn't* speak—when it fails to raise an argument that is all the more conspicuous for its absence—it also listens. In two recent cases, the EPA (represented by the Justice Department) has declined to argue that cases challenging agency rules be dismissed for want of prudential standing on the part of petitioners. While "standing" is a constitutional requirement derived from the "case or controversy" requirement of Article III, prudential standing concerns a litigant's suitability with respect to the purposes of a particular statute. Under D.C. Circuit law, a litigant must demonstrate that "that the interest it seeks to protect is arguably within the zone of interests to be protected or regulated by the statute...in question."[4] It is common, particularly in the D.C. Circuit, for the government to argue that one or another (or every) party challenging an agency action lacks standing to do so.[5] And it frequently prevails on that point, particularly against organizations seeking to advance a policy agency through litigation. So it is notable when, in a case where the doctrine may well apply, the government declines to raise it in defense.

Yet that is what happened in several recent cases involving the EPA. *Grocery Manufacturers Association v. EPA* was a challenge by trade associations representing the petroleum and food industries to EPA decisions approving the introduction of a high-ethanol fuel blend that, in turn, would raise corn prices and impose costs on the petroleum industry.[6] And *Association of Battery*

[4] *Nat'l Petrochem. Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (per curiam) (quotation marks omitted). Subsequent to the cases discussed here, the Supreme Court has cast doubt on the D.C. Circuit's approach to prudential standing. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014). But the D.C. Circuit, in turn, has so far declined to revisit its precedents in this area. *See White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1256 (D.C. Cir. 2014); *Mendoza v. Perez*, 754 F.3d 1002, 1016–17 (D.C. Cir. 2014).

[5] *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 211 (D.C. Cir. 2013).

[6] 693 F. 3d 169, 180–81 (2012) (Kavanaugh, J., dissenting).

Recyclers, Inc. v. EPA was a challenge to a revision of the emissions standards for lead-smelting facilities brought by, among others, a battery recycler that supported stricter standards on its competitors.[7] In both cases, the prudential standing issue under D.C. Circuit precedent was plain. In both cases, the court dismissed the claims of certain petitioners for want of prudential standing.[8] And in both cases, the EPA declined to raise the issue.

Judge Silberman, in a concurring opinion in *Association of Battery Recyclers*, felt the need to remark on this unusual occurrence:

> [I]t is worth noting that this question—whether prudential standing should be raised by a federal court *sua sponte*—typically arises when the government neglects to raise the issue, which might be thought a rare occasion of litigation lapse. However, in both this case and *Grocery Manufacturers*, the Justice Department failed to do so, and in both cases, the government's position was defended by the Environmental Division. It would seem that this division—perhaps reflecting the political views of its major "client" (the EPA)—declines to raise standing issues available as a defense. That practice has led to some dramatic contrasts between positions taken by the Civil Division and the Environmental Division. Indeed, in one case some years ago, a lawyer for the Environmental Division *fainted* during oral argument while attempting to explain a different position on standing than one argued a few days before by a Civil Division lawyer.
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> The justification for the Justice Department's control over all executive branch litigation—a control that I, as a judge, think is even more important than I once thought as a Justice Department official—depends on its ability to ensure uniformity and sophistication in government litigation. It hardly serves that end to allow one division of the Justice Department to subordinate a government-wide litigation interest to the desires of one agency.[9]

The potential conflict to which Judge Silberman alludes is this: the Justice Department's broad responsibility for nearly all executive branch litigation versus the EPA's interest in its relationships in litigation and otherwise

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[7] 716 F. 3d 667, 674.

[8] 693 F. 3d at 179 (holding that a statute regarding fuel waivers does not include within its zone of interests food prices); 716 F.3d at 674 (no prudential standing where business "objects not to any regulatory burden imposed on it but instead to the absence of regulatory burdens imposed on its competitors").

[9] 716 F.3d at 678–79.

with environmentalist groups, whose presence in litigation is often challenged on prudential standing grounds. In other words, the EPA's close relationship[10] with these groups may lead it to forgo meritorious arguments that might undermine those groups' interests in other cases. Thus, these two cases provide a strong indication that, as Judge Silberman observes, government-wide litigation interests are being subordinated "to the desires of one agency," EPA. And there is no reason to believe that the EPA's desires are limited to the issue of prudential standing.

This raises serious questions regarding the EPA's litigation practices that merit further investigation. Has the EPA directed the ENRD or other Justice Department components to forgo arguments that the government would raise in similar circumstances involving other agencies? What other defenses or arguments has the EPA sought to deemphasize or forgo to protect non-governmental interests? To what extent do outside groups participate in the formulation and execution of the EPA's litigation strategies? Are those groups also in contact with ENRD attorneys? Do former EPA officials who have decamped to environmentalist groups remain in contact with current staff and participate in discussions or provide input regarding agency litigation? To what extent are EPA officials previously affiliated with environmentalist groups involved in the formulation of the agency's litigation strategies? To what extent has EPA collaborated with environmentalist groups in formulating regulations and developing their legal rationales? What has been the litigation impact of the "revolving door" between EPA and environmentalist groups?[11] What have been the consequences to the government of formulating litigation strategy to accommodate third-party interests?

It may be that these episodes are isolated incidents, and that would be worth knowing. But it may be that the ENRD's litigation actions in these cases are symptoms of a more serious pathology—in the same way that a single botched prosecution threw light on failures in supervision and oversight of the Justice Department's Public Integrity Section.[12] In short, Congress and the

[10] *See, e.g.*, Coral Davenport, Taking Oil Industry Cue, Environmentalists Drew Emissions Blueprint, N.Y. Times, July 6, 2014, available at http://www.nytimes.com/2014/07/07/us/how-environmentalists-drew-blueprint-for-obama-emissions-rule.html.

[11] *See* William Yeatman, Regulatory Capture Comes Full Circle at the EPA, May 15, 2014, http://www.globalwarming.org/2014/05/15/regulatory-capture-comes-full-circle-at-the-epa/ (listing "current and recent EPA political appointees that have come from green litigation groups (and vice-versa)").

[12] *See generally* Henry F. Schuelke III, Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, Apr. 7, 2009, https://www.wc.com/assets/attachments/Schuelke%20Report.pdf. By refer-

public would be well-served by greater transparency regarding the role of the EPA in formulating the litigation strategies carried out by the ENRD and regarding the involvement of non-governmental third parties.

II. The Sue and Settle Phenomenon Is Real

A. The Issue, In General

Typically, the federal government vigorously defends itself against lawsuits challenging its actions. But not always. Sometimes regulators are only too happy to face collusive lawsuits by friendly "foes" aimed at compelling government action that would otherwise be difficult or impossible to achieve. In a number of cases brought by activist groups, the Obama Administration has chosen instead to enter into settlements that commit it to taking action, often promulgating new regulations, on a set schedule. While the "sue and settle" phenomenon is not new, dating back to the broad "public interest" legislation of the 1960s and 1970s, what is new is the frequency with which generally applicable regulations, particularly in the environmental sphere, are being promulgated according to judicially enforceable consent decrees struck in settlement. The EPA alone entered into more than sixty such settlements between 2009 and 2012, committing it to publish more than one hundred new regulations, at a cost to the economy of tens of billions of dollars.[13]

In the abstract, settlements serve a useful, beneficial purpose by allowing parties to settle claims without the expense and burden of litigation. But litigation seeking to compel the government to undertake future action is not the usual case, and the federal government is not the usual litigant. Consent decrees and settlements that bind the federal government present special challenges that do not arise in private litigation. This happens in all manner of litigation, and is not confined to a particular subject matter. Settlements binding federal actors have been considered in cases concerning environmental policy, civil rights, federal mortgage subsidies, national security, and many others. Basically, settlements may become an issue in any area of the law where federal policymaking is routinely driven by litigation.

But they are especially prevalent in environmental law, due to the breadth of the governing statutes, their provisions authorizing citizen suits, and the great number of duties those statutes arguably impose on the relevant

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ring to the prosecution of Sen. Stevens, I do not intend to suggest any misconduct on the part of the ENRD, its leadership, or its attorneys, but only to demonstrate how a lapse in one case may serve to reveal deeper problems.

[13] U.S. Chamber of Commerce, Sue and Settle: Regulating Behind Closed Doors (2013), at 14.

agencies. The ENRD, being responsible for litigation in this area, represents the EPA and the other relevant agencies in striking settlements.

B. Implications for Democratic Governance and Accountability

Judge Frank Easterbrook provides a compelling account of the ways that government officials may use consent decrees to obtain advantage—over Congress, over successors, over other Executive Branch officials—in achieving their policy goals:

> The separation of powers inside a government—and each official's concern that he may be replaced by someone with a different agenda—creates incentives to use the judicial process to obtain an advantage. The consent decree is an important element in the strategy. Officials of an environmental agency who believe that the regulations they inherited from their predecessors are too stringent may quickly settle a case brought by industry (as officials who think the regulations are not stringent enough may settle a case brought by a conservation group). A settlement under which the agency promulgated new regulations would last only for the duration of the incumbent official; a successor with a different view could promulgate a new regulation. Both parties to the litigation therefore may want a judicial decree that ties the hands of the successor. It is impossible for an agency to promulgate a regulation containing a clause such as "My successor cannot amend this regulation." But if the clause appears in a consent decree, perhaps the administrator gets his wish to dictate the policies of his successor. Similarly, officials of the executive branch may obtain leverage over the legislature. If prison officials believe their budget is too small, they may consent to a judgment that requires larger prisons, and then take the judgment to the legislature to obtain the funds.[14]

The abuse of consent decrees in regulation raises a number of practical problems that reduce the quality of policymaking actions and undermine representative government. In general, public policy should be made in public, through the normal mechanisms of legislating and administrative law and subject to the give-and-take of politics. When, for reasons of convenience or advantage, public officials attempt to make policy in private sessions between government officials and (as is often the case) activist groups' attorneys, it is the public interest that suffers. Experience demonstrates at least five specific consequences that arise when the federal government regulates pursuant to a consent decree or settlement:

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[14] Frank Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. Chi. L. Forum 19, 33–34 (1987).

- **Special-Interest-Driven Priorities**. Settlements can undermine presidential control of the executive branch, empowering activists and subordinate officials to set the federal government's policy priorities. Regulatory actions are subject to the usual give-and-take of the political process, with Congress, outside groups, and the public all influencing an administration's or an agency's agenda, through formal and informal means. These include, for example, congressional policy riders or pointed questions for officials at hearings; petitions for rulemaking filed by regulated entities or activists; meetings between stakeholders and government officials; and policy direction to agencies from the White House. Especially when they are employed collusively, consent decrees short-circuit these political processes. In this way, agency officials can work with outside groups to force their agenda in the face of opposition—or even just reluctance, in light of higher priorities—from the White House, Congress, and the public. When this happens, the public interest—as distinct from activists' or regulators' special interests—may not have a seat at the table as the agency reorganizes its agenda by committing to take particular regulatory actions at particular times, in advance or to the exclusion of other rulemaking activities that may be of greater or broader benefit.
- **Rushed Rulemaking**. The public interest may also be sacrificed when officials use settlements to accelerate the rulemaking process by insulating it from political pressures that may reasonably require an agency to achieve its goals at a more deliberate speed. In this way, officials may gain an advantage over other officials and agencies that may have competing interests, as well as over their successors, by rushing out rules that they otherwise may not have been able to complete or would have had to scale back in certain respects.

  In some instances, aggressive deadlines contained within settlements, as was the case with EPA's Mercury Rule, may provide the agency with a practical excuse (albeit not a legal excuse) to play fast and loose with the Administrative Procedure Act and other procedural requirements, reducing the opportunity for public participation in rulemaking and, substantively, likely resulting in lower-quality regulation. Although a settlement deadline does not excuse an agency's failure to observe procedural regularities, courts are typically deferential in reviewing regulatory actions and are reluctant to vacate rules tainted by procedural irregularity in all but the most egregious cases, where agency misconduct and party prejudice are manifest. In practical terms, members of the public and regulated entities whose procedural rights are compromised by overly aggressive settlement schedules can rarely achieve proper redress.

- **Practical Obscurity**. Settlements and consent decrees are often faulted as "secret regulation," because they occur outside of the usual process designed to guarantee public notice and participation in policymaking.[15] As one recent article argues, "[W]hen the government is a defendant, the public has an important interest in understanding how its activities are circumscribed or unleashed by a decree," but too often these settlements are not subject to any public scrutiny.[16] And even when the public is technically provided notice, that notice may be far less effective than would ordinary be required under the Administrative Procedure Act. The result is that the agency may make very serious policy determinations that affect the rights of third parties without subjecting its decisionmaking process to the public scrutiny and participation that such an action would otherwise entail. This is so despite the fact that a settlement or consent decree may be more binding on an agency than a mere regulation, which it may alter or abandon without a court's permission.
- **Eliminating Flexibility**. Abusive settlements may reduce the government's flexibility to alter its plans and to select the best policy response to address any given problem. The Supreme Court has recently clarified that agencies need not provide any greater justification for a change in policy than for adopting a new policy, recognizing the value of flexibility in administering the law.[17] It is unusual, then, that when an agency acts pursuant to a settlement, it has substantially less discretion to select other means that may be equally effective in satisfying its statutory or constitutional obligations. In effect, settlements have the potential to "freeze the regulatory processes of representative democracy."[18] This is what the Reagan Administration learned when it entered office to find that its predecessor had already traded away its

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[15] *See, e.g.*, Margo Schlanger, *Against Secret Regulation: Why and How We Should End the Practical Obscurity of Injunctions and Consent Decrees*, 59 DePaul L. Rev. 515 (2010). Such concerns may be overblown, however, when they concern settlements between private parties or settlements with the government that predominantly affect private rights.

[16] *Id.* at 516.

[17] *FCC v. Fox Television Stations*, 129 S. Ct. 1806 (2009).

[18] *Citizens for a Better Envt. v. Gorsuch*, 718 F. 2d 1117, 1136 (D.C. Cir. 1983) (Wilkey, J., dissenting).

ability to adopt new approaches and respond to changing circumstances.[19]

- **Evading Accountability**. What the preceding points share in common is that they all serve to reduce the accountability of government officials to the public. The formal and informal control that Congress and the President wield over agency officials is hindered when they act pursuant to settlements and consent decrees. Their influence is replaced by that of others:

> Government by consent decree enshrines at its very center those special interest groups who are party to the decree. They stand in a strong tactical position to oppose changing the decree, and so likely will enjoy material influence on proposed changes in agency policy. Standing guard over the whole process is the court, the one branch of our government which is by design least responsive to democratic pressures and least fit to accommodate the many and varied interests affected by the decree. The court can neither effectively negotiate with all the parties affected by the decree, nor ably balance the political and technological trade-offs involved. Even the best-intentioned and most vigilant court will prove institutionally incompetent to oversee an agency's discretionary actions.[20]

C. The High Costs of Sue and Settle: Recent Examples

By design, sue and settle facilitates expensive, burdensome rules. First, as described above, it allows agency officials to evade political accountability for their actions by genuflecting to a judicially enforceable consent decree that mandates their action. As a result, officials face less pressure to moderate their approaches to regulation or to consider less burdensome alternatives. This, in turn, presents the risk of collusion and still more-burdensome rules that would be politically untenable but for a consent decree. Second, due to skirting of the notice-and-comment procedure, officials may not even be aware of alternatives. Third, even when alternatives do present themselves, officials may lack the time to analyze and consider them—assuming, of course, that alternative approaches are not barred altogether by one or another provision of the consent decree. In sum, it may be expected that the rules resulting from consent-decree settlements will be, on the whole, less efficient, more burdensome, and more expensive than those adopted through the normal rulemaking process.

[19] *See* 2012 Testimony, supra n.3, at 6–10.

[20] *Id.* at 1136–37.

This has been borne out in recent practice:

- **EPA's Mercury Rule**. My 2012 testimony describes the American Nurses litigation that resulted in a consent decree requiring EPA to propose one of its most complex and expensive rules ever in a matter of months.[21] Since the rule was finalized, it has been amended and corrected on multiple occasions and reconsidered by the agency in numerous respects.[22] The most recent corrections were proposed in February of this year—*three years* after the rule was finalized.[23] The legal challenges to it have been divided into a number of different proceedings, with one—alleging that in its haste EPA failed to properly consider the cost of its actions—currently before the Supreme Court.[24] Whether or not the Court ultimately vacates the rule, these events demonstrate the high costs, in terms of legal and regulatory uncertainty, of the compressed timetables that can result from agency settlements.
- **EPA's Existing Source Performance Standards**. EPA arguably committed to regulate carbon dioxide emissions from new and existing power plants under Section 111 of the Clean Air Act in a 2011 agreement with environmentalist groups and states.[25] The settlement provides that EPA "will" propose "emissions guidelines for GHGs from existing [power plants]" and will promulgate "a final rule that takes final action with respect to the proposed rule," despite considerable doubt as to the agency's legal authority to regulate at all. In particular, Section 111(d) prohibits EPA from regulating the emission of "any air pollutant...emitted from a source category which is regulated under section [112]," which (following EPA's Mercury Rule) power plants are.[26] Relying in part on the settlement agreement, EPA's proposal includes an aggressive timetable for implementation that requires states to begin major preparations now and is already affecting planning and investment decisions in the energy sector. In short, whether or not EPA is ultimately found to have authority to regulate existing power plants—a coalition of states has challenged the settlement agreement, a

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[21] 2012 Testimony, supra n.3, at 10–12.

[22] William Yeatman, This Month in Sue and Settle, Feb. 19, 2015, http://www.globalwarming.org/2015/02/19/this-month-in-sue-and-settle/.

[23] 80 Fed. Reg. 8,442 (Feb. 17, 2015).

[24] *Michigan v. Environmental Protection Agency*, No. 14-46.

[25] Settlement Agreement ¶¶ 1–4, EPA-HQ- OGC-2010-1057-0002.

[26] 42 U.S.C. § 7411(d)(1).

coalition of states and private parties has brought an All Writs Act challenge following EPA's issuance of the proposal, and a challenge to any final rule is inevitable—the agency will have used the settlement agreement to achieve much of what it sought to do: reduce the use of coal-fired generation.[27]

- **EPA's Brick MACT Rule**. A consent decree entered to settle a lawsuit that the Sierra Club brought against the EPA committed the agency to propose and finalize National Emissions Standards for Hazardous Air Pollutants for brick manufacturers on an aggressive timetable. That rule was subject to a lengthy reconsideration and then ultimately vacated, and EPA (pursuant to another consent decree with the Sierra Club) has proposed a replacement that the agency estimates will be substantially more expensive and that may impose new compliance obligations on sources that already made substantial expenditures to comply with the first rule. In testimony before this Subcommittee, the President of the Columbus Brick Company, a small business in Columbus, Mississippi, explained that his industry was excluded from settlement discussions regarding timing issues and that the agency lacks the time to consider flexible alternatives that may ease compliance burdens.[28]
- **Endangered Species Listing**. In two settlements executed in September 2011, the Fish and Wildlife Service agreed to make listing determinations for 251 species by September 2016 in an order negotiated with two environmentalist groups, Wildearth Guardians and Center for Biological Diversity.[29] In so doing, the agency abandoned its statutory

[27] *See generally* Comment from the Attorneys General of the States of Oklahoma, West Virginia, Nebraska, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota, Utah and Wyoming on Proposed EPA Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Docket ID No. EPA–HQ–OAR–2013–0602, *available at* http://www.ok.gov/oag/documents/EPA%20Comment%20Letter%20111d%2011-24-2014.pdf.

[28] Hearing on H.R. 1493, the "Sunshine for Regulatory Decrees and Settlements Act of 2013," June 5, 2013 (written testimony of Allen Puckett III), *available at* http://judiciary.house.gov/_files/hearings/113th/06052013/Puckett%2006052013.pdf.

[29] Stipulated Settlement Agreement re Wildearth Guardians, *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10-377 (D.D.C.); Stipulated Set-

authority to determine that an endangerment finding is warranted, but precluded by higher listing priorities—a status that allows public agencies, private landowners, and other interested parties to take actions to reduce threats and gather data so as to reduce the likelihood of a listing or, at the least, to undertake long-range planning with awareness of possible listings.[30] Rather than rely on the best available science and its own judgment to set priorities in an open and transparent manner, the agency instead deferred to these private parties, both in the timing and the substance (by excluding "warranted but precluded" determinations) of its decisions.

Some would wave away these examples—as well as those in my 2012 testimony and 2014 Heritage Foundation monograph[31]—as saying little about the impact of settlement agreements. On the facts, that is a difficult position to maintain. Each of these examples illustrates how settlements can affect agency priorities and, in certain instances, the substance of their decisions. Even a recent Government Accountability Office report that claimed, based on comments by EPA staff, that settlements have only a "limited" impact on EPA rulemaking recognized that they do "affect the timing and order in which rules are issued"—in other words, the agency's priorities.[32] With statutes as capacious as the Clean Air Act and Endangered Species Act, agency priorities determine the regulatory agenda.

Agency priorities are particularly important now, in the waning days of the Obama presidency. This administration has been aggressive in the pursuit of its policy goals through non-legislative means, upsetting settled understandings regarding executive power and statutory constructions to implement policies that it has been unable to convince Congress to enact.[33] The agency offi-

tlement Agreement re Center for Biological Diversity, *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10-377 (D.D.C.).

[30] *See generally* 16 U.S.C. § 1533; Endangered and Threatened Wildlife and Plants; Review of Native Species That Are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 76 FR 66369, 66370–71 (Oct. 26, 2011) (describing listing process).

[31] Andrew M. Grossman, Regulation Through Sham Litigation: The Sue and Settle Phenomenon, Heritage Foundation Legal Memorandum No. 110, Feb. 25, 2014.

[32] U.S. Government Accountability Office, Impact of Deadline Suits on EPA's Rulemaking Is Limited, December 2014.

[33] *See generally* Examining the Proper Role of Judicial Review in the Regulatory Process: Hearing before the Senate Subcommittee on Regulatory Affairs

cials responsible for carrying out this agenda have every incentive to attempt to force it on their successors through the use of settlements and consent decrees. There is precedent: in its final months, the Carter Administration entered into settlements that served to tie the hands of Reagan Administration officials on major policy question, including construction of public works, issuance of environmental regulations targeting particular industries, and education funding, among others.[34] Vigorous oversight is necessary to ensure that the next administration, which may have very different priorities than this one, is not stymied in its ability to exercise its policy discretion and is not bound by its predecessor's unwise policy choices.

III. Opportunities for Reform

Congress can and should adopt certain common-sense policies that provide for transparency and accountability in settlements and consent decrees that compel future government action. Any legislation that is intended to address this problem in a comprehensive fashion should include the following features, with respect to settlements that commit the government to undertake future action that affects the rights of third parties:

- **Transparency**. Proposed settlements should be subject to the usual notice and comment requirements, as is generally the case under the Clean Air Act.[35] To aid Congress and the public in its understanding of this issue, agencies should be required to make annual reports to Congress on their use of settlements. In addition, Treasury should be required to report the details of cases that result in payments by the Judgment Fund.[36]

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and Federal Management of the Committee on Homeland Security and Governmental Affairs, Apr. 28, 2015 (written testimony of Andrew M. Grossman), at 22–25, available at
http://object.cato.org/sites/cato.org/files/pubs/pdf/grossman_-_judicial_review_testimony.pdf (describing aggressive statutory interpretations under the Obama Administration)

[34] *See* 2012 Testimony, supra n.3, at 6–10.

[35] Clean Air Act § 113(g), 42 U.S.C. § 7413(g). Note that this provision, however, does not require EPA to respond to comments, only that, "as appropriate," it "shall promptly consider" them.

[36] To that end, the Judgment Fund Transparency Act, H.R. 1669, would require Treasury to publish the following for each disbursement from the Judgment Fund:

> (1) The name of the specific Federal agency or entity whose actions gave rise to the claim or judgment.

- **Robust Public Participation**. As in any rulemaking, an agency or department should be required to respond to the issues raised in public comments on a proposed settlement, justifying its policy choices in terms of the public interest; failure to do so would prevent the court from approving the consent decree. These comments, in turn, would become part of the record before the court. Parties who would have standing to challenge an action taken pursuant to a settlement should have the right to intervene in a lawsuit where one may be lodged. As described below, these interveners should have the right to demonstrate to the court that a proposed settlement is not in the public interest.
- **Sufficient Time for Rulemaking**. The agency should bear the burden of demonstrating that any deadlines in the proposed decree will allow it to satisfy all applicable procedural and substantive obligations and further the public interest.
- **A Public Interest Standard**. Especially for settlements that concern future rulemaking, those parties in support of the settlement should bear the burden of demonstrating that it is in the public interest. In particular, they should have to address (1) how the proposed settlement would affect the discharge of other uncompleted nondiscretionary duties; and (2) why taking the regulatory actions required under the settlement, to the delay or exclusion of other actions, is in the public interest. The court, in turn, before ruling on the motion to enter the set-

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(2) The name of the plaintiff or claimant.

(3) The name of counsel for the plaintiff or claimant.

(4) The amount paid representing principal liability, and any amounts paid representing any ancillary liability, including attorney fees, costs, and interest.

(5) A brief description of the facts that gave rise to the claim.

(6) A copy of the original or amended complaint or written claim, and any written answer given by the Federal Government to that complaint or claim.

(7) A copy of the final action by a court regarding the claim (whether by decree, approval of settlement, or otherwise), or of the settlement agreement in any action not involving a court.

(8) The name of the agency that submitted the claim.

A companion bill, S. 350, has been introduced in the Senate.

tlement, would have to "satisfy itself of the settlement's overall fairness to beneficiaries and consistency with the public interest."[37]

- **Accountability**. Before the government enters into a settlement that affects the rights of third parties, the Attorney General or agency head (for agencies with independent litigating authority) should be required to certify that he has reviewed the decree's terms, found them to be consistent with the prerogatives of the Legislative and Executive Branches, and approves them. In effect, Congress should implement the Meese Policy,[38] consistent with the Executive Branch's discretion, by requiring accountability when the federal government enters into consent decrees or settlements that cabin executive discretion or require it to undertake future actions.
- **Flexibility**. Finally, Congress should act to ensure that settlements do not freeze into place a particular official's or administration's policy preferences, but afford the government reasonable flexibility, consistent with its constitutional prerogatives, to address changing circumstances. To that end, if the government moves to terminate or modify a settlement or consent decree on the grounds that it is no longer in the public interest, the court should review that motion *de novo*, under the public interest standard articulated above.

These principles are reflected in the Sunshine for Regulatory Decrees and Settlements Act, H.R. 712 and S. 378. That bill represents a leap forward in transparency, requiring agencies to publish proposed settlements before they are filed with a court and to accept and respond to comments on proposed settlements. It also requires agencies to submit annual reports to Congress identifying any settlements that they have entered into. The bill loosens the standard for intervention, so that parties opposed to a "failure to act" lawsuit may intervene in the litigation and participate in any settlement negotiations. Most substantially, it requires the court, before approving a proposed consent decree or settlement, to find that any deadlines contained in it allow for the agency to carry out standard rulemaking procedures. In this way, the federal government could continue to benefit from the appropriate use of settlements and consent decrees to avoid unnecessary litigation, while ensuring that the public interest in transparency and sound rulemaking is not compromised.

Other proposed legislation focuses on settlements under specific statutory regimes. For example, the Endangered Species Act (ESA) Settlement Re-

[37] *United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977) (internal quotation marks and citation omitted).

[38] Memorandum from Edwin Meese III Regarding Department Policy Regarding Consent Decrees and Settlement Agreements, Mar. 13, 1986.

form Act[39] would amend the ESA to provide, in cases seeking to compel the Fish and Wildlife Service to make listing determinations regarding particular species, many of the procedural reforms contained in the Sunshine for Regulatory Decrees and Settlements Act, such as broadening intervention rights to include affected parties and allowing them to participate in settlement discussions. In addition, as particularly relevant in this kind of litigation, the bill would require that notice of any settlement be given to each state and county in which a species subject to the settlement is believed to exist and gives those jurisdictions a say in the approval of the settlement. In effect, this proposal would return discretion for the sequencing and pace of listing determinations under the ESA to the Fish and Wildlife Service, which would once again be accountable to Congress for its performance under the ESA.

Similarly, the Reducing Excessive Deadline Obligations Act of 2013,[40] which was introduced in the last Congress and passed the House, would have amended the Resource Conservation and Recovery Act to remove a nondiscretionary duty that EPA review and, if necessary, revise all current regulations every three years and the Comprehensive Environmental Response Compensation and Liability Act to remove a 1983 listing deadline that has never been fully satisfied.[41] The effect of these amendments would have been to reduce the opportunity for citizen suits seeking to set agency priorities under these obsolete provisions.

These bills suggest that, rather than proceeding in a piecemeal fashion, Congress may wish to consider a more comprehensive approach that limits the ability of third parties to compel Executive Branch action. Suing to compel an agency to act on a permit application or the like is different in kind from seeking to compel it to issue generally applicable regulations or take action against third parties. As Justice Anthony Kennedy has observed, "Difficult and fundamental questions are raised" by citizen-suit provisions that give private litigants control over actions and decisions (including the setting of agency priorities) "committed to the Executive by Article II of the Constitution of the United States."[42] Constitutional concerns aside, at the very least, the ability to compel agency action through litigation and settlements gives rise to the policy concerns identified above, suborning the public interest to special interests and sacrificing accountability.

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[39] H.R. 585; S. 293.

[40] H.R. 2279 (113th Cong.).

[41] *See generally* Reducing Excessive Deadline Obligations Act of 2013, House Report 113-179 (113th Cong.).

[42] *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring).

The sue-and-settle phenomenon is facilitated by the combination of broad citizen-suit provisions with unrealistic statutory deadlines that private parties may seek enforced through citizen suits. According to William Yeatman of the Competitive Enterprise Institute, "98 percent of EPA regulations (196 out of 200) pursuant to [Clean Air Act] programs were promulgated late, by an average of 2,072 days after their respective statutorily defined deadlines."[43] Furthermore, "65 percent of the EPA's statutorily defined responsibilities (212 of 322 possible) are past due by an average of 2,147 days."[44] With so many agency responsibilities past due, citizen-suit authority allows special-interest groups (whether or not in collusion or philosophical agreement with the agency) to use the courts to set agency priorities. Not everything can be a priority, and by assigning so many actions unrealistic and unachievable non-discretionary deadlines, Congress has inserted the courts into the process of setting agency priorities, but without providing them any standard or guidance on how to do so. It should be little surprise, then, that the most active repeat players in the regulatory process—the agency and environmentalist groups—have learned how to manipulate this situation to advance their own agendas and to avoid, as much as possible, accountability for the consequences of so doing.

Two potential solutions suggest themselves. First, a deadline that Congress does not expect an agency to meet is one that ought not to be on the books. If Congress wants to set priorities, it should do so credibly and hold agencies to those duties through oversight, appropriations, and its other powers. In areas where Congress has no clear preference as to timing, it should leave the matter to the agencies and then hold them accountable for their decisions and performance. What Congress should not do is empower private parties and agencies to manipulate the litigation process to set priorities that may not reflect the public interest while avoiding the political consequences of those actions. To that end, Congress should seriously consider abolishing all mandatory deadlines that are obsolete and all recurring deadlines that agencies regularly fail to observe.[45]

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[43] William Yeatman, EPA's Woeful Deadline Performance Raises Questions about Agency Competence, Climate Change Regulations, "Sue and Settle," July 10, 2013, http://cei.org/sites/default/files/William%20Yeatman%20-%20EPA%27s%20Woeful%20Deadline%20Performance%20Raises%20Questions%20About%20Agency%20Competence.pdf.

[44] *Id.*

[45] One commentator endorses allowing agencies to set their own non-binding deadlines, subject to congressional oversight. Alden F. Abbott, The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal, 39 Admin. L. Rev. 171, 200–02 (1987).

Second, Congress should consider narrowing citizen-suit provisions to exclude "failure to act" claims that seek to compel the agency to consider generally applicable regulations or to take actions against third parties. As a matter of principle, these kinds of decisions regarding agency priorities should be set by government actors who are accountable for their actions, not by litigants and not through abusive litigation.

IV. Conclusion

Settlements that govern the federal government's future actions raise serious constitutional and policy questions and are too often abused to circumvent normal political process and evade democratic accountability. Congress can and should address this problem to ensure that such consent decrees are employed only in circumstances where they advance the public interest, as determined by our public institutions, not special interests.

I thank the subcommittee for the opportunity to testify on these important issues.

Mr. MARINO. Thank you, sir.

Ms. Saunders.

TESTIMONY OF LAUREN K. SAUNDERS, ASSOCIATE DIRECTOR, NATIONAL CONSUMER LAW CENTER

Ms. SAUNDERS. Thank you.

Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee, all in one seat, thank you for inviting me.

I'm here to testify in support of the Department of Justice's Operation Choke Point and to urge DOJ to do more to combat payment fraud.

Last year, DOJ brought its first Operation Choke Point case against Four Oaks Bank and Trust, which helped process payments for a Ponzi scheme, an illegal gambling site, and illegal and fraudulent payday loans. The bank overlooked hundreds of consumer complaints, warnings from State attorneys general, and extremely high rates of payments rejected as unauthorized.

I have not heard one word of criticism about the Four Oaks case itself. The bank's conduct was indefensible. Yet the case led to rampant speculation that DOJ was engaged in a covert attack on legal businesses deemed immoral.

These concerns should have been put to rest by the two most recent Choke Point cases brought this past March. Commerce West Bank facilitated 1.3 million remotely created checks for telemarketing scams, medical benefit discounts card scams, and payday loan finder scams. In taking on the new payment processor account, the bank planned for and soon saw half of the payments rejected. Hundreds of consumers complained. Commerce West blocked debits from banks that complained that their customer was—that Commerce West's customer was targeting elder abuse. But Commerce West allowed the debits to continue at the banks that didn't complain.

In the third case, Plaza Bank enabled tens of millions of dollars of Internet telemarketing schemes, fraudulent identity theft protection insurance, and false offers of free credit cards and airline tickets. The bank's COO, who was secretly a part owner of the payment processor, dismissed concerns from its compliance officer about extremely high return rates and complaints from banks and law enforcement. Even when new management was brought in, they debated whether the lucrative revenue outweighed the risk to the bank from the frauds.

Again, I have heard no one question the extent of the fraud or the egregiousness of the banks' conduct in these cases. And, yet, this evidence about what DOJ is actually doing has not stopped criticism. Lately, pawnbrokers and gun dealers have complained that their accounts were closed. But I have seen no ties to DOJ's Operation Choke Point. Complaints about bank closures go back to the Bush administration, to the 2001 PATRIOT Act. A decade ago, long before Operation Choke Point, the pawnbrokers complained in a letter to FinCEN in 2006, "Pawn industry members have lost longstanding lines of credit as well as demand deposit relationships in those parts of the country since 2004." Anti-money-laundering rules require scrutiny of accounts with high levels of cash or international transactions. Gun dealers are often pawnbrokers. And both may be cash-intensive. If a regulator finds Bank Secrecy Act violations or a bank spots problems, accounts may be closed until the problems can be fixed.

Numerous other reasons that I outlined in my written testimony that have nothing to do with Operation Choke Point can also account for bank account closures.

But there is one area where DOJ does deserve some credit, accounts used for payment fraud. And my only complaint is that DOJ has not done enough. With only three cases in the last 2 years, DOJ has barely touched the tip of the iceberg. In March, a court fined the ringleaders of a scam who took $11 million illegally from seniors' accounts. What did the scammer's bank know? In another case, fraudulent payday lenders took $46 million from the bank accounts of consumers who never took out a payday loan. What did the scammer's bank know?

DOJ does go after scammers directly. And I've outlined many instances in my written testimony. But if a bank is a willing accomplice, choking off several scammers at once is more effective than playing Whack-A-Mole by chasing individual scammers around the globe. Choke Point is also a helpful reminder about how financial institutions can be and, in most cases, are part of the fight against fraud.

In this age of rampant data breaches and Internet scams, why on earth would we criticize DOJ for using all the tools it has to protect the American public from fraud? Thank you for the opportunity to testify today. I am happy to answer your questions.

[The prepared statement of Ms. Saunders follows:]

Testimony of Lauren K. Saunders

Associate Director, National Consumer Law Center

On behalf of

Americans for Financial Reform
National Consumer Law Center (on behalf of its low income clients)
Center for Responsible Lending
Consumer Federation of America
U.S. PIRG

On
"Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environment and Natural Resources Divisions and the U.S. Trustee Program"

Before the

Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

May 19, 2015

Chairman Marino, Ranking Member Johnson and Members of the subcommittee:

Thank you for inviting me to testify today on behalf of Americans for Financial Reform, the low income clients of the National Consumer Law Center, the Center for Responsible Lending, Consumer Federation of America, and U.S. PIRG.

I am here today to testify in support of the Department of Justice's Operation Choke Point and to urge the Department to increase its work to deprive fraudsters of access to consumers' bank accounts. I would like to make the following key points:

- Operation Choke Point stops fraud. Many fraudsters rely on banks and third party payment processors to enable them to take money from consumers' accounts. Banks and payment processors can enable fraud, and often they can stop it.

- The three cases that DOJ has brought through Operation Choke Point prove that DOJ is focusing only on banks that willfully ignore blatant signs of illegal activity. No one has defended the egregious conduct of any of the banks targeted.
- Reports that banks have closed the accounts of legal businesses have little or nothing to do with Operation Choke Point. Complaints about account closures go back a decade, since passage of the 2001 Patriot Act with its anti-money laundering rules.
- Bills such as H.R. 766 (Luetkemeyer), the Financial Institution Customer Protection Act of 2015; H.R. 1413 (Schweikert), the Firearms Manufacturers and Dealers Protection Act of 2015; and similar bills would make it harder for DOJ and other government agencies to protect the public.

Fraudsters Use Banks and Payment Processors to Take Money from Consumers

Many scams, frauds and illegal activity could not occur without access to consumers' bank or credit card accounts. Fraudsters who obtain consumers' account numbers can take payments from consumers in several ways. They can submit a "preauthorized" electronic payment through the ACH system; they can create a remotely created check drawn on the consumer's account and deposit it; or they can process a fraudulent charge against the consumer's credit or debit card through the relevant card network (Visa, MasterCard, American Express or Discover).[1]

[1] To my knowledge, none of the Operation Choke Point cases to date have involved card payments, but many scams do. For example, the FTC recently brought a case against a third party payment processor that contributed to a massive $26 million internet scam by helping its fraudster clients evade the credit card networks' fraud monitoring programs. FTC, Press Release, "FTC Charges Payment Processors Involved in I Works Scheme" (Aug. 1, 2014), https://www.ftc.gov/news-events/press-releases/2014/08/ftc-charges-payment-processors-involved-i-works-scheme.

When fraudsters submit a payment against a consumer's account, two different banks are involved: the consumer's bank – which receives the debit (ACH, check, card charge) – and the bank that initiates or submits the debit on behalf of the payee. For simplicity, I will refer to the consumer's bank as the Receiving Depository Financial Institution (RDFI) and the initiating bank as the Originating Depository Financial Institution (ODFI), although different terminology is actually used for payment methods other than ACHs.[2]

Banks play a critical role in enabling payment fraud. Scammers must use an ODFI to gain access to the ACH, check clearing or card network system in order to extract money from a consumer's account.[3]

A payment processor is often used as an intermediary between the payee and the ODFI . The payment processor collects consumers' account information from the payee, formats it, and submits it to the ODFI, which then forwards the debit through the appropriate system. Payment processors enable legitimate merchants and scammers alike to process payments against millions of accounts.

Many scams and other forms of unlawful activity rely on the ability to access the payment system to get the consumer's money. Examples of scams that accessed consumers' accounts include the following:

[2] Those are the terms used for preauthorized payments processed through the ACH system. If a check is involved, the consumer's bank would be the "payor bank" and the bank of the payee or its processor would be the "depository bank." For a card payment, the consumer's bank is the "issuing bank" and the bank of the payee or its processor is the "acquiring bank."

[3] The ODFI is the entry point for each of these payments. In a preauthorized ACH transaction, the ODFI initiates the ACH debit against the consumer's account through the ACH system pursuant to its agreement with NACHA, which writes the rules governing the ACH system. In a check transaction, the ODFI accepts the deposit of the check and then forwards it for collection to the RDFI. In a card transaction, the ODFI is the bank that has the agreement with the card network and provides the merchant with access to the network in order to accept card payments, pursuant to the ODFI's agreement with the network.

- Scammers who cold-called seniors claiming to sell fraud protection, legal protection and pharmaceutical benefits took $10.7 million illegally from consumer accounts using remotely created checks and funneled the money across the border to Canada.[4]
- Wachovia Bank enabled $160 million in fraud by processing payments for scammers who targeted vulnerable seniors.[5]
- Some Wachovia scammers then moved to Zions Bank, whose wholly owned third party payment process earned 49% of its revenue from mass market frauds ultimate shut down by the Federal Trade Commission or the Justice Department. Zions ignored suspicious activity and allowed the scammers to continue defrauding seniors.[6]
- A lead generator tricked people who applied for payday loans and used their bank account information to charge them $35 million for unwanted programs.[7]
- Bogus debt relief services scammed consumers out of $8 million and made their debt problems worse.[8]

[4] FTC, Press Release, "Court Orders Ringleader of Scam Targeting Seniors Banned From Telemarketing Court Imposes $10.7 Million Judgment" (March 12, 2015), https://www.ftc.gov/news-events/press-releases/2015/03/court-orders-ringleader-scam-targeting-seniors-banned?utm_source=govdelivery.

[5] *See* Charles Duhigg, "Bilking the Elderly, With a Corporate Assist," New York Times (May 20, 2007), available at http://www.nytimes.com/2007/05/20/business/20tele.html?pagewanted=all&_r=1&.

[6] Jessica Silver-Greenberg, New York Time, "Banks Seen as Aid in Fraud Against Older Consumers" (June 10, 2013), available at http://www.nytimes.com/2013/06/11/business/fraud-against-seniors-often-is-routed-through-banks.html?pagewanted=all&_r=0. Letter from Howard Langer to Rep. Spencer Bachus & Rep. Hank Johnson re Hearing on Operation Choke Point at (July 15, 2014), attached as Exhibit A available at http://judiciary.house.gov/_cache/files/30804b28-f604-4e22-80c5-201db94c0cdc/113-114-88724.pdf (pp. 54-57).

[7] *See* Federal Trade Comm'n, Press Release, "FTC Charges Marketers with Tricking People Who Applied for Payday Loans; Used Bank Account Information to Charge Consumers for Unwanted Programs" (Aug. 1, 2011), available at http://www.ftc.gov/news-events/press-releases/2011/08/ftc-charges-marketers-tricking-people-who-applied-payday-loans.

[8] *See* Federal Trade Comm'n, Press Release, "FTC Charges Operation with Selling Bogus Debt Relief Services; DebtPro 123 LLC Billed Consumers as Much as $10,000, But Did Little or Nothing to Settle Their Debts" (June 3, 2014), available at http://www.ftc.gov/news-events/press-releases/2014/06/ftc-charges-operation-selling-bogus-debt-relief-services.

- The FTC obtained a $6.2 million settlement against a payday loan broker that falsely promised to help consumers get loans and then used consumers' bank account information to make unauthorized withdrawals without their consent.[9]

In each of these scams, the fraudsters' ability to take money out of consumers' accounts depended on access to an ODFI and often a payment processor.

Even when consumers authorize an initial payment from their accounts to purchase products or repay loans, they may find that their accounts are repeatedly debited for fees or charges they did not authorize or additional products they did not buy. For example, the FTC brought an action against a weight loss company that debited consumers' accounts monthly for offers they did not ask for.[10] Online payday lenders have deceived consumers by imposing undisclosed charges and inflated fees that were automatically deducted from their bank accounts.[11]

The FBI estimates that mass-marketing fraud schemes cause tens of billions of dollars of losses each year for millions of individuals and businesses.[12] A MetLife study found that fraud drains $2.9 billion a year from the savings of senior citizens.[13]

[9] See Federal Trade Comm'n, Press Release, "Phony Payday Loan Brokers Settle FTC Charges," (July 11, 2014) available at http://www.ftc.gov/news-events/press-releases/2014/07/phony-payday-loan-brokers-settle-ftc-charges.
[10] FTC, Press Release, "At FTC's Request, Court Stops Supplement Marketers From Deceptive Advertising and Illegally Debiting Consumers' Accounts" (Oct. 20, 2014), https://www.ftc.gov/news-events/press-releases/2014/10/ftcs-request-court-stops-supplement-marketers-deceptive.
[11] FTC, Press Release, "U.S. District Judge Finds that Payday Lender AMG Services Deceived Consumers by Imposing Undisclosed Charges and Inflated Fees" (June 4, 2014), available at http://www.ftc.gov/news-events/press-releases/2014/06/us-district-judge-finds-payday-lender-amg-services-deceived.
[12] Federal Bureau of Investigation, International Mass-Marketing Fraud Working Group, "Mass-Marketing Fraud: A Threat Assessment" (June 2010), available at http://www.fbi.gov/stats-services/publications/mass-marketing-fraud-threat-assessment/mass-marketing-threat.
[13] The MetLife Study of Elder Financial Abuse (June 2011), available at https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf.

How Banks and Payment Processors Can Prevent or Enable Payment Fraud

When an ODFI's customer collects payments through the ACH system, the check system, or a card network, the ODFI has a unique window into the customer's business and the transactions. The ODFI has a corresponding responsibility to undertake due diligence to ensure that the payments it processes are legitimate. Payment processors have similar obligations.

Banks have know-your-customer (KYC) responsibilities under the Bank Secrecy Act (BSA) and the USA Patriot Act amendments. Before agreeing to open an account and process payments for a customer, the bank must conduct due diligence to ascertain the identity of the customer and the purpose of the account. For example, the bank must conduct basic research to establish that a business customer has an actual, legal business; that it has a real address and is truly based in the United States if that is what the business claims; and that the business has not been involved in unlawful or fraudulent activity, such as might be revealed by checking news reports, the Better Business Bureau or internet complaint sites. Additional precautions apply if the customer is located out of the country or intends to process payments internationally. KYC rules are important not only for stopping consumer scams but also for preventing terrorists, drug dealers and other criminals from laundering money and moving it around.

Banks must also monitor accounts for signs of fraud or unlawful activity. One of the clearest signs of a problem is a high return rate – the percentage of payments that are rejected and are returned by the RDFI to the ODFI because the payment was challenged as unauthorized, was subject to a stop payment order, bounced because of insufficient funds, or was rejected because the account does not exist or was closed. Not every rejected payment is a sign of fraud. But if return rates are high, banks have a duty – both under NACHA rules (governing ACH payments) and under bank regulator supervisory expectations – to determine why and to investigate if the account is being used for improper purposes.[14] If large numbers of consumers are challenging an OFDI's customer's payments as unauthorized, clearly the customer is doing something wrong. If an unusually high number are rejected because the account has been closed, that may reveal that consumers are closing their accounts in response to fraud or that the fraudster is buying lists of bank account numbers that contain older accounts long since closed. Even high rates of payments rejected for insufficient funds, especially when combined with returns for other reasons, may reveal that consumers are not expecting the payments and have been defrauded.

In the ACH system, the average rate of transactions returned as unauthorized is 0.03%.[15] Under upcoming NACHA rules, an unauthorized return rate higher than 0.5% (over sixteen times higher than the average rate) will trigger a responsibility to investigate.[16] The average total rate at which ACH debits are returned for any reason is 1.42%, and under new rules, a total return rate of above 15% (over ten times higher than the average rate) will require scrutiny.[17] Legitimate return rates in the check system and card networks are in the same ballpark as the average ACH return rates.[18]

[14] *See, e.g.,* NACHA, ACH Operations Bulletin #1-2014: Questionable ACH Debit Origination: Roles and Responsibilities of ODFIs and RDFIs (Sept. 30, 2014), https://www.nacha.org/news/ach-operations-bulletin-1-2014-questionable-ach-debit-origination-roles-and-responsibilities; Federal Deposit Ins. Corp., FIL-127-2008, Guidance on Payment Processor Relationships (Revised July 2014), https://www.fdic.gov/news/news/financial/2008/fil08127.pdf ("FDIC Revised Payment Processor Guidance"); Office of the Comptroller of the Currency, OCC Bulletin 2006-39, Automated Clearing House Activities (Sept. 1, 2006), http://www.occ.gov/news-issuances/bulletins/2006/bulletin-2006-39.html ("OCC 2006 ACH Bulletin").

[15] NACHA, ACH Network Risk and Enforcement Topics, Topic 1- Reducing the Unauthorized Return Rate Threshold (effective date September 18, 2015), https://www.nacha.org/rules/ach-network-risk-and-enforcement-topics.

[16] *Id.*

[17] NACHA, ACH Network Risk and Enforcement Topics, Topic 2- Establishing Inquiry Process For Administrative and Overall Return Rate Levels (effective date September 18, 2015), https://www.nacha.org/rules/ach-network-risk-and-enforcement-topics.

[18] *See, e.g.,* FTC, Press Release, "FTC Sues Payment Processor for Assisting Credit Card Debt Relief Scam" (June 5, 2013), https://www.ftc.gov/news-events/press-releases/2013/06/ftc-sues-payment-processor-assisting-credit-card-

An ODFI's ability to scrutinize return rates can be somewhat more complicated if a payment processor is acting as an intermediary between the payees and the ODFI. The ODFI may not directly see a high return rate for an individual merchant if that merchant's payments are bundled together with those of other merchants. But ODFIs have a responsibility to oversee the payment processors in order to that ensure that each merchant receives KYC scrutiny and return rate monitoring.[19]

The use of "nested" payment processors – a processor that processes payments for other payment processors – can further launder signs of unlawful activity and is itself a warning signal. For this reason, regulators have advised ODFIs to be especially careful of processor customers whose clients include other payment processors.[20]

Other signs of fraud are obvious. The consumer's bank, state attorneys general, or other government officials may complain to or tip off the ODFI. The ODFI also may learn of high rates of consumer complaints when payments are contested.

Efforts to stop payment fraud protect not only consumers but also ODFIs themselves. In all three systems – ACH, check and card network – an ODFI that initiates a payment must extend a warranty to the RDFI that the payment is legitimate. If the consumer challenges it and the payment turns out to be unauthorized, the ODFI must reimburse the RDFI (which in turn reimburses the consumer).

Banks are not expected to verify the legality of every payment they process, and they are not always aware that they are being used to facilitate illegal activity. But financial institutions

debt-relief-scam?utm_source=govdelivery (noting that the average credit card chargeback rate is well below one percent).

[19] *See, e.g.*, OCC 2006 ACH Bulletin, *supra*; FDIC Revised Payment Processor Guidance, *supra*.

[20] *Id.*

that take their duties seriously can be an important bulwark depriving criminals of access to the payment system.

DOJ's Operation Choke Point

The Department of Justice's (DOJ) Operation Choke Point is aimed at banks that "choose to process transactions even though they know the transactions are fraudulent, or willfully ignore clear evidence of fraud."[21] The focus is on illegal conduct, not activity that DOJ deems immoral.

Banks that choose profits in the face of blatant signs of illegality are an appropriate target for enforcement action. Cutting scammers off from access to the payment system can be a much more effective way of protecting the American public than playing a game of "whack a mole" by limiting enforcement actions to individual scammers.

The three Choke Point cases that DOJ has brought to date are unassailable. In each of these three cases, banks assisted horrible scams that took millions of dollars out of consumers' bank accounts. Each of the three banks that DOJ targeted ignored overwhelming evidence that its customer was engaged in widespread fraudulent activity.

Four Oaks Bank & Trust

The first case, brought in January of 2014, was against Four Oaks Bank & Trust Co. and its holding company, Four Oaks Fincorp, Inc. Four Oaks enabled payments for an illegal Ponzi scheme that resulted in an SEC enforcement action;[22] a money laundering operation for illegal

[21] The U.S. Department of Justice, "Holding Accountable Financial Institutions that Knowingly Participate in Consumer Fraud," The Justice Blog (May 7, 2014), available at http://blogs.justice.gov/main/archives/3651.
[22] SEC, Press Release, "SEC Shuts Down $600 Million Online Pyramid and Ponzi Scheme" (Aug. 17, 2012), available at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171483920#.U8P2rpRdX9Z.

internet gambling payments;[23] illegal and fraudulent payday loans; and a prepaid card marketing scam that made unauthorized debits for a bogus credit line.[24]

Four Oaks ignored blatant red flags of illegality, including:

- extremely high rates – *up to 70%* -- of payments returned as unauthorized;
- efforts to hide merchants' identities;
- offshore entities clearly violating U.S. laws;
- disregard for Bank Secrecy Act obligations by foreign entities;
- hundreds of consumer complaints of fraud; and
- federal and state law violations, including warnings by NACHA and state attorneys general.[25]

I am not aware of a single criticism of the Four Oaks case itself. The bank's conduct was indefensible. But because some of the payments being processed were for illegal and fraudulent payday loans, it spawned a cottage industry of critics claiming that the hidden purpose of Operation Choke Point was to target legal industries that the Obama Administration dislikes.

However, the Four Oaks case was merely about a bank that was knowingly processing illegal and fraudulent payments that just happened to involve payday loans. The loans were made in states where payday loans are prohibited, rendering both the loan and the payment authorization invalid.[26] The complaint also described many consumers who were defrauded

[23] United States v. Pokerstars, et al., 11-CV-02564 (S.D.N.Y.).
[24] Federal Trade Comm'n, Press Release, "FTC Sends Full Refunds to Consumers Duped by Marketers of Bogus '$10,000 Credit Line'" (May 12, 2014), available at http://www.ftc.gov/news-events/press-releases/2014/05/ftc-sends-full-refunds-consumers-duped-marketers-bogus-10000.
[25] Complaint for Injunctive Relief and Civil Monetary Penalties, United States v. Four Oaks Fincorp, Inc., and Four Oaks Bank & Trust Company, No. 5:14-cv-00014-BO (E.D. N.C. filed Jan. 8, 2014), https://www.manatt.com/uploadedFiles/Content/4_News_and_Events/Newsletters/BankingLaw@manatt/7-U.S.-v-Four-Oaks-Fincorp.pdf. A summary of the key allegations is available at http://www.nclc.org/images/pdf/banking_and_payment_systems/letter-doj-payment-fraud.pdf.
[26] *See* discussion in footnote 47, *infra*.

when they authorized a one-time payment from their bank account but found that the payday lenders debited their accounts repeatedly, without authorization, and would not stop.

In March of this year, DOJ brought two additional cases through Operation Choke Point. Both fit the model of clearly fraudulent activity and banks that looked the other way.

CommerceWest Bank

CommerceWest Bank allowed V Internet Corp LLC, a third-party payment processor, to make unauthorized withdrawals from consumers' bank accounts. CommerceWest facilitated over 1.3 million unauthorized remotely created checks for telemarketing scams, medical benefit discount card scams, and payday loan finder scams. The merchants included a fraudulent telemarketing company and a company that charged victims $15 million in payday loan referral fees they never authorized.

CommerceWest ignored clear warning signs indicating that V Internet and its merchants were defrauding consumers, including:

- return rates *exceeding 50%*,
- thousands of complaints from consumers to the Better Business Bureau and in other venues, and
- multiple complaints from other banks whose customers had been victims of these fraud schemes.[27]

When CommerceWest received complaints from other banks, it blocked access to banks that complained but allowed transactions to continue against consumers' accounts at other banks.[28]

[27] U.S. DOJ, Press Release, "CommerceWest Bank Admits Bank Secrecy Act Violation and Reaches $4.9 Million Settlement with Justice Department" (Mar. 10, 2015), http://www.justice.gov/opa/pr/commercewest-bank-admits-bank-secrecy-act-violation-and-reaches-49-million-settlement-justice.
[28] *Id.*

The conduct at CommerceWest was so egregious that DOJ brought a criminal action, charging CommerceWest with willfully failing to file Suspicious Activity Reports required by the Bank Secrecy Act. CommerceWest Bank admitted its wrongdoing and gave up any claim to more than $2.9 million seized by the U.S. Postal Inspection Service from the processor's accounts at the bank.

Plaza Bank

The third Operation Choke Point case to date was against Plaza Bank. The bank's chief operating officer (COO), who was secretly the part-owner of a payment processor, brushed aside warnings from the bank's compliance officer and allowed fraudsters unfettered access to steal from tens of thousands of consumers.[29]

For three years, fraudulent merchants acted through a third-party payment processor to illegally withdraw tens of millions of dollars from the bank accounts of consumers who owed them nothing.[30] Scams included internet telemarketing schemes, fraudulent "identity theft protection insurance," misusing consumer financial information from payday loan applications, and false offers of free credit cards, airline tickets, and other products to the public.[31]

Plaza's chief compliance officer had raised concerns in response to a flood of warning signs. Thousands of consumers complained that money was withdrawn from their accounts without their authorization. Other banks and law enforcement officials expressed concern that

[29] Press Release, Department of Justice, Justice Department Announces Settlement with California Bank for Knowingly Facilitating Consumer Fraud (March 12, 2015), *available at* http://www.justice.gov/opa/pr/justice-department-announces-settlement-california-bank-knowingly-facilitating-consumer-fraud.
[30] Complaint at 11–12, U.S. v. Plaza Bank, No. 8:15-cv-00394 (C.D. Cal. Mar. 15, 2015).
[31] *Id.* at 18, 22, 28.

the payment processor's transactions were fraudulent. Approximately *half* of withdrawals from this payment processor were rejected as fraudulent or unauthorized by consumers' banks.[32]

The compliance officer's concerns were dismissed by Plaza's COO. Unknown to the compliance officer, the COO was one of two Plaza officials who also held an ownership stake in the payment processor.[33]

The bank was also affirmatively making money from fraud. Each time a scammer's fraudulent withdrawal was rejected, Plaza collected a fee from the payment processor, including over $83,000 in fees resulting from over 160,000 rejected withdrawals just in September 2009. Even when new management realized the scope of the fraud, management spent months debating whether the revenues outweighed the risk to the bank.[34]

DOJ Pursues Scammers Directly, But Cutting Off Access to Bank Accounts is a Critical Tool

One of the criticisms of Operation Choke Point is that DOJ should be going after scammers directly and that it is unfair to expect banks to be accountable for fraud committed by their customers or their customers' customers. But as described above, the only banks that DOJ has targeted are ones that have willfully participated in scams by flagrantly violating their duties to know their customers, monitor return rates, and pay attention to other signs of unlawful or fraudulent activity.

The Department of Justice does go after scammers directly. Here are just a few examples of scams that the Department has stopped recently:

- DOJ shut down a call center in Peru that targeted US Spanish-speakers, telling them that they owed thousands of dollars and threatened to sue those who didn't pay. DOJ secured

[32] *Id.* at 15.
[33] *Id.* at 10.
[34] *Id.* at 22–25.

a sentence of over 10 years in prison for the perpetrators of the scheme and seized related assets.[35]

- A Jamaican man who preyed on elderly victims in the US through an international lottery scam pleaded guilty to conspiracy to commit wire fraud after being extradited from Jamaica. He faces up to 30 years in prison, and over $90,000 dollars has been recovered in connection with the scheme.[36]
- DOJ filed complaints against the perpetrators of a multi-million dollar mail-fraud scheme in which thousands of people received letters supposedly written by world-renowned psychics. The letters, which were allegedly made to appear personalized to their recipient, targeted the elderly, the ill, and those in perilous financial condition, and defrauded victims out of tens of millions of dollars.[37]
- DOJ shut down a business opportunity fraud scheme in which scammers based in Costa Rica fraudulently induced purchasers in the US to buy into fake business opportunities, usually costing at least $10,000. The perpetrator faces a maximum sentence of 25 years in prison, fines, and restitution of profits.[38]
- Two men were sentenced to more than eight years in prison for defrauding Spanish-speaking consumers into buying knockoff products and then threatening to arrest or

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[35] U.S. DOJ, Press Release, "Peruvian Man Sentenced for Defrauding and Extorting Spanish-Speaking U.S. Residents through Fraudulent Call Centers" (Jan. 27, 2015), http://www.justice.gov/opa/pr/peruvian-man-sentenced-defrauding-and-extorting-spanish-speaking-us-residents-through.

[36] U.S. DOJ, Press Release, "First Jamaican Man Extradited to the United States in Connection with International Lottery Scheme Pleads Guilty" (April 10, 2015), http://www.justice.gov/opa/pr/first-jamaican-man-extradited-united-states-connection-international-lottery-scheme-pleads.

[37] U.S. DOJ, Press Release, "Justice Department Files Enforcement Actions to Shut Down 'Psychic' Mail Fraud Schemes" (Nov. 19, 2014), http://www.justice.gov/opa/pr/justice-department-files-enforcement-actions-shut-down-psychic-mail-fraud-schemes.

[38] Press Release, Department of Justice, U.S. Citizen Extradited from Costa Rica in Connection with International-Based Business Opportunity Fraud Ventures (February 12, 2015), *available at* http://www.justice.gov/opa/pr/us-citizen-extradited-costa-rica-connection-international-based-business-opportunity-fraud.

deport consumers who complained. DOJ seized assets related to the scheme, including around 20 pieces of real property.[39]

These types of direct prosecutions of scammers are an important part of DOJ's work. But the Department should not limit itself in the tools it uses in the never-ending fight against fraud. Individual criminals are often hard to find. Scammer-by-scammer prosecutions take time and can have a limited impact, often popping up again somewhere else.

It can be a much more efficient and effective use of limited government resources to stop a bank or payment processor that has developed a business of processing payments for multiple fraudsters. For example, in the Four Oaks case, the bank and payment processor helped to process payments for an illegal Ponzi scheme, a money laundering operation for illegal internet gambling payments, numerous illegal online payday lenders, and a bogus prepaid card marketing scam. The CommerceWest action stopped numerous scams including telemarketing scams, medical benefit discount card scams, and payday loan finder scams.

Indeed, some banks and processors specialize in companies that have been banned from the ACH system or card networks, or were rejected by more careful financial institutions. Discovery in lawsuits against Wachovia and Zions Bank revealed:

> The very same persons who operated the NHS fraud through Zions had operated a similar fraud through Wachovia. Several of the frauds involved in the T-Bank and First Bank of Delaware cases had simply migrated to Zions. Had the banks engaged in the most rudimentary due diligence they would have turned up these migrating frauds. Wachovia and Zions both obtained the fraudulent customers through what are known as account

[39] Press Release, Department of Justice, Florida Residents Sentenced for Defrauding and Threatening Spanish-Speaking Consumers (January 9, 2014), *available at* http://www.justice.gov/opa/pr/florida-residents-sentenced-defrauding-and-threatening-spanish-speaking-consumers.

> brokers. The account broker who brought PPC to Wachovia testified that four other banks had refused to open accounts for PPC before Wachovia accepted it. The perpetrator of the NHS fraud testified that he was approached by an account broker who brought his account to Zions within twenty-four hours of losing his prior access to the banking system, through a court order freezing PPC's accounts at Wachovia.[40]

That is, basic due diligence would have denied those fraudsters access to the bank accounts of their elderly victims.

Prosecuting banks and payment processors that willfully participate in fraud also has benefits beyond the individual cases. Operation Choke Point has served as an important reminder to all financial institutions and payment processors about the importance of taking their due diligence duties seriously. Since DOJ's work began, numerous financial industry conference sessions, webinars, white papers and consulting efforts have helped the industry to be more vigilant against fraud.

The vast majority of financial institutions and payment processors have no desire to help scammers. These institutions are important partners with law enforcement when they deny criminals access to the payment system. It is much better to deny fraudsters access to consumers' accounts in the first place than to prosecute them after the fact.

Closures of Pawnbroker or Gun Dealer Accounts are Unrelated to Operation Choke Point

It is virtually impossible to read the three Choke Point complaints to date without concluding that this is essential work for which DOJ should be applauded, not criticized. Yet the two new cases brought this year – clear evidence of what DOJ is actually doing – have not

[40] Letter from Howard Langer to Rep. Spencer Bachus & Rep. Hank Johnson re Hearing on Operation Choke Point at (July 15, 2014), attached as Exhibit A available at http://judiciary.house.gov/_cache/files/30804b28-f604-4e22-80c5-201db94c0cdc/113-114-88724.pdf (pp. 54-57).

quelled critics from making baseless claims that, behind the scenes, Operation Choke Point is actually about pressuring banks to cut off legal businesses. Bills continue to be introduced to de-fund Operation Choke Point.

The primary "evidence" used against Operation Choke Point is reports that some pawnbrokers, money transmitters, gun dealers and even cigar stores have had their bank accounts closed. The banks generally did not discuss the reasons.

However, complaints about bank closures go back a decade, long before Operation Choke Point, which began in 2013. Bank account closures have much more to do with the Bush Administration USA Patriot Act passed in 2001 after 9/11 than with any current DOJ activity.

The current complaints are just the continuation of an old gripe. Pawn brokers, check cashers, remittance providers and others have been complaining about "bank discontinuance" for years. In 2006, FiSCA, the trade association of neighborhood financial service providers, testified:

> "For the past six years banks have been abandoning us - first in a trickle, then continuously accelerating so that now few banks are willing to service us ...."[41]

Also in 2006, the National Pawnbroker Association complained to FinCEN:

> "Pawn industry members have lost longstanding lines of credit as well as demand deposit relationships in most parts of the country since 2004."[42]

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[41] Gerald Goldman, General Counsel of FiSCA, "Summary Of speech before the U.S. House Committee on Financial Services, Subcomm.on Fin'l Inst'ns & Consumer Credit , Regarding Banking Services to MSBs (June 21, 2006), http://www.fisca.org/Content/NavigationMenu/GovernmentAffairs/TestimonySpeeches/FiSCAHearingOralStmtGoldman_6_21_06.pdf.

[42] Letter from Fran Bishop, President, National Pawnbroker Association to Robert W. Werner, Director, Financial Crimes Enforcement Network (FinCEN) (May 9, 2006), http://www.fincen.gov/statutes_regs/frn/comment_letters/71fr12308_12310/msb_51_bishop.pdf.

Cash-intensive businesses and accounts used for international transactions can be impacted by enforcement of anti-money laundering laws. Payday lenders and pawnbrokers are often involved in check cashing and remittances.

Gun dealers may also be impacted indirectly by Patriot Act enforcement – not because they are selling guns, but because they may be cash-intensive businesses.

Anti-money laundering rules can lead to account closures if:

- A regulator finds that a bank or credit union lacks the controls required by the BSA and orders the institution to stop serving cash-heavy businesses until the failures can be remedied.
- The bank makes an individual business decision to simplify compliance by not handling certain types of accounts.
- The bank has concerns about the level of cash transactions.
- The bank cannot confirm the ownership or use of the account.

None of these issues have anything to do with Operation Choke Point. The idea that Operation Choke Point is a moral crusade against gun sales is pure conspiracy theory. Not one of the voluminous DOJ documents produced in the House of Representatives' inquiry about Operation Choke Point mentioned a focus on gun dealers.[43] DOJ's focus is entirely on banks that are complicit in payment fraud.

[43] The only supposed link between Operation Choke Point and gun dealers is DOJ's use of the FDIC's former guidance on third party payment processors, which in one footnote listed online firearm sales among the businesses that had been associated by the payments industry with higher-risk activity. But there is no indication that DOJ (or the FDIC) has ever shown any interest in the bank accounts of gun dealers, and the FDIC later amended the guidance to remove the list of specific merchants.

Banks Close Accounts for a Wide Variety of Reasons

Anti-money laundering efforts are not the only reasons why a bank account may be closed. There are a wide variety of reasons, and it is important not to leap to conclusions based on one-sided anecdotes. Other reasons that a financial institution may close an account include:

- *The bank shuts down a payment processor account used for fraudulent activity.* When that happens, the legal clients of that processor can also be disrupted.
- *Signs of suspicious activity, or indications of financial difficulties such as a pattern of overdrafts, default on another loan held by the bank, or a deteriorating credit rating.* Privacy concerns may prevent banks from explaining why an account was closed,[44] but the customer's side of the story is not always complete.[45]
- *Business decisions to avoid areas with high rates of illegal activity or predatory lending.* Regulators have clarified that financial institutions that are aware of the risks and have appropriate controls are not discouraged from serving entire categories of businesses. But some banks choose to exit areas like debt settlement and online payday lending where there are high rates of complaints and illegal activity. Banks may also choose not to be associated with predatory lending even if it is legal.
- *Unprofitable business areas.* Banks make strategic decisions to exit areas unrelated to regulator pressure.

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[44] Dana Liebelson, "Is Obama Really Forcing Banks to Close Porn Stars' Accounts? No, Says Chase Insider," Huffington Post (May 8, 2014), available at http://www.motherjones.com/politics/2014/05/operation-chokepoint-banks-porn-stars(quoting Chase source as saying: "This has nothing to do with Operation Choke Point … we have no policy that would prohibit a consumer from having a checking account because of an affiliation with this industry. We routinely exit consumers for a variety of reasons. For privacy reasons we can't get into why.").

[45] Red Wing Ammunition Co. "isn't sure why he was cut off" by First Data, which stated: "First Data processes transactions for merchants selling firearms and ammunition, so long as they meet our longstanding credit/risk management policy requirements… These policies were implemented before the DOJ's Operation Choke Point and are unrelated." Jennifer Bjorhus, Star Tribune, "Federal antifraud initiative goes too far, banks say" (June 7, 2014), available at http://www.startribune.com/business/262167821.html.

There is one area where Operation Choke Point deserves some credit for bank account closures: accounts used for scams and other illegal activity. For example, some online payday lenders operate unlawfully without state licenses. Operating offshore or through a tribe does not exempt lenders from state laws, contrary to their claim.[46] Banks may close the accounts of lenders that cannot show state licenses, and some banks may choose to stay away from payday lending, simply because it is unlawful in many states.

But the mere fact that Operation Choke Point has a catchy name and makes for good headlines does not mean that every business that has suffered a bank account closure is related to DOJ's work. A few anecdotes about individual businesses drawn from the thousands of accounts that are closed every year do not prove a pattern. The proof of what DOJ is doing is in the cases it has brought – against those rare institutions that choose to enable fraud.

[46]The Supreme Court repeated last year its longstanding view that tribes must obey state law when they act off reservation even if they cannot be sued directly. A state "can shutter, quickly and permanently, an illegal casino" – or an illegal payday loan operation – by denying a license, obtaining an injunction, and even using the criminal law. Michigan v. Bay Mills Indian Community et al., 134 S.Ct. 2024, 2035 (2014).

H.R. 766, the Financial Institution Customer Protection Act of 2015, Would Limit DOJs Ability to Address Fraud.

H.R. 766 (Luetkemeyer) would eliminate the authority that DOJ used to investigate and bring the cases against CommerceWest Bank, Plaza Bank and Four Oaks Bank & Trust for helping scammers to debit consumers' bank accounts. The bill would amend the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) to eliminate penalties for and investigative authority into unlawful conduct "affecting" federally insured financial institutions. Instead, agencies could only penalize or investigate illegal conduct "against" a financial institution or "by" the institution against a third party. In other words, DOJ could not use FIRREA authority to look into signs that a bank is knowingly helping scammers to take money out of the accounts of seniors, because the scammers are not targeting the bank and the bank is not targeting the senior.

The bill would frustrate efforts to protect not only the public but also insured financial institutions. Payment fraud poses risks to ODFIs, which by law warrant the legality of payments when the bank serves as an intermediary between payors and payees.[47] Thus, ODFIs that overlook signs of fraud are on the hook for illegal payments when they are challenged. The bill also imposes new procedural hurdles to investigations into FIRREA violations of any kind and makes it more difficult and burdensome for banking agencies to discourage a financial institution from maintaining a banking relationship with a customer that shows significant signs of being involved with fraud or illegal activity.

[47] *See* Testimony of Adam J. Levitin, Professor of Law, Georgetown University Law Center, Before the United States House of Representatives, Judiciary Committee, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, "Guilty Until Proven Innocent? A Study of the Propriety & Legal Authority for the Justice Department's Operation Choke Point" at 9-10 (July 17, 2014), http://judiciary.house.gov/_cache/files/f6210f6f-68eb-49b6-b617-167eecfdfe3b/levitin-testimony.pdf.

H.R 766 also makes it more cumbersome for the Department of Justice to issue subpoenas in connection with its investigations of financial fraud. A subpoena is merely a request for information. If a financial institution is potentially facilitating illegal activity, a subpoena is an important tool to determine the facts. Abusive practices, especially in cases of payments fraud, are hard to detect. For fraudsters, this is by design – the best scams are those that go undetected for as long as possible. We should not deprive investigators of the information they need to determine if a financial institution is willingly enabling financial fraud.

H.R. 1413, the Firearms Manufactures and Dealers Protection Act 2015, Would Cut off Critical Funding to Prevent Fraud.

H.R. 1413 would prohibit federal agencies from using any funds to carry out Operation Choke Point – no matter what illegal conduct is targeted – or any program designed to discourage financial institutions from providing credit or payment processing for firearms or ammunition dealers. As discussed above, Operation Choke Point has nothing to do with gun dealers. Yet H.R. 1413 would completely defund DOJ's payment fraud activities, such as the cases described above against fraudsters who targeted seniors and others.

H.R. 1413 would also inhibit federal agencies from enforcing the Bank Secrecy Act and the Patriot Act if a financial institution's noncompliance or lax money-laundering controls happened to involve an account held by a firearm or ammunition dealer. Criminals could hide money laundering in the guise of gun sales. The bill could also restrict efforts to stop a bank account from being used for illegal activity if the owner of the account is a firearm or ammunition dealer.

DOJ Must Do More to Stop Payment Fraud, Which Hurts Everyone

Wrongdoers who access the payment system inflict harm on everyone. In addition to the direct victims of fraud:

- The general public spends millions of dollars on identity protection products and loses faith in the security of the payment system;
- Retailers and online merchants lose business if consumers are afraid to shop on their websites or at their stores;
- Consumers' banks bear the customer friction and the expense of dealing with an unauthorized charge – at an average cost of $100 and up to $509.90 for a smaller bank, according to NACHA;
- The fraudsters' banks may suffer regulatory or enforcement actions, lost customers, private lawsuits, and adverse publicity; and
- American security is put at risk when banks and processors that lack know-your-customer controls are used for money laundering for drug cartels, terrorist groups, and other criminals.

Operation Choke Point targets few but protects many.

Indeed, my only concern about Operation Choke Point is that it has not brought enough actions. The three cases that the Justice Department has brought in the last two years are just the tip of the iceberg. We have heard a regular litany of payment fraud cases, with new cases coming out every day. In some cases, fraudsters manage to hide their fraud from the financial institutions or payment processors who process the payments. But it is hard to believe that at least some of the banks that enabled the scams described earlier in my testimony did not know what was going on.

Conclusion

Fighting payment fraud should not be controversial. Everyone benefits from efforts to stop illegal activity that relies on the payment system. The tens of billions of dollars that Americans lose to fraud every year are just too great to abandon vigilance by banks that are in a position to stop illegal activity. I urge you to support DOJ's Operation Choke Point and other efforts to ensure that banks comply with know-your-customer requirements, conduct due diligence, and keep an eye out for signs of illegality. Everyone must do their part to protect the integrity of the payment system and to prevent illegal activity that harms millions of Americans, businesses and American security.

Thank you for inviting me to testify today. I would be happy to answer any questions.

Mr. MARINO. Thank you.

And, once again, all of your statements will be made of the full record.

And I'm going to recognize myself for some questions. Mr. Johnson said he would be back.

So, with that, let's start the questioning. And I would like to start with Mr. Horowitz, if you would, please. Mr. Horowitz, you provided such an honorable picture of your colleagues in the Reagan administration and in the White House. That appears to sharply contrast with what is taking place today. What do you think has changed?

Mr. HOROWITZ. Well, I think Ronald Reagan understood that there were things more important in the end than winning a particular game. One had to stand for something larger than oneself. And I think it was reflected. I also think there was a quality issue. My younger colleagues, then younger, at the Reagan White House included two later circuit court judges, the CEO of Home Depot, a group of Washington all-stars, people making more money than even the settlement amounts paid that have been described here, and the Chief Justice of the United States. These were people for whom the rule of law meant something. We took it seriously. But what we got was leadership from the top.

And I think that this Administration is just so eager to win, to score, to achieve results, that the means become irrelevant and the ends are. Leadership comes from the top.

I would say one other thing. And that is that I believe—and I'm glad Mr. Johnson is here when I say it—that Eric Holder has been the most lawless Attorney General since John Mitchell. I just do not see this notion of the rule of law trumping some immediate political gain. And I think that that has—so that the quality of the lawyers taken from the top, from the Attorney General, are just extraordinarily disappointing here. They think they're winning. I think they get press support for doing it whereas we used to get hit by the press. That was helpful to us when we got criticized by the press. They kept our feet to the fire. The press is not doing it to this Administration.

Mr. MARINO. My next question for you is, what is the long-term damage, if any, to the system from these results-driven lawyers?

Mr. HOROWITZ. Well, it is extraordinary. And I'm, again, grateful that Mr. Johnson is here because what I tried to say was that the issue that's raised by the misperformance of this Administration is not a Democrat versus Republican issue. It's the executive branch versus Congress issue. When Executive orders are issued that create whole legal regimes, Congress becomes irrelevant.

You know, the reach of the Federal Government is now so great that you don't need Congress anymore. The President can say anybody who wants to deal with the Federal Government shall from now on do and he fills in the blank. Do this in terms of environmental laws. Do this in terms of discrimination. Do this in terms of immigration. He is not simply managing the Federal Government; he is legislating for the entire country with the stroke of a pen. I think that is dangerous to democracy. And it's got to stop. I also think he creates—when there's not that democratic process going on, the President constantly talks about: My authorities have expanded. I've got a pen that's handy, and I can just sign a piece of paper and make all kinds of things happen.

I will say, Mr. Johnson, that today Democrats may applaud what gets done on immigration. But if that power over Executive orders can trump Congress, if that power to make settlements trumps the appropriations process, what's sauce for the goose is sauce for the gander. And there will be a conservative administration that will trump Congress just as well.

So I think there is a real damage and risk to the whole process of governance because the rule of law today—and I'm not saying this is a venal administration—but I will say, Mr. Johnson, as someone who got attacked by the Ku Klux Klan when I was in Mississippi, I find little difference in terms of respect and disrespect to the law between the Attorney General's Office of the State of Mississippi at its worse and the lawyers of this Administration. I think there's nothing worse that can be said of this Presidency.

Mr. MARINO. Thank you.

Mr. Epstein, the historian Paul Johnson writes that President Roosevelt was well known for using the IRS to punish political enemies. Do you see anything going on today that makes you fear that this is taking place with this Administration?

Mr. EPSTEIN. Well, I think what is most obvious, and this is a direct result of my organization's litigation against the Treasury inspector general for tax administration, is we know based off an order to TIGTA that there are 2,500 records of alleged unauthorized disclosures from the IRS to the White House. The White House has very broad means to obtain taxpayer information. It does that through a provision of the Tax Code. What is clear is the White House has never disclosed that it ever used these provisions. And, yet, what is obvious is that taxpayer information is going into the White House. And when you have 2,500 records of that, it—while there is, because of the lack of transparency on this, no direct evidence of the President specifically requesting that information, it is highly likely that there is some risks. And I think the fact that the President has not followed direct congressional statutes indicates that there may be some serious issues involved with this White House and taxpayer information.

Mr. MARINO. Thank you.

Mr. Grossman, what do you say to the suggestion that collusive litigation is not a problem?

Mr. GROSSMAN. Mr. Chairman, I think my response is simply to look at the facts. If one looks at the 2011 settlements between two environmentalist groups and the Fish and Wildlife Service requiring the Fish and Wildlife Service to make listing determinations for 251 separate species within a set period of time, while abandoning its traditional discretion, its statutory discretion to defer such listings and then to prioritize its operations based on sound science—that's what the statute says—if you look at that settlement agreement, I think it becomes clear that what is going on here is not what Congress intended when it anticipated that the citizen suit provisions would be used to encourage agencies to undertake their statutory duties.

Mr. MARINO. My time has long expired. And I'm going to defer to the Ranking Member, Mr. Johnson. And we'll come back and do a second round because I don't like making you come here and then just do one round of questioning and then send you on your way, if you don't mind.

Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

And I thank the panelists for being here today.

Mr. Horowitz, I realize that you are the lead witness on this panel. I realize you're the lead witness on this panel. And it was not my intent to disrespect anyone on the panel by having to leave out. I had a pre-arranged 3:30 event that I had to take care of. And so, therefore, I went ahead and did it. And so I missed your testimonies. So, please, don't take that as a sign of disrespect.

And I do, Mr. Horowitz, feel your intensity about what you see as a usurping or overstepping of executive authority as you see it. I happen to disagree. And I'm one of those who feels that a strong government can promote prosperity for all. I look at government in terms of being an entity that protects the weak from the strong. And it does so through rules and regulations and laws. And there's a reason why the legislative branch is the first branch dealt with in our Constitution in Article I. It's a reason why the executive branch is afforded less attention in the founding document than the powers enumerated to the legislative branch. There's a reason for that. And I think the Framers intended for the legislative branch to—although we have a coequal branch or coequal setup of checks and balances where each branch checks the other. So, from that standpoint, it's equal. But I do understand the hierarchy that is set forth in our Constitution.

And I would also note that, of late, our legislative branch has been gummed up. It hasn't really been working. The 113th branch—or Session of Congress was known as the most donothingest branch of Congress in the history of our country. And when you take the number of bills that were enacted into law, passed and enacted into law, and this, despite the grave circumstances within which we find ourselves as a Nation, on a global level. Our challenges are unprecedented, both domestically and beyond our borders. And we just can't let things go within our borders and expect to maintain the same position internationally that we have enjoyed.

And so that has given rise to some practical responses, I think, by the executive branch. When there is a vacuum, it has to be filled. And if not filled, then woe be unto the entire Nation. And so I don't think that there is any ulterior purposes by our President and our former Attorney General in terms of doing the work that they see that needs to be done. And I think both have evidenced a desire to work with Congress. But despite that mentality, I think both have been met by unprecedented levels of obstruction, particularly the President. It seems like anything that he does and any person that he puts into a position to do anything is going to be opposed just because it's President Obama's prerogative.

So, you know, that's kind of where we find ourselves in my view. And I look at—I look at both men having proceeded out of love and admiration for the country and not for any other purpose other than to serve the people of our great Nation. And, fortunately, in this Nation, we can agree to disagree with each other. And we have elections. And we change the guard. The American people speak through those elections. And President Obama was elected twice, the second time with the same Attorney General as he appointed the first time. So that's kind of where we stand. And I certainly would have no problem with you responding, though my time has run out.

Mr. HOROWITZ. Well, if I may comment, Mr. Johnson.

First, we don't disagree on much that you said. We agree on much that you said. First, I believe in a strong Presidency. The Reagan administration was a very strong Presidency that filled in what we thought were lots of gaps. And there was debate on the matter.

The part—and I agree that there are gaps now in governance and things that need to be done and blockages in terms of action. These are problematic things always in government. However, and this I believe is the key, if there is gridlock in the system, no matter how bad the consequences, it must never permit the President and, very particularly, the Attorney General to override the clear force of law. And that is what lawyers are there to say. We saw lots of gaps from our point of view in the Reagan administration. And, yet, when the Iran, when the Contra battle was going on, I had the unhappy task of making it even harder for the President to prevail in Nicaragua because you had passed legislation that made it impossible for the White House, as I viewed it, to have administration over that combat.

That's where I disagree. Maybe you think ObamaCare is absolutely critical. And let me say I share your view that Eric Holder and the President operate from love of the country. I don't disagree with that. What I am saying is that that love and that frustration should never allow them and you should never allow them to transcend the law. How in the world do they justify giving billions of dollars to people in Federal exchanges when the law says only people in State exchanges could get the money? How do they justify ignoring deadlines? How do they justify waiving tax payments? The law is clear on that subject. And if there is gridlock, let me just say——

Mr. JOHNSON. With all due respect, on the issue of the Federal versus State exchanges, I think that clearly when you look at the legislative intent and you construe it in accordance with time-honored rules of construction by the court, you must conclude that the legislative branch intended for everyone to have benefit of subsidies, regardless of whether or not the Federal Government or the State set up of the exchange.

Mr. HOROWITZ. Well, let's say we disagree on that. And maybe after the hearing, I can give my view and you give me yours if you have a second. But I don't want to moot that here. What I really mean to say is if there is gridlock and if it is hurting the country and if there is impatience, it does not justify issuing an Executive order, as the President says: Hey, Congress is not acting, so I'm issuing an Executive order ordering clemency for illegals and putting them on a path to citizenship. The remedy for gridlock, the remedy for failure is elections.

If there's a Republican Congress, it's a do-nothing Congress, do what Harry Truman did: Get them kicked out in the next election.

But do not issue an Executive order to fill in the gap that Congress refused to fill in, in your judgment. That's what I see happening here.

Mr. JOHNSON. Mr. Horowitz, if we were to take your view to its logical conclusion, then there should never be a single Executive order issued by a President.

Mr. HOROWITZ. Mr. Johnson, as general counsel at OMB, I had primary responsibility for handling Executive orders. I've got 5 years of the most critical experience in dealing with Executive orders. I am trying to—and they are necessary tools of the President. But I want again to make clear, the idea that you take, the President has waiver authority. And then you extend it to waive anything is just, is legislation. There is——

Mr. JOHNSON. That's what we have a court system for though.

Mr. HOROWITZ. Ah, but that's where I think my Mississippi experience is very important. What would happen would be the lawyers didn't ever have to make a decision. If the courts had ordered integration of the parks and then there would be pools; they would keep them segregated. And they would say: Well, let's keep them segregated. And they can litigate it. When the court tells us to integrate the pools, we'll integrate the pools.

Mr. JOHNSON. And that's pretty much the way——

Mr. HOROWITZ. It is not the responsibility—an Administration has its own responsibility to follow the law and to follow it carefully, no matter what the consequences and not simply say: Well, it goes to us, and when the courts come in, they'll tell us what to do. I tell you, accepting your judgment about love of country, that it pains me to see that the practices of this Administration, in terms of being constrained by legal mandates, is no different from what I saw in Mississippi during the massive resistance campaigns. I agree, it's a noble motive. But when—and let me say one last thing in terms of the rule of law: It won't work because eventually what is going to happen, Mr. Johnson, is that the courts are going to step in. We have already had a 9-nothing decision from the Supreme Court on recess appointments that never should have been allowed if lawyers had been alive here. And so, in the end——

Mr. JOHNSON. That's something that had been taking place for, since——

Mr. HOROWITZ. Yes, but not during congressional sessions. And it was a 9-nothing decision of the court. I think you are going to find, as the Nixon administration did, as the Southern States did, that extended indifference to law and I got a stroke of the pen and I got new authorities every day is going to create counter-reactions that is going to make ObamaCare less lasting because that is—you do not breed respect for what you do if you think you can do it by yourself and if you override Congress. I'm just telling you if——

Mr. JOHNSON. Mr. Horowitz, I would love to continue our dialogue. But I'm doing a disservice to my Chairman, who is trying to run this Committee.

And, so out of respect, I do, I must yield back.

Mr. MARINO. We'll ask another round, if you don't mind. Is anybody in a hurry here other than wanting to get home? Just bear with me. We're going to vote here shortly anyhow. Ms. Saunders, let me qualify my question before I ask it because, as a prosecutor, district attorney in my State of Pennsylvania, and a U.S. attorney responsible for prosecuting Federal laws and working for Justice and the White House, I just, whoever breaks the law has to pay the consequences. I have absolutely no problem with that. And there were banks doing that and probably still are. And I hope they do get caught. And they should be punished and not only with civil penalties but criminal penalties as well.

So the issue is not that banks and other entities that are operating under—that are operating illegally, according to the rule of law. That's warranted. It's the collateral effects that is taking place here because of negotiations and settlements and how it's being done.

When I was a prosecutor, I didn't say to someone or suggest to anyone that if you do things this way, we will not prosecute you. If you broke the law, you broke the law. So let me give you two examples of where there is collateral damage. And certainly the Justice Department and the IRS, any government entity that has that kind of power can simply say no, we didn't force someone to do this. But they've suggested in numerous situations not to lend to a particular individual or individuals or to suggest to banks that if you don't change your lending habit, we will shut you down. If they violated the law, it should have been dealt with. So there's a situation where ZestFinance—it's an online lending startup, funded by a Princeton graduate, who is the former chief information officer at Google. Are you familiar with ZestFinance? Maybe not. Z-E-S-T Finance.

Ms. SAUNDERS. I've heard of it.

Mr. MARINO. It uses—and I'm not going to ask you to respond to ZestFinance particulars because there are many cases that I don't know about either. But ZestFinance uses mathematical analysis of large consumer data. It sets to offer loans at a far lower cost than competing products. ZestFinance submitted a statement to this Committee that as a result of Operation Choke Point, they have already had to layoff 45 percent of their workforce. Are you aware of this?

Ms. SAUNDERS. Not——

Mr. MARINO. I'm not trying to get you because there are many cases out there.

Ms. SAUNDERS. I do vaguely recall testimony about Zest.

Mr. MARINO. And let me tell you why, because Zest Finance, being a startup company, needed financing to continue with its business and needed continual financing until it got to the point where it was generating the profits to not have to run to get financing. But the bank said, you know, your industry is not a popular industry, and we're not going to do business with you. And I have to believe that it's an example of Justice or IRS or some entity going in, saying: Hey, we don't like the way you're doing business.

The rule of law isn't based on we do not like the way you are doing business. The rule of law is here is the statute, here is the law, here is the evidence that we have that you violated, and you will be prosecuted. Most recently, in November 2014, Heritage Credit Union told Hawkins Guns in Wisconsin that it was closing the company's account. To determine why, the owner called the bank manager and teller and recorded the conversation. The bank confirmed that officials from the National Credit Union Administration forced the closure.

NCUA officials came in, looked at their books, looked at everything and said: Here are some accounts that we feel that we are going to regulate you on. So that put Hawkins Guns at a disadvantage and lost a lot of business because of it. I'm not sure if they went out of business. So if there was something wrong there, the Federal Government should have done two things. If they had the evidence, they should have said to Heritage Credit Union: You are making illegal loans, or whatever the situation is, you are not following the banking rules, and you will be prosecuted. Didn't happen, at least to my knowledge, not yet. And as far as Hawkins Guns, however they're concerned, if they were selling guns illegally or doing something in violation of the crimes code or sales law or not paying their taxes, they should have been prosecuted as well. And they were not.

So you criticize opponents of the operation of Choke Point for making baseless claims. But these are not baseless claims. And I've had information from people saying: We don't want to publicly come out because the IRS will come after us or some entity will come after us.

So this is what I'm telling you what the collateral effects are. But that is not the argument that this Committee is making. We're simply explaining it; the rule of law must be followed. And no government entity should be saying to someone: I don't think you should do this because of political reasons.

Either you prosecute or you do not prosecute. What say you?

Ms. SAUNDERS. Thank you. Well, I think that as a former prosecutor, I am sure you also appreciate that not every allegation that gets thrown around is necessarily backed up by the evidence. And I have seen all sorts of baseless claims about this bank account and that bank account was closed because of Operation Choke Point. But I haven't seen any evidence that the Justice Department is pressuring any bank to close a lawful business.

Mr. MARINO. Okay. I'll let you finish. But you know as well as I do, that there are very subtle ways of getting the message across. And you know as a prosecutor, there are ways of dodging so-called, the "terminology of the law" to get a point across. Prosecutors should not be doing that, Government entities should not be doing "I think you should not lend this company money."

Ms. SAUNDERS. And I've seen no hint that that is going on. In the case of Heritage Credit Union, first of all, you quoted NCUA which, of course, is not the Department of Justice, and it's not Choke Point. And, of course, supervisory exams by the bank regulators are secret. And I think the banks like it that way. So they can't always talk about exactly what is going on. So I don't know. I do know that I think Heritage Credit Union sent the gun dealer a letter, saying they had some matters that they needed to take care of, but they would be happy to have the gun dealer back as a customer. I believe, if I'm not mistaken, that's a credit union that had recently merged and that had grown quite quickly. And it may be that there were some compliance issues with the Bank Secrecy Act.

Mr. MARINO. Now you're jumping to conclusions here.

Ms. SAUNDERS. And so are these dealers.

Mr. MARINO. It may be, it may be this, it may be that. And, yes, it's not part of the Justice Department, but it's a part of the Federal Government. And it should be transparent. And it should be open. And no games will be played. And I didn't tolerate it from my prosecutors. They made me look good. They followed the law. But when the Federal Government starts flexing its muscle because of political reasons, there is a severe problem.

Ms. SAUNDERS. Would you like every bank exam to be public? I mean, there's lots of bank examinations. I would love to see what is going on. Frankly, we are often frustrated because regulators do things quietly, you know, with the bank behind the scenes.

Mr. MARINO. Well, given the disaster that Dodd-Frank has caused, I would imagine that banks would not, even mine, exams being opened up to the public if they didn't have to follow such ridiculous regulation that has been laid out over the decade.

Ms. SAUNDERS. You know, I think a lot of these complaints go back to the Bush administration, have nothing to do with this Administration.

Mr. MARINO. I wasn't in Congress during the Bush administration. If I were, I would be holding the Bush administration responsible for that. There is something—here's my premise about being a Congressman: I want to improve the quality of life for Americans. I think there is too much regulation. And I don't care if it's a Republican President; I don't care if it's a Democrat President. I'm the type of individual, as I took an oath as a prosecutor—I was a prosecutor for 18 years. That's still in my mind, and that's still ingrained in me. Again, I don't care what Administration, if I were around or if I will be around when there's a Republican President and I think that they are circumventing the system, breaking the law or trying to play some games, I will be the first one leading the charge on taking them on.

Ms. SAUNDERS. Right. My point is that it's easy to attribute motives. But back, in 2006, CFSA, which represents payday lenders said—this is in 2006—for the past 6 years banks have been abandoning us, first in a trickle, then continuously accelerating so that now few banks are willing to service us.

Now, I don't think anybody thought that the Bush administration was on a moral crusade against payday lenders. It's easy to attribute motives, but I think we have a serious problem with funding of terrorists and drug dealers that move cash around. And, unfortunately, you know, there are rules that impact all of us. And, you know, the conversation whether we have too much regulation or not enough regulation is, you know, is another conversation. You know, the Justice Department is not passing regulations here. Frankly, I think that better regulation would have saved us hundreds of billions of dollars, and a Great Recession, and communities devastated, and countries around the world are on the verge of collapse and so I——

Mr. MARINO. I'm going to respectfully disagree with your opinion, but I hear it constantly, not only from my constituents but small businesses and large businesses and medium businesses, that regulation is killing them, regulations that I could explain here. You look up my record, it's on record, example after example after example of regulation. But, again, I don't care what Administration it is; there is, at this point, businesses are being so regulated that they are going out of business. And you talk about—you really don't want to open a can the worms when you talk about terrorism and funding of terrorism with this Administration. We don't have the time to go into that, but I'd love to have that debate with you some day.

Ms. SAUNDERS. I just ask you not to believe every headline.

Mr. MARINO. Believe me, I don't. And that's another thing, as a prosecutor, I take with a pound of salt what someone tells me, what evidence is there. And you have to do a lot of work and research. And, as a prosecutor, just continually root out what evidence that is brought to your attention, so-called evidence, to make sure that when you go into the courtroom, you're not doing something, presenting any evidence that is just not so. And this Administration and the departments have been—the Justice Department has been accused of doing this, not being straightforward with judges. And it's not one judge; it's several judges. I can—if, as a prosecutor, if any one of my staff or I were publicly chastised and accused by a Federal judge, let alone several Federal judges, that the issue was—is still being litigated, I would be devastated. I would absolutely be devastated because we're officers of the court. There's a rule of law, and if nowhere else—which I think should be done in other areas—you don't try to pull the wool over someone in a courtroom. So, with that——

Ms. SAUNDERS. Well, I would just say that I think the best evidence on Choke Point—the best evidence of what they are doing is what they've actually done, three, you know, sound cases that we should all be standing up and applauding them for. We should be thanking the financial institutions that are doing their duty, which is most of them. We should be thanking the bank conferences that I see agenda, people talking about: Hey, here are the red flags; these are things you can look out to.

And people are there listening because they want to cooperate——

Mr. MARINO. But here are the red flags, but here are the red flags, but instead of us finding you, why don't you donate money to a particular organization, that yet—we're going to have hearings on that as well.

So, with that, I'm going to defer to was it Mr. Epstein or Mr.—raising your hand?

Mr. Horowitz.

Mr. HOROWITZ. If I could indulge, because I really——

Mr. MARINO. Just for a moment.

Mr. HOROWITZ. Just be very short. I really want to come back to Mr. Johnson, and I want to say the following: First, the President and the Attorney General act out of love for their country, I share your view.

What I criticize is not their pursuit of politics but their pursuit of policies that they believe in and believe are deeply needed. But I think they risk all when they go through stroke-of-the-pen kinds of practices to fill in what they see as the gap. They risk their reputation. They risk backlash from the courts and Congress. They risk making the policies that they care about become impermanent rather than permanent. That's the lesson of the Reagan, as I say, as against the Nixon administration in terms of the importance of rule of law.

They weaken what makes a democracy really work. And so if I were advising this President as a senior lawyer, I would say the same thing we did in the Reagan administration, it may hurt now what happens, but the long-term consequence of patience, of respect for law, wins you a lot more than you'll lose. The remedy for gridlock is elections, not saying: I've got new authorities that I've just discovered; I've got a pen ready to sign anything.

I think we're going to need reform now as a result of this practice of Executive orders, of lots of practices of this President. And I think these—less discretion is going to be given to the Presidency because the performance of this Administration and a failure to follow the rule of law.

Mr. JOHNSON. Mr. Horowitz, I believe that any Administration will fill the vacuum, the void, left by congressional inaction when it comes to what needs to be done for the benefit of this country. And we may view—we may have different views. Some of us come from an anti-regulatory philosophical bent of mind like Charles and David Koch. I mean they are free-market, no-regulation, laissez-faire folks. And that's a philosophy that has taken hold in Congress and has been here for decades now, predominantly. And that's what led to the Great Recession, in my opinion—an anti-regulatory, hands-off approach, "let the free market settle everything." And when it all boiled down, the free market needed a bail out. And this economy and thus the world economy was teetering on the brink of disaster. And woe and behold the free-marketers came to Congress and asked for the American people to bail them out. And the American people bailed them out.

I didn't vote for the bailout because I didn't think that it was—the $700 billion was adequately restricted or conditioned. There were not enough congressional conditions on the use of that money. And so, therefore, the banks that created the Great Recession themselves in a deregulated environment because there was no restriction between the investment and the commercial side, and that investment side took over. The American taxpayers were on the hook for $250,000 per account. And we had to bail them out like that. We had to bail out the banks to that extent. But on the investment side, it got much deeper, and we had to bail out the whole thing.

And so the American people bailed out the banks, gave them money. What did they do? The too big to fail got even bigger and too bigger to fail. And what about the homeowners? What about the homeowners—what about the homeowners on whose backs the crushing weight of the recession hurt most? They were not bailed out. But, nevertheless, we're still in an antiregulatory environment.That's what controls Congress now. That's the mindset of Congress. And it has led to a do-nothing Congress.

And, Mr. Epstein, you are an alumnus of the Koch brothers associates program, correct? That's not C-o-k-e; K-o-c-h, the Koch brothers.

Mr. EPSTEIN. I used to work at the Charles Koch Foundation.

Mr. JOHNSON. Uh-huh. And you are an alumnus of the Koch associates program, correct?

Mr. EPSTEIN. That's correct.

Mr. JOHNSON. And can you tell us what—tell us about that program.

Mr. EPSTEIN. It is a——

Mr. JOHNSON. It instills free-market principles in those who come through it?

Mr. EPSTEIN. Yeah. Actually, those who go through that program believe, I think like you do, that the government should be accountable, fair, and transparent.

Mr. JOHNSON. And they also believe that there should not be a government that takes a lot of aggressive action. You favor a more laissez-faire approach to the economy.

Mr. EPSTEIN. Well, it's interesting, Mr. Johnson——

Mr. JOHNSON. Is that true?

Mr. EPSTEIN. You—well, I can't speak on their behalf. I can only tell you that my organization and why—I'm here to testify, to talk about

Mr. JOHNSON. Cause of Action.

Mr. EPSTEIN [continuing]. In the Federal Government.

Mr. JOHNSON. Cause of Action.

Mr. EPSTEIN. That's correct, sir.

Mr. JOHNSON. Now, there was a 2015 article, a February 2015 article, in the Los Angeles Times that notes that critics of Cause of Action call it a sophisticated charade, saying the lawyers trawl for clients like Fuel Cell, whose cases enable them to pursue a Koch brothers agenda in the guise of helping individuals or small firms that liberals might find sympathetic.

Is that true, or is that false?

Mr. EPSTEIN. Yeah, that's false. Cause of Action, we are committed, just like what you pointed out, which is there is an antiregulatory bias in the Federal Government. That's exactly what's happening. Choke Point is a policy that has no regulation. It's not subject to notice and comment. The Bank of America settlements were not subject to notice and comment. These were unelected officials engaging in decisionmaking that the public had no stake in. I believe that——

Mr. JOHNSON. You don't think that Federal agencies should have the ability to take wrongdoers to civil courts to obtain civil remedies?

Mr. EPSTEIN. I absolutely do. But neither in the case of Choke Point nor in the case of Bank of America was there any court involvement at all. In the case of Bank of America, that settlement agreement was never approved by a court. As you pointed out in your arguments about arbitration, you actually believe in a very robust court system. Yet that robust court system has nothing to do with the programs and policies that have been discussed here today.

Now just simply point out——

Mr. JOHNSON. But the parties agreed to it, though, didn't they?

Mr. EPSTEIN. Well, and I think that's exactly the point. You know, the banks that agreed——

Mr. JOHNSON. There was nobody holding a gun to anybody's head to make them do something.

Mr. EPSTEIN. Well, I think that Congressman Johnson, that the banks that agreed to the settlements and the slush fund, it's no surprise that these are banks that also accepted payments from the bailout. These are also banks that have the groups that they are going to be funding, they are groups that these banks' foundations have funded in the past. You yourself said that strong government ensures prosperity for all. Well, what strong government means is that the banks are the only ones who can afford to understand the cost of government decisions.

Mr. JOHNSON. All I know is that $700 billion in taxpayer funds and a $30 million agreement for Bank of America and Citigroup to donate to HUD-approved housing counseling agencies, I mean that's—that's just—we're sitting here—I mean, we're comparing ants to elephants.

And, with that, and I do wish we could have further dialogue, but I know that the Chairman wants to adjourn this hearing.

And, with that, I yield back.

Before I do that, though, I would like to tender for the record, by unanimous consent, an article from The Hill entitled "Is Operation Choke Point to Blame for Bank Account Closures?" And also a coalition letter on Operation Choke Point to the U.S. House of Representatives.

Mr. MARINO. Without objection.

[The information referred to follows:]

THE HILL

April 30, 2015, 06:30 am

Is Operation Choke Point to blame for bank account closures?

By Lauren Saunders

Pawn brokers, payday lenders, gun dealers, and others claim that the Department of Justice's Operation Choke Point and bank regulator pressure are forcing banks and credit unions to close the accounts of legal businesses. But most of those account closures have more to do with the Bush Administration's 2001 USA Patriot Act than with Operation Choke Point. Banks also close accounts all the time for a variety of other reasons.

Complaints about bank account closures and "de-risking" go back a decade, to implementation of the post-9/11 reforms to deny criminals access to the banking system.

The National Pawnbroker Association is now blaming Operation Choke Point. But in 2006, pawnbrokers were complaining to the Financial Crimes Enforcement Network (FinCEN) about the Patriot Act and related anti-money laundering efforts: "Pawn industry members have lost longstanding lines of credit as well as demand deposit relationships in most parts of the country since 2004."

FiSCA, the trade association representing many check cashers, money transmitters, and payday lenders, had the same complaint in 2006: "For the past six years banks have been abandoning us - first in a trickle, then continuously accelerating so that now few banks are willing to service us ...."

Unfortunately, scrutiny of cash deposits, international transactions, and know-your-customer rules are more important now than ever. Yes, accounts with high levels of cash or international remittances – including accounts of legal payday lenders and gun dealers – can be impacted. If regulators find that a financial institution does not have appropriate controls, it may require certain accounts to be closed until those controls can be put in place. Banks may close accounts if they cannot confirm the ownership or legal business purpose for the account. Some financial institutions will also make their own business decision to simplify compliance by staying out of certain areas.

Apart from money laundering compliance issues, banks close accounts for a variety of other reasons that have nothing to do with regulators' disapproval of the customer's line of business. Banks respect their customers' privacy and may be unwilling to talk publicly about why an account was closed, but the bank could have seen signs of suspicious activity or account mismanagement. Banks may also decide to exit unprofitable areas or to close accounts for other reasons. A few anecdotes drawn from the thousands of accounts that are closed every year do not prove a pattern.

But Operation Choke Point does deserve credit for account closures in one area -- accounts that are being used for domestic scams. The Department of Justice has sent a clear signal: banks that willfully ignore blatant signs of fraudulent or other illegal activity will be held accountable. No one can defend the conduct of the banks – or criticize the Department of Justice's enforcement actions – in the three Choke Point cases to date. All three actions involved banks that ignored numerous complaints from consumers, government officials, and other banks and had high rates of payments challenged as unauthorized. These banks facilitated scams against seniors as well as telemarketing fraud, illegal and fraudulent online payday lending, and a Ponzi scheme.

The publicity over these three cases and bank regulator warnings about payment fraud have appropriately led financial institutions to shut down some accounts involved with illegal or fraudulent activity. Third party payment processor accounts, in particular, are often essential for scam operations. When a bank closes the account of a payment processor, the legal clients of that processor may also be affected, but legitimate businesses can find a new processor.

Online payday lenders that operate unlawfully without state licenses have also felt the heat. Contrary to their claims, affiliation with an Indian tribe does not exempt a lender from state laws. The U.S. Supreme Court made clear last year that states may require licenses and legal compliance when tribes operate off-reservation. Banks may close the accounts of lenders that cannot show state licenses or that generate complaints about fraudulent activity and unauthorized withdrawals, which are rampant in online payday lending. And some banks may choose to stay away from payday lending, which is illegal in many states.

Financial institutions appropriately close bank accounts for many reasons. We should not draw broad, unsubstantiated conclusions from a few anecdotes. Instead, let's thank the prosecutors, regulators, and financial institutions that are working to cut off terrorists, drug dealers, criminals, and fraudsters from the payment system.

Saunders is the associate director of the National Consumer Law Center in Washington, DC.

April 27, 2015

Representative
U.S. House of Representatives
Washington, DC 20515

Re: Oppose H.R. 1413 (Luetkemeyer), H.R. 766 (Luetkemeyer) and other efforts to restrict Operation Choke Point or bank regulator anti-money laundering and payment fraud work

Dear Representative:

The undersigned civil rights and consumer organizations urge you to oppose any measures to restrict the Department of Justice's Operation Choke Point or bank regulator efforts to prevent money laundering and payment fraud. In particular, H.R. 766 (Luetkemeyer), the Financial Institution Customer Protection Act of 2015, H.R. 1413 (Luetkemeyer), the Firearms Manufacturers and Dealers Protection Act 2015, and similar bills would make it harder for government agencies to protect the public. In these days of escalating data breaches, terrorism threats, and internet fraud, we need to encourage, not discourage, efforts to deprive criminals of access to the banking system.

Operation Choke Point is focused only on banks that help scammers and other illegal activity. Separately, bank regulators enforce the Bank Secrecy Act's anti-money laundering rules that apply when customers deposit large amounts of cash or transmit money overseas. Regulators also require financial institutions and payment processors to avoid facilitating illegal or fraudulent conduct by knowingly giving fraudsters access to the payment system. None of these efforts are aimed at curtailing legal businesses, whether the business involves payday lending, pawn brokers, gun sales or any other legal business.

All three Operation Choke Point cases to date target banks that helped to process transactions despite clear evidence of fraud:

- **CommerceWest Bank** ignored explicit notice from other banks about ***fraud schemes targeting the elderly***, allowing one of its clients to steal tens of millions of dollars from consumers' bank accounts.

- **Plaza Bank's** chief operating officer, who was secretly the part-owner of a payment processor, brushed aside warnings from the bank's compliance officer and allowed ***fraudsters unfettered access to the bank accounts*** of tens of thousands of consumers.

- **Four Oaks Bank & Trust** facilitated illegal payments taken out of consumer accounts for a ***Ponzi scheme, a scam operation targeted by the FTC, and illegal and fraudulent payday loans.***

Bank regulators' efforts to stop money laundering and payment fraud are not part of DOJ's Operation Choke Point. But enforcement of money laundering and know-your-customer rules has similar benefits. ***Drug dealers and terrorists*** win if a bank has loose controls over cash-intensive customers or international money transmission. Similarly, banks that fail to vet their customers or look the other way when they process payments despite clear red flags of fraud or illegal activity permit ***scams to flourish and enable criminals to profit from data breaches.***

Payment fraud harms not only consumers but businesses and banks as well, especially small ones. Banks are on the hook when a consumer disputes an unauthorized charge. The customer service costs are substantial as well, especially for small banks. According to NACHA, it ***costs a small bank*** $100 to $500 for each unauthorized payment challenged by its customers, compared to $5 for a larger bank.

DOJ and bank regulators are not pressuring banks to close the accounts of legal businesses.

DOJ has brought enforcement actions against banks complicit in payment fraud, and has issued subpoenas to other banks that it has reason to suspect might be involved in similar conduct. But there is zero evidence that DOJ has pressured any bank to close the account of a legal operation. Similarly, bank regulators are doing their job by enforcing anti-money laundering laws and requiring financial institutions to be alert to signs that a bank account is being used for illegal activity.

Complaints about banks closing the accounts of check cashers, pawn dealers, money transmitters and others stem from the ***2001 Bush Administration USA Patriot Act***, not Operation Choke Point, which began in 2013. In 2006, FiSCA, the trade association of neighborhood financial service providers, testified: "For the past six years banks have been abandoning us - first in a trickle, then continuously accelerating so that now few banks are willing to service us ...."[1] Also in 2006, the National Pawnbroker Association complained to FinCEN that "Pawn industry members have lost longstanding lines of credit as well as demand deposit relationships in most parts of the country since 2004."[2] Unfortunately, controls over cash deposits, international money transmitters and know-your-customer requirements are more important than ever.

Legal payday lenders and other legal businesses are not a target.

Internet payday lenders that operate illegally without state licenses may have trouble with banking relationships. Affiliation with a tribe does not make unlicensed lending legal. The Supreme Court made clear in 2014 that tribes must comply with state laws, including license requirements, for off-reservation conduct. But we see no evidence that regulators are pressuring banks to discontinue legal payday operations. However, payday lenders are often cash-intensive businesses and also may be involved in international money transmitting, and they could be impacted by individual bank business decisions or by enforcement of the Patriot Act against noncompliant financial institutions.

Gun dealers are not the focus of DOJ or the banking agencies.

Operation Choke Point has nothing to do with gun dealers. Not one of the voluminous DOJ documents produced in the House of Representatives' inquiry about Operation Choke Point mentioned a focus on gun dealers. DOJ's focus is entirely on banks that are complicit in payment fraud. Similarly, gun dealers may be impacted indirectly by Patriot Act enforcement not because they are selling guns but because they may be cash-intensive businesses. Regulators may order a bank or credit union to stop serving cash-heavy businesses until the institution remedies failures in money-laundering efforts. But the idea that agencies are on a moral crusade against gun sales is a pure conspiracy theory.

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[1] Gerald Goldman, General Counsel of FiSCA, "Summary Of speech before the U.S. House Committee on Financial Services, Subcomm.on Fin'l Inst'ns & Consumer Credit, Regarding Banking Services to MSBs (June 21, 2006), http://www.fisca.org/Content/NavigationMenu/GovernmentAffairs/TestimonySpeeches/FiSCAHearingOralStmtGoldman_6_21_06.pdf.

[2] Letter from Fran Bishop, President, National Pawnbroker Association to Robert W. Werner, Director, Financial Crimes Enforcement Network (FinCEN) (May 9, 2006), http://www.fincen.gov/statutes_regs/frn/comment_letters/71fr12308_12310/msb_51_bishop.pdf.

H.R. 766, the Financial Institution Customer Protection Act of 2015, would limit DOJs ability to address fraud.

H.R. 766 would eliminate the authority that DOJ used to investigate and bring the cases against CommerceWest Bank, Plaza Bank and Four Oaks Bank & Trust for helping scammers to debit consumers' bank accounts. The bill would amend the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) to eliminate penalties for and investigative authority into unlawful conduct "affecting" federally insured financial institutions. Instead, agencies could only penalize or investigate illegal conduct "against" a financial institution or "by" the institution against a third party. In other words, DOJ could not use FIRREA authority to look into signs that a bank is knowingly helping scammers to take money out of the accounts of seniors, because the scammers are not targeting the bank and the bank is not targeting the senior. The bill would frustrate efforts to protect not only the public but also insured financial institutions. The bill shows a fundamental lack of understanding of the risk that payment fraud poses to banks, which by law warrant the legality of payments when the bank serves as an intermediary between payors and payees.[3] The bill also imposes new procedural hurdles to investigations into FIRREA violations of any kind.

H.R. 766 would also make it more difficult and burdensome for a banking agency to discourage a financial institution from maintaining a banking relationship with a customer that shows significant signs of being involved with fraud or illegal activity. The bill would require the agency to justify that it has a "material reason" other than reputation risk for asking or encouraging an institution to terminate an account; to provide written justification to the financial institution with legal authority; and to issue annual reports to Congress. But reputation risk also leads to other risks, and it is appropriate for regulatory agencies to warn financial institutions if conduct supporting scammers, drug dealers or other criminals could endanger the institution's reputation and lead to a loss of business. More importantly, even if the agency has concerns beyond reputation risk, the bill would impose new, burdensome requirements before an agency could warn a financial institution about red flags of fraudulent conduct by one of its customers.

H.R. 1413, the Firearms Manufactures and Dealers Protection Act 2015, would cut off critical funding to prevent fraud.

H.R. 1413 would prohibit federal agencies from using any funds to carry out Operation Choke Point – no matter what illegal conduct is targeted – or any program designed to discourage financial institutions from providing credit or payment processing for firearms or ammunition dealers. As discussed above, neither Operation Choke Point nor bank regulator efforts are aimed at gun dealers. Yet H.R. 1413 would completely defund DOJ's payment fraud activities, such as the cases described above against fraudsters who targeted seniors and others.

H.R. 1413 would also inhibit federal agencies from enforcing the Bank Secrecy Act and the Patriot Act if a financial institution's noncompliance or lax money-laundering controls happened to involve an account held by a firearm or ammunition dealer. Criminals could hide money laundering in the guise of gun sales. The bill could also restrict efforts to stop a bank account from being used for illegal activity if owner of the account is a firearm or ammunition dealer.

[3] *See* Testimony of Adam J. Levitin, Professor of Law, Georgetown University Law Center, Before the United States House of Representatives, Judiciary Committee, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, "Guilty Until Proven Innocent? A Study of the Propriety & Legal Authority for the Justice Department's Operation Choke Point" at 9-10 (July 17, 2014), http://judiciary.house.gov/_cache/files/f6210f6f-68eb-49b6-b617-167eecfdfe3b/levitin-testimony.pdf.

U.S. House of Representatives
April 27, 2015
Page 4

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DOJ's Operation Choke Point and bank regulators' enforcement of the BSA and work against payment fraud protect the public from fraud, terrorism, data breaches, drug dealers and other illegal activity. None of these activities are aimed at lawful businesses. Congress should not hinder these critical federal agency activities to protect the public.

Yours very truly,

National Signatories:

Americans for Financial Reform
Center for Responsible Lending
Consumer Action
Consumer Federation of America
The Leadership Conference on Civil and Human Rights
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
U.S. PIRG

State and Local Signatories:

Arkansans Against Abusive Payday Lending, AR
Arizona Community Action Association, AZ
California Reinvestment Coalition (CRC), CA
SALAAMI FIRM, CA
Law Office of T. A. Taylor-Hunt, LLC, CO
Connecticut Association for Human Services, CT
Florida Alliance for Consumer Protection, FL
Chicago Consumer Coalition, IL
Kentucky Equal Justice Center, KY
Financial Protection Law Center, NC
Center for Economic Integrity - New Mexico Office, NM
Empire Justice Center, NY
COHHIO, OH
Oregon Consumer League, OR
SC Appleseed Legal Justice Center, SC
Texas Appleseed, TX
Virginia Poverty Law Center, VA

Mr. JOHNSON. Thank you.

Mr. MARINO. Ladies and gentlemen, this concludes our hearing for today. I want to thank you for the time that you've spent here and the lively debate. I've learned things, and I try to learn something every time we have hearings. Again, thank you for attending, and you are excused.

And this hearing is concluded.

[Whereupon, at 4:30 p.m., the Subcommittee was adjourned.]

A P P E N D I X

Material Submitted for the Hearing Record

Response to Questions for the Record from Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice

Questions for the Record
Principal Deputy Assistant Attorney General Benjamin Mizer
Civil Division
"Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environment and Natural Resources Divisions and the U.S. Trustees Program"
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Administrative Law
U.S. House of Representatives
May 19, 2015

Questions submitted for the Record from Subcommittee Chairman Marino

Immigration

1. The Civil Division failed to intervene in the Third Circuit case, *Galarza v. Zalczyk*,[available at http://www2.ca3.uscourts.gov/opinarch/123991 p.pdf] to defend the U.S. Immigration and Customs Enforcement agency's authority to issue immigration detainers.

a. Do you agree that a series of lawsuits have been filed with the purpose or effect of inhibiting ICE from doing its job?

Response: It is common for class action lawsuits to be filed that challenge ICE enforcement efforts on a wide range of issues. The Civil Division's immigration litigators vigorously defend class actions and other lawsuits seeking to inhibit ICE from its immigration enforcement efforts. The *Galarza* case was before my time managing the Division, but I understand it was a personal injury claim by one plaintiff for money damages, where we represented the United States as well as individual ICE agents who have been sued in their individual capacity, and we vigorously defended the propriety of the conduct of those agents.

b. There is a perception that the Administration has contributed to the success of these lawsuits, for example, by declining to challenge them and offering prompt settlements. What specific steps is the Division taking, particularly in the settlement context, to ensure that immigration authorities are defended vigorously?

Response: The Civil Division vigorously defends immigration authorities when facing federal court challenges. In evaluating what course of action best serves the interests of the United States, we evaluate whether settlement would be appropriate. In conducting that evaluation, we consider a wide range of factors, including, critically, the risks to the programs at issue should we not prevail, and the strength of our arguments. In certain cases, settlement may be pursued out of concern that a court-ordered remedy could be far more harmful to the enforcement program or policy.

2. Has the President's stated policy to let unlawful aliens remain in the country affected the vigor with which the Civil Division pursues immigration cases and defends the government's deportation authority?

Response: As the entity representing the Attorney General in cases filed in the Federal courts, the Civil Division's Office of Immigration Litigation (OIL) is responsible for defending the government's removal authority. Such cases are typically brought by individuals wishing to challenge removal orders issued by the Department's Board of Immigration Appeals. OIL has always handled this litigation vigorously, giving the government expert and energetic representation in all federal immigration cases, and it continues to do so in a manner consistent with the Department of Homeland Security's removal priorities, which emphasize that cases involving dangerous felons and security threats are the highest agency priorities.

3. The Immigration Act excludes terrorists and certain dangerous felons from eligibility for Asylum. Is it true that terrorists and dangerous felons are nevertheless eligible for asylum under the U.N. Convention Against Torture? Are you aware of any specific cases of terrorists or dangerous felons claiming a right to remain in the U.S. under this treaty? If so, have you seen an uptick in such cases?

Response: The Immigration and Nationality Act (INA) precludes granting the relief of asylum to individuals who are described in certain terrorism-related inadmissibility grounds and for persons convicted of certain crimes. These restrictions extend to the protection of withholding of removal under section 241(b)(3). The U.N. Convention Against Torture (CAT) also provides the removal protections of withholding and deferral of removal. The United States will not grant withholding of removal under the CAT to those inadmissible under terrorism related grounds or who have been convicted of "particularly serious crimes." However, there are no such restrictions for the limited protection of deferral of removal under the CAT. As a signatory to the CAT, the United States has an international legal obligation not to remove a person to a country where he would more likely than not be tortured. Although any alien may apply for deferral of removal under the CAT, torture is defined narrowly. To qualify as torture, the harm an individual faces must be an extreme form of cruel and inhuman treatment that is specifically intended to cause severe pain or suffering to a person in the torturer's custody or control, and it must be inflicted by, or with the consent or acquiescence of, the government of the country in question. Individuals in removal proceedings may only apply for deferral of removal under the CAT as a protection from removal to specified countries where they face torture. An individual granted deferral of removal can still be removed to another country where he would not be tortured, and deferral can be terminated at any time if it is determined that the likelihood of torture no longer exists. Additionally, this protection is rarely granted. Statistics maintained by the Executive Office for Immigration Review indicate that immigration judges granted 121 applications for deferral of removal in Fiscal Year 2014; in Fiscal Year 2013, immigration judges granted 131. The Office of Immigration Litigation has not observed a significant increase in cases seeking review of such determinations.

Mortgage Settlements

4. A number of the Civil Division's high-profile mortgage lending settlements with JPMorgan, Citibank, and Bank of America relate to the banks' packaging, marketing, and sale of Residential Mortgage Backed Securities (RMBS). The Committee's chief concern is that settlement money go directly to consumers actually harmed. But there are related considerations. Some have noted that certain DOJ mortgage settlements give settling banks credit for forgiving loans owned, not by them, but by investors. It is troubling that investors, who can include teachers, first responders, law enforcement officers and other pensioners, are in this way made to pay the bill for those whom the Department has sued.

a. Were investors in the mortgage securities that these banks sold damaged as well?

Response: As we saw from the recent financial crisis, the harm caused by the fraudulent sale of securities can extend to numerous victims including consumers, homeowners, investors, the federal government, financial markets and the economy as a whole. There were investors, including federally insured financial institutions, that purchased Residential Mortgage-Backed Security (RMBS) and were damaged as the result of fraud. Indeed, a number of investor and trustee lawsuits and settlements have sought recoveries for alleged trust and investor losses. For example, on March 6, 2015, the New York Law Journal reported that the prior day, the New York Court Appellate Division approved an $8.5 billion settlement between Bank of America and a RMBS trustee which recovered funds for RMBS trusts. The Wall Street Journal reported on November 15, 2013, that JP Morgan entered into a $4.5 billion settlement with a group of 21 investors. Law360 reports that on April 7, 2014, Citigroup entered into a $1.13 billion deal with 18 institutional investors to return funds to RMBS trusts.

b. How much money in these bank settlements goes to investors in the mortgage backed securities at issue?

Response: In addition to providing an unprecedented level of accountability (partially in the form of record penalties paid to the U.S. government) and billions of dollars of relief to American homeowners, the settlements with JP Morgan, Citigroup and Bank of America also provided relief to RMBS investors. As a result of all three settlements, over $1.7 billion was paid to the Federal Deposit Insurance Corporation (FDIC), acting as the receiver for federally-insured banks that had invested in RMBS. The JPMorgan settlement resulted in the payment of billions of dollars to RMBS investors, including $4 billion to Fannie Mae and Freddie Mac, and more than $1.4 billion to the National Credit Union Administration. All three settlements also provided for the payment of hundreds of millions of dollars to several states, which in turn paid out funds to investors such as state pension funds. Additionally, it bears noting that the modifications of mortgages owned by third-party investors may result in consumer relief credit under these settlements only where the third-party investor has consented to that sort of modification.

5. Senior Department of Justice officials met with activist groups that sought mandatory donations in the mortgage settlements. By contrast, the Association of Mortgage Investors asserts that substantial portions of the mortgage settlements with JP Morgan, Bank of America and Citigroup are funded, not by defendant banks, but by innocent bondholders who were not consulted. Specifically, the Association states that billions of dollars in mortgage relief under the settlements are funded by reducing the value of the securitized mortgage portfolios that are owned by investors and merely managed by the banks.

> **a. Did Department officials meet with mortgage investors actually harmed about what the settlement terms with the relevant defendant banks should be?**
>
> **b. Did Department officials meet with consumers actually harmed about what the settlement terms with these banks should be?**

__Response:__ I was not in the Civil Division when these settlements were negotiated and was not personally involved in those negotiations. My understanding is that the Department has made clear that outside organizations may have expressed views about the settlements, but only the parties to the agreements (along, in certain instances, with our regulatory partners) negotiated, independently assessed, and ultimately agreed to the settlement terms. These parties included certain parties harmed as a result of RMBS (such as the FHFA, NCUA, and FDIC). Additionally, it bears noting that the modifications of mortgages owned by third-party investors may result in consumer relief credit under these settlements only where the third-party investor has consented to that sort of modification.

6. What can the Civil Division do to include investor and consumer representatives in negotiations when investor and consumer rights are substantially affected?

__Response:__ Settlement negotiations take place between or among the parties to a dispute. The Department, to the extent appropriate, will continue to listen to consumers, investors, interested third parties, other interested states and agencies, among others, and to consider specific and general public interests as it negotiates settlement agreements.

Response to Questions for the Record from the Honorable John C. Cruden, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice

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Questions for the Record
Assistant Attorney General John C. Cruden
Environment and Natural Resources Division
"Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environment and Natural Resources Divisions and the U.S. Trustees Program"
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Administrative Law
U.S. House of Representatives
May 19, 2015

Questions Submitted for the Record from Subcommittee Chairman Marino

Sue-and-Settle

1. According to a 2013 study by the U.S. Chamber of Commerce, the Obama Administration has entered into more than 70 sue-and-settle agreements which have led to the issuance of at least 100 regulations, including the Utility MACT rule. Since that study was completed, numerous additional examples have arisen.

a. How does the Environment and Natural Resources Division evaluate whether to settle cases?

Response: I respectfully disagree with the conclusions reached by the U.S. Chamber of Commerce in its 2013 report. Instead, I would draw your attention to the U.S. Government Accountability Office's recent examination of the Environment and Natural Resources Division's (the "Division" or "ENRD") handling of deadline litigation and the ensuing rulemaking in the report entitled "Environmental Litigation: Impact of Deadline Suits on EPA's Rulemaking is Limited" (GAO-15-34) (December 2014), which did not identify any deficits in the process the Division follows.

As to any suggestion that settlements are a form of "backdoor regulation" or are entered into collusively, the Department of Justice (the Department) and I, as the head of the Division within the Department, would never countenance such behavior, as I have testified.

The Environment and Natural Resources Division brings enforcement cases against those who violate the nation's civil and criminal pollution-control and natural resources laws, defends challenges to agency programs and activities, and represents the United States in matters concerning natural resources and public lands. With regard to defending federal agencies, a variety of plaintiffs, including members of the public, companies, organizations, and state and local governments, sue federal agencies. While ENRD litigates many suits to final judgment, it has a longstanding practice of entering into settlements when such a resolution is in the best interest of the government. Departmental policy memorialized in 28 C.F.R. § 0.160(d) and the memorandum issued in 1986 by Attorney General Meese entitled "Department Policy Regarding Consent Decrees and Settlement Agreements" provides guidance that ENRD follows.

The Division settles litigation only when it is appropriate based on the law and facts of the case and is in the best interests of the United States. In deciding whether to settle any case, ENRD conducts a full evaluation of the strengths and weaknesses of the claims presented. The Division assesses the legal risk presented by the case, including both the probability and consequences of an adverse decision; and weighs the implications of litigation versus settlement, including the resources required by each. These factors are applied in an evenhanded manner, without regard to the identity of the plaintiff or petitioner in the case.

Frequently litigation against federal agencies—encompassing some of the cases identified in the U.S. Chamber of Commerce study—are what we call "deadline litigation," in which Congress has mandated by statute that an agency take some action by a specified date, and the federal agency is then sued if the deadline is not met. The volume of this type of litigation is a direct function of the number of deadlines for nondiscretionary duties established by Congress in environmental and natural resources statutes and the right to sue to enforce those deadlines granted by Congress. Often, it is quite clear that the federal agency has not met the specific Congressionally-imposed deadline to act. In those instances, settlement may be in the best interests of the United States, to provide the agency with certainty that any statutorily required action will occur in a time frame that the agency can meet, rather than leaving that decision to a court, which could mandate action by a date that is difficult or impossible to achieve.

Settlements reduce unnecessary litigation, as well as the costs and attorneys' fee payments often associated with cases that are litigated to judgment. By settling appropriate cases, the Division is able to focus its resources in areas important to the protection of public health and the nation's environment and natural resources, and to free up the resources of the judicial system to address cases that should be litigated to conclusion.

b. How does the Division ensure that adequate public input will be allowed for in rulemakings pursued under consent decrees and settlements negotiated by the Division?

Response: Although a settlement may end the litigation, it does not obviate the need for public comment in the future. The Administrative Procedure Act (APA), 5 U.S.C. § 553, requires opportunity for notice and comment on proposed agency rulemaking, regardless of whether it may have been the subject of a consent decree or settlement agreement. This includes the right of "interested persons" to be given an opportunity to participate in the rulemaking by the submission of written data, views, and arguments. We strive to structure Division settlements so as to preserve ample time for public participation in the ensuing rulemaking proceeding. Our settlements do not predetermine the outcome of that rulemaking proceeding, consistent with the purposes of the APA and as a matter of Departmental policy. 28 C.F.R. § 0.160(d)(5).

c. How does the Division assure compliance with statutory and Executive Order analytical, cost-benefit and other process requirements in rulemakings pursued under consent decrees and settlements negotiated by the Division?

Response: A settlement cannot provide agencies with any greater or lesser authority to act. Authority to act comes from the laws enacted by Congress. Our agreements ensure that federal agencies comply with the law. A Division settlement establishing a time frame for a rulemaking cannot change the applicability of any statutory requirement relating to analysis or cost-benefit requirements, or otherwise affect the substance of the rulemaking. We also strive to structure Division settlements to preserve ample time for applicable procedural requirements in any ensuing rulemaking proceeding, whether imposed by law or Executive Order.

ENRD Permitting Defense

2. Your written testimony notes that the "Division has defended challenges to permits and rights-of-way in nearly 40 cases involving solar and wind projects across the country."

a. What is ENRD's record in permit defense cases involving traditional-energy projects?

<u>**Response:**</u> While ENRD does not maintain "win/loss" statistics for any particular category of cases, we vigorously defend all challenged energy permitting decisions, regardless of the energy source, and we have obtained very favorable results over the past few years. The following are several illustrative examples.

We secured a long string of victories in cases involving the development of oil and gas resources on the Outer Continental Shelf following the *Deepwater Horizon* oil spill. Among these were our successful defense of federal oil and gas lease sales in the Central and Western Gulf of Mexico, and our defeat of over 20 petitions for review in the Fifth and Eleventh Circuits where petitioners challenged the Department of the Interior's (DOI's) approval of exploration and development plans. More recently, we successfully defended DOI's approval of an oil spill response plan relating to exploration operations in the Chukchi and Beaufort Seas, and we successfully defended DOI's rule authorizing incidental impacts to the Pacific walrus in connection with oil and gas activities in the same area. Turning to onshore resources, we have defeated challenges to DOI's coal leasing decisions in the Powder River Basin, and we successfully defended a land use planning amendment that provided for coalbed natural gas development on public lands in northeastern Wyoming. We have also prevailed in our defense of numerous permits relating to the construction of oil and gas pipelines, including the Alberta Clipper, Keystone, Keystone Gulf Coast, and Flanagan South pipelines.

b. How many permitting challenges have you defended in that category?

<u>**Response:**</u> The volume of cases ENRD defends involving hydrocarbon energy projects far exceeds its solar and wind energy cases, but quantifying an exact number is very difficult because challenges to hydrocarbon permits take varied forms, arise under a broad range of federal statutes, and can implicate any one of a number of federal agencies. Many cases involving hydrocarbon-based energy projects arise under broad statutes of general applicability, such as the National Environmental Policy Act, the Federal Land Policy and Management Act, the Endangered Species Act, and the Clean Water Act. Still other cases are classified in our system as pertaining generally to a particular agency, such as the Department of Energy or U.S. Army Corps of Engineers, without elaboration as to the nature of the challenged program. We

estimate that ENRD has defended hundreds of cases involving hydrocarbon energy projects over the past five years. In addition to numerous cases involving land-use planning, leasing, and permitting relating to the development of fossil fuels, we routinely defend agency actions relating to the construction of domestic and cross-border pipelines, the issuance of rights-of-way for energy-related infrastructure, and the placement of mining-related fill into waters of the United States, to name only a few.

Further, approximately half of the cases involving hydrocarbon projects are identifiable because the primary cause of action involves onshore mineral leasing, offshore mineral leasing, or the Surface Mining Control and Reclamation Act. The Division handled over 100 cases in this latter group over the past five years.

c. Do permitting challenges seem to trend differently depending on whether the project is renewable or traditional energy?

<u>Response:</u> Each case in which ENRD defends a challenge to an agency's energy permitting decision is unique in its particular facts and the applicable law. For example, the source of legal authority that an agency relies upon when permitting a domestic energy source, and the parameters that guide the exercise of that authority, often vary by the source. In addition, the facts surrounding permitting decisions differ from one to the next. The Division vigorously defends challenged energy permitting decisions based on our analysis of the applicable law and the facts of each case, regardless of the energy source. I would not say there are trends in the outcome of these cases based on the source of energy at issue.

d. Do you agree that vigor across the board in permit defense is the right policy?

<u>Response:</u> Yes. ENRD vigorously defends challenged energy permitting decisions regardless of the energy source. Our defense of these decisions is based on our analysis of the applicable law and the facts of each case, not on the energy source.

Over-criminalization

3. During the 113th Congress, the Judiciary Committee's over-criminalization task force heard stories of hard-working individuals criminally punished for violating environmental regulations they did not even know existed. For example, a single dad working as a janitor at a military retirement home tried to prevent the home from flooding and flushed sewage into a drain that, unbeknownst to him, led to a nearby creek. Despite his lack of criminal intent, he was prosecuted by the Department under the Clean Water Act.

a. What are the policies that determine whether such cases are handled as criminal or civil matters?

<u>Response:</u> Civil and criminal enforcement of the nation's pollution control, wildlife, and natural resource laws are of fundamental importance to protecting the environment and public

health and welfare. I respectfully disagree with the characterization of the Clean Water Act criminal prosecution you note. This matter involved the prosecution of the Director of Engineering for the retirement home who was a licensed Class I Steam Engineer. He directed an employee to connect a hose to a by-pass pipe in the facility which then ran outside of the facility. This resulted in multiple discharges of untreated human sewage into the storm drain that led directly to Rock Creek, endangering public health and the environment. There was no permit to allow such discharges into Rock Creek, and he did not contact the environmental officials before discharging to the creek rather than the sanitary sewer. The defendant pleaded guilty to a misdemeanor violation of the Clean Water Act, admitting to his negligence. He was sentenced to one year of probation and 50 hours of community service.

Pursuant to the Department's and ENRD's policies, Division attorneys evaluate each potential case to determine whether to pursue criminal or civil enforcement. United States Attorneys' Offices also have policies and procedures that govern coordination of potential civil and criminal remedies, which apply to environmental cases handled solely or jointly by those offices. Department attorneys consider whether the evidence in a potential criminal matter which meets statutory requirements.

The United States Attorneys' Manual (USAM) directs government attorneys to "commence or recommend Federal prosecution if they believe that the person's conduct constitutes a Federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction." *See* USAM 9-27.220. The USAM also sets forth the circumstances when a prosecutor should recommend declining criminal prosecution. These include when there is no substantial Federal interest that would be served, when the person is subject to effective prosecution in another jurisdiction, or when there is an adequate non-criminal alternative. *Id.* When evaluating whether there is an adequate non-criminal alternative, prosecutors consider "(1) the sanctions available under alternative means of disposition; (2) the likelihood that an effective sanction will be imposed; and (3) the effect of non-criminal disposition on federal law enforcement interests." *See* USAM 9-27.250.

All attorneys at the Department have access to and receive training about these policies and the USAM. The USAM, the Department Memorandum on Coordination of Parallel Proceedings, and the ENRD Directive 08-02: Parallel Proceedings Policy, December 2008 are all publicly available at http://www.justice.gov/usam/united-states-attorneys-manual, http://www.justice.gov/usam/organization-and-functions-manual-27-parallel-proceedings, and http://www.justice.gov/enrd/selected-publications, respectively.

b. What protocols does the Division have to make sure criminal resources are being deployed on the most worthy cases?

Response: The Department works hard to ensure that federal law enforcement and judicial resources are used most effectively. Cases are referred to the Department by investigating agencies based on their assessment that there is evidence of criminal conduct that warrants federal prosecution. Criminal prosecutors at the United States Attorneys' Offices and ENRD then evaluate each case in light of all relevant considerations, including those identified in the USAM. In particular, USAM 9-27-230 directs prosecutors to weigh whether there is a substantial federal interest that would be served by the prosecution. In making this determination, prosecutors consider factors such as the nature and seriousness of the offense, the deterrent effect of prosecution, the person's culpability in connection with the offense, and the person's history with respect to criminal activity. *See* USAM 9-27-230 (listing additional factors). When civil enforcement authority is available, consideration of these factors may weigh in favor of declining to bring a criminal prosecution but referring the case for possible civil judicial or administrative action.

The recommendations by prosecutors to pursue criminal enforcement are reviewed by management at either the United States Attorneys' Offices and/or ENRD, depending upon ENRD's involvement in a particular case. Within ENRD, this management review applies at every significant stage of the criminal enforcement process, beginning at the acceptance of a matter for criminal investigation, continuing through to review and approval of an indictment prior to presentation to a federal grand jury, and also including supervision and approval of the plea negotiations, trial strategy, sentencing recommendations, and appeals.

Questions Submitted for the Record from Representative Doug Collins

1. Mr. Cruden, in many cases, your "clients" are the agencies. Let's take the EPA for example. The EPA is sued, and your division, as the EPA's attorney, represents the EPA in settling disputes. Would you say this is a fair characterization?

If the EPA is your client, to what extent would you say the American people are the client? How are their interests represented and protected when you are defending the EPA? It seems like in many of these cases-particularly "Sue and Settle" cases-the outcome is more about aggregating power at the agency and expanding the EPA's jurisdiction than actually protecting the interests of the American people. How is it in the interest of the American people for the government to get more power for itself-at the expense of the legislative branch and the regulatory process-through a settlement that stakeholders are often not even privy to until after the fact?

Response: The client of the Environment and Natural Resources Division and its attorneys is the United States as a whole as we direct and conduct litigation in the best interests of the United States. While it is the Department's policy and practice to consult extensively with the federal agencies that are named as parties or otherwise have interests in the litigation handled by Department lawyers, the Attorney General or her designee has the ultimate authority to determine the position of the United States in litigation.

In January 2015, I returned to the Division as the Assistant Attorney General following my Senate confirmation. I have had the honor and privilege of spending over two decades at the Department of Justice, first as Chief of the Environmental Enforcement Section and then as a career Deputy Assistant Attorney General. I can say without reservation that during my tenure with the Department, the Environment and Natural Resources Division has settled cases only when it is in the best interests of the United States. Any suggestion that during my tenure the Division settled cases to "aggregat[e] power at" or "expand [] the . . . jurisdiction" of the Environmental Protection Agency (EPA) is incorrect. I can assure you that there is—and will be—a litigation risk-based justification for the negotiated resolution of cases on my watch, as discussed in my response to the first Question for the Record posed by Chairman Marino. As also noted above, settlements in ENRD cases cannot expand EPA's jurisdiction and EPA only has such jurisdiction as granted it by law. Importantly, stakeholders also have every opportunity to participate in ensuing rulemakings resulting from EPA settlements to which they are not a party, as also explained in the response to the first Question for the Record posed by Chairman Marino.

2. Mr. Cruden, you indicated during the hearing that you would not tolerate a collusive agreement when defining the terms of a settlement. Expert testimony by a witness on the second panel indicated that they are quite common. (See pages 6 and 10-13 of Mr. Andrew Grossman"s testimony.) How do you square your definition of collusive agreements with the testimony provided by Mr. Grossman? Please explain your definition of "collusive" in light of the many examples provided by Mr. Grossman.

Response: I reiterate my view that I would not tolerate a collusive settlement. The Division enters into settlements based on legal risk and the interests of the United States, and does not favor particular parties or litigants in any way. In none of the cases cited by Mr. Grossman did the Division or other federal agencies collude with any party. Mr. Grossman's testimony describes the timetables agreed in particular settlement agreements as "aggressive." But the alternative to considering a rulemaking on a timetable agreed in a settlement may be to adhere to a much shorter deadline imposed by a court. In the Division's experience, such timetables can often be more aggressive, and more disruptive of agency priorities, than reaching an agreement that allows the parties to take into account the agency's resources and other obligations in setting a schedule.

There are multiple errors in Mr. Grossman's characterization of the Division's cases. For example, the mercury rule referenced in that testimony was not issued until 2012, 12 years after EPA determined in 2000 that such a rulemaking was appropriate and necessary. *See* 42 U.S.C.§ 7412(c)(5) (requiring promulgation of standards within two years after determination). That is hardly a hasty timetable for a rulemaking.

Mr. Grossman also references a consent decree involving promulgation of EPA's National Emission Standards for Hazardous Air Pollutants for the brick and structural clay products manufacturing industry source category. In that case, the Division initially challenged the court's jurisdiction to consider Sierra Club's arguments. Only after an adverse ruling did the Division and EPA agree to a settlement, under which a proposed rule was to be issued a year and a half later, and a final rule later.

Mr. Grossman also discusses two settlements in which the Fish and Wildlife Service agreed to address 251 species that had been subject to previous findings for listing under the Endangered Species Act (ESA). His testimony suggests that the Service's decision to enter into these settlements conflicts with the intent of the provisions of the ESA. The D.C. Circuit, however, twice expressly rejected the view presented by Mr. Grossman that the "warranted-but-precluded" provisions of the ESA may properly be invoked to justify delaying a listing decision. *In re Endangered Species Act Section 4 Deadline Litigation -MDL No. 2165*, 704 F.3d 972, 978-79 (D.C. Cir. 2014); *National Ass'n of Home Builders v. FWS*, 786 F.3d 1050, 1053 (D.C. Cir. 2015). Mr. Grossman's testimony also suggests that these settlements somehow impair the ability of states and other parties to participate in the listing process. That statement overlooks what the court said, that "the settlements simply require the agency to render a final listing decision—warranted or not-warranted—using a specific timeline, without dictating the agency's substantive judgment." *National Ass'n of Home Builders*, 786 F.3d at 1053. Public participation and comment is available during the agency's decisionmaking process, as it would be for any other agency decision. The settlements do not dictate that any species must be listed and in fact, in many instances at the conclusion of this process the Service decided against listing a particular species.

3. In 2013, Judge Silberman of the U.S. Court of Appeals for the D.C. Circuit questioned whether your division is suffering what he called "litigation lapse[s]" to advance the "political views of its major 'client' (the EPA)." He criticized ENRD for

"subordinat[ing] a government-wide litigation interest to the desires of one agency." How do you answer Judge Silberman's concerns and what steps have you taken to address his perception?

Response: Although I have a great deal of respect for Judge Silberman and I was not in the Division at the time of this litigation, I strongly disagree with his suggestions in his concurring opinion. The quoted statements from Judge Silberman relate to two isolated cases in which the Environment and Natural Resources Division did not raise the question of whether a litigant lacked prudential standing. In both cases, the Division prevailed. In one of the mentioned cases, Judge Kavanaugh dissented and found that the petitioners had prudential and Article III standing. And both cases also involved industry groups, not environmental groups. Importantly, however, there was no evidence before the court in either case to suggest inappropriate conduct by the Division or EPA.

The Environment and Natural Resources Division routinely challenges the standing of a wide variety of petitioners in a wide variety of cases and routinely asserts defenses such as finality, ripeness, and waiver, where it is appropriate to do so. In fact, in response to arguments we raised in one case, the D.C. Circuit adopted a local circuit rule that requires petitioners to file their proof of standing with their opening brief. *See* D.C. Circuit Rule 28(a)(7), citing *Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002).

4. Mr. Cruden, when you negotiate "Sue and Settle" agreements, is it typically DOJ lawyers or EPA lawyers studying and agreeing to the terms? What precisely is the role of EPA in formulating the litigation strategies carried out by your division?

Response: At the outset, I would again disagree with the characterization of any settlements entered into by ENRD as "sue and settle" agreements. As I have testified, I would not tolerate collusive settlements, and the Division enters into settlements only based on analysis of legal risk and the interests of the United States.

As to your question about EPA's role when the Environment and Natural Resources Division enters into a settlement agreement, an agency's scientific experts and attorneys are consulted to make certain that any agreement is accurate and complete. If the settlement involves future rulemaking, EPA also will provide information as to what rulemaking schedule the agency has the resources to meet. The Division, however, retains ultimate control over the conduct of all litigation.

5. Mr. Cruden, it seems like many consent decrees or settlements are reached the same day as the complaint is filed. Despite what may or may not be legitimate reasons for this to occur, the complaint and settlement occurring on the same day give the appearance of improper collusion and further contribute to the concerns that the public is kept out of negotiations and in the dark until a settlement that could have very onerous and burdensome regulations is announced. This seems to circumvent the rulemaking process and eliminates the chance for critical public participation. How do you ensure that there is

adequate chance for public input on what could result in major issues of federal rulemaking?

<u>**Response:**</u> When the United States is initiating an enforcement case, Executive Order 12988 typically requires advance notice to that party and requires that the United States seek to achieve a settlement, with the goal of avoiding litigation. The Division provides such notice as a rule before filing civil enforcement actions. In many instances, a prospective defendant will prefer to resolve a case without litigation, although settlement discussions may require weeks or even months of negotiations. When a consent decree is finally reached, a complaint is still filed at the same time that the settlement is lodged with the federal court. It is the complaint that gives the court the jurisdiction to consider and review the settlement.

In cases in which the United States is the defendant, the environmental laws (with a few exceptions) generally require notice to the United States 60 days before a suit is filed. This notice period is required in order to allow the United States to investigate the alleged violations, and may also be used to come into compliance with the underlying legal requirement. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 175 (2000). EPA posts such notices on the agency website upon receipt, so the public is informed that they have been received.

As to the question's reference to the opportunity for public participation, as we have discussed above, there is a full opportunity for public comment within the rulemaking process itself, and the Division does not enter into settlements that would interfere with such public participation or would require that the rulemaking process have a particular outcome. Some statutes, such as the Clean Air Act, also provide for public notice and comment before a judicial settlement is entered.

6. Mr. Cruden, sue-and-settle agreements often amount to "regulation through litigation." By entering into private settlements with special-interest litigants, the legislative and regulatory process is circumvented and agencies can act under the guise of the settlement or consent decree to implement unpopular or politically controversial regulations. These regulations can have real and serious consequences on hardworking Americans, including those in the Ninth District of Georgia. What consideration do you give to these facts when deciding to settle a case-particularly those settled on the same day a complaint is filed? Given the effect on the public, how do you determine whether to settle cases? Don't you think it would be beneficial to hear from the public and affected stakeholders prior to settling on terms that could very well negatively affect the regulated parties?

<u>**Response:**</u> I disagree that Department settlements amount to "regulation through litigation." When an agency is sued for failing to conduct a rulemaking, a viable claim will only exist if Congress has enacted legislation that requires a federal agency to conduct that rulemaking process, and the agency has failed to carry out that requirement. In requiring an agency to conduct a rulemaking, Congress also set forth the rules governing when and how to consider costs and benefits in the rulemaking process, and the agency is bound to follow those requirements in carrying out the rulemaking. When an agency issues a regulation in this setting,

it does so because Congress has imposed a specific requirement on the agency to act and set the parameters for agency action. It does not "circumvent" the legislative process for an agency to carry out the commands of Congress in this manner. Nor does it "circumvent" the regulatory process, as the agency will complete the usual steps of that process, such as public notice and comment.

The decision as to whether to settle is made on the basis of applicable law. If the Division enters into a settlement relating to an agency rulemaking process, it is because Congress has imposed a legal requirement to conduct a rulemaking process and the legal risks and lack of available defenses make a settlement appropriate. In the rulemaking process, the agency must consider all legal requirements, including, when applicable, any costs and benefits, including the economic costs referenced in the question, in accordance with applicable law. The rulemaking process will also provide a full opportunity for the public and stakeholders to participate and present any relevant information to the agency.

Questions for the Record submitted to Caroline Ciraolo, Acting Assistant Attorney General, Tax Division, U.S. Department of Justice*

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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June 26, 2015

Ms. Caroline D. Ciraolo
Principal Deputy Assistant Attorney General
Tax Division
U.S. Department of Justice
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530-0001

Dear Ms. Ciraolo,

The Committee on the Judiciary's Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing on "Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environment and Natural Resources Divisions and the U.S. Trustee Program," on Tuesday, May 19, 2015 in room 2141 of the Rayburn House Office Building. Thank you for your testimony.

Questions for the record have been submitted to the Subcommittee within five legislative days of the hearing. The questions addressed to you are attached. We would appreciate a full and complete response as it will be included in the official hearing record.

Please submit your written answers by Friday, July 24, 2015 to Andrea Lindsey at Andrea.Lindsey@mail.house.gov or 6240 O'Neill Federal Office Building, Washington, D.C. 20024. If you have any further questions or concerns, please contact Ms. Lindsey at (202) 226-7680.

Thank you again for your participation in the hearing.

Sincerely,

Bob Goodlatte
Chairman

Enclosure

***Note:** The Subcommittee did not receive a response from this witness at the time of the filing of this hearing record.

Ms. Caroline D. Ciraolo
June 26, 2015
Page 2

Questions submitted for the Record from Subcommittee Chairman Marino

Lois Lerner/Internal Revenue Service Targeting Issues

1. Defense lawyers routinely have to worry about their clients withholding information from them. Similar considerations govern when DOJ lawyers represent agencies. For example, in February 2014, the Internal Revenue Service Chief Counsel to the Commissioner, Kate Duvall, learned that there were significant gaps in Lois Lerner's emails. Yet one month later, instead of preserving the material as relevant to pending litigation, Internal Revenue Service IT officials erased the backup tapes. What mechanisms were in place, prior to the Lois Lerner litigation, to ensure that the information Division lawyers presented to the court in that litigation was accurate? What changes have you made to those mechanisms in response to the lost emails and related problems that arose during the Lois Lerner litigation?

Tax Division WH Detailees/Access to Sensitive Taxpayer Data

2. There is concern about the Tax Division's practice on detailees, particularly to the White House. How many detailees does the Division dispatch to other agencies or departments and for what periods of time? Does the Division have any protocols in place to ensure that sensitive taxpayer information remains protected when Division attorneys are detailed to the White House or elsewhere?

Contract Auditing

3. The Internal Revenue Service and the Tax Division have long cooperated in staffing complex cases, whether litigating in the U.S. Tax Court, the Court of Federal Claims, or the federal district courts. The Internal Revenue Service recently entered into a multi-million dollar contract with the law firm of Quinn Emanuel.

   a. Does the Internal Revenue Service typically request Tax Division assistance before resorting to contracts with third-parties for help?
   b. Does the Internal Revenue Service request the Tax Division's view on the propriety of contracts with third-parties? If so, what views were expressed on the Quinn Emanuel contract?
   c. Was the Tax Division consulted prior to the issuance of temporary (T.D. 9669) regulations in June 2014 authorizing contractual third-parties, such as Quinn Emanuel, to take testimony by summons?

4. To your knowledge, did the Internal Revenue Service ever seek advice from the Tax Division or any other Department of Justice component, such as the Office of Legal Counsel, concerning the propriety of engaging a private law firm in connection with an Internal Revenue Service audit?

Ms. Caroline D. Ciraolo
June 26, 2015
Page 3

Question submitted for the Record from Representative Doug Collins

1. Ms. Ciraolo, I have a long-standing interest in "Sue and Settle" cases, and have introduced a bill to shed light on these practices and ensure that the Administration is not engaged in back-door regulating. The Freedom from Religion Foundation, an atheist advocacy group, sued the IRS claiming it routinely ignored their complaints about partisan activities at churches. The Tax Division represented the IRS in a settlement with the Freedom from Religion Foundation. In 2014, the IRS concluded the settlement, which required it to monitor churches and other houses of worship for compliance with non-electioneering rules. I have serious concerns that the IRS could be using this settlement—negotiated by your division—to improperly target houses of worship.

   I would like to know the details of the deal cut by your division and the Foundation. What was the level of coordination between your division, the IRS, and the activist atheist group?

Ms. Caroline D. Ciraolo
June 26, 2015
Page 4

Questions submitted for the Record from the Honorable Henry C. "Hank" Johnson, Jr., Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, and the Honorable John Conyers, Jr., Ranking Member, Committee on the Judiciary

1. In his written testimony, Daniel Epstein asserts that the White House has a practice of detailing attorneys from the Tax Division to the White House and that "there is no evidence that any ethical or legal safeguards were in place to ensure that private information was not disclosed – even inadvertently – to the White House," raising "legal and ethical concerns." What is your response?

2. What criteria are utilized by the Justice Department to select from among its attorneys to serve as detailees to the White House?

3. What safeguards are in place to ensure that the privacy of taxpayers' confidential tax information is not violated with respect to Tax Division attorneys who are detailed to the White House?

Response to Questions for the Record from Clifford J. White, III, Director, Executive Office for United States Trustees

Questions for the Record
Director Clifford J. White III
Executive Office for U.S. Trustees
"Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environment and Natural Resource s Division and the U.S. Trustee Program"
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
U.S. House of Representatives
May 19, 2015

Questions submitted by Subcommittee Chairman Marino

1. **The Office of the Comptroller of the Currency (OCC), which regulates national banks, recently issued guidance that banks should not sell bankruptcy accounts, including payments under chapter 13, contrary to common practice. Was the U.S. Trustee Program consulted by the OCC before the guidance was issued? Is this an area in which the unique expertise of the U.S. Trustee Program could provide for more nuanced guidance to bankruptcy stakeholders?**

Response:

The U.S. Trustee Program (USTP or the Program) was not consulted by the Office of the Comptroller of the Currency (OCC) before it issued guidance to national banks and federal savings associations concerning new requirements governing consumer debt sales transactions. *See* OCC Bulletin 2014-37, "Consumer Debt Sales" (Aug. 4, 2014). The USTP has communicated, however, with the OCC on other matters of common interest and when our enforcement jurisdictions intersect.

There is a significant amount of claims selling in both consumer and business bankruptcy cases. While experts suggest trading provides benefits to the bankruptcy system and the broader economy by adding liquidity to the markets, trading also accentuates the importance of compliance with the disclosure rules in bankruptcy. *See, e.g.*, Comm'n to Study the Reform of Chapter 11, Am. Bankr. Inst., Final Report and Recommendations (2014), at 242, available at https://abiworld.box.com/s/vvircv5xv83aavl4dp4h (discussing claims trading in the context of chapter 11 of the Bankruptcy Code). The role of the USTP is to ensure that buying and selling distressed debt in bankruptcy cases is conducted in accordance with the Bankruptcy Code and Rules.

The sale of debt that has been discharged in bankruptcy is highly problematic because efforts to collect stale debt violate the discharge injunction. The Program has taken enforcement action when creditors seek to collect consumer debt that was previously discharged in bankruptcy. For example, on June 5, 2013, the Program announced the successful conclusion of a 2008 nationwide settlement with Capital One to resolve allegations that Capital One sought to collect debts that were previously discharged in bankruptcy. The Program's settlement required an independent auditor to examine customer accounts to ensure monies improperly received had been or would be returned to debtors or their bankruptcy estates. The auditor determined that Capital One filed more than 15,500 erroneous claims in the nearly four years prior to the settlement, and received about $2.35 million (about seven times the $340,000 originally alleged) based on the erroneous claims. Under the settlement, Capital One withdrew the erroneous claims in open cases, fully refunded the money it had been improperly paid, reimbursed fees and expenses incurred by debtors and trustees, and corrected the process that led to the erroneous claims.

Although the sale and purchase of claims in bankruptcy cases may be perfectly proper and be beneficial for the reasons cited above, the sale of bankruptcy debt merits special attention. In 2011 and 2012, the Judicial Conference's Advisory Committee on Rules of Bankruptcy Procedure promulgated major amendments to Federal Rule of Bankruptcy Procedure 3001 and Official Form 10 to require additional disclosures that enable stakeholders to better assess claim validity. A member of the Program's senior leadership serves as a consultant to that Committee and, through that role, the Program supported the enhancements to Rule 3001. The Program has subsequently reviewed claims filed in bankruptcy to enforce compliance with the new requirements. This effort has led to a significant improvement in the disclosures on claims, better enabling practitioners and trustees to do their jobs.

In addition, the Program has reviewed practices of claims traders to ensure that the discharge injunction is not vitiated by the structure of the sales transaction, including by impeding the updating of credit reports to reflect the subsequent discharge of the debt. For a more complete description of these activities, please see the response provided to Question #3 below.

2. The federal courts have begun, without approval from Congress, assessing a "transfer fee" for proofs of claims. Was the U.S. Trustee Program involved in this decision? Please explain your views on this fee.

Response:

On September 11, 2012, the Judicial Conference of the United States approved a recommendation of the Conference's Committee on Court Administration and Case Management to assess a $25 claim transfer fee. USTP was not involved in the courts' decision to assess this fee, nor does the Program share in the proceeds of the claim transfer fees collected by the courts.

3. **In your statement, you indicated that the U.S. Trustee Program has begun a systematic review of the accuracy and sufficiency of papers filed by unsecured creditors. Could you elaborate on this review?**

Response:

Our unsecured creditor abuse project commenced as a review of compliance with amendments to Federal Rule of Bankruptcy Procedure 3001 that the Judicial Conference's Advisory Committee on Rules of Bankruptcy Procedure made in 2012. The amendments required disclosures in proofs of claim filed by holders of unsecured credit card and other revolving consumer debt designed to assist debtors and their case trustees in associating a claim with a known account and to provide a basis for assessing the accuracy of the claim.

In the initial phase of the project, the Program reviewed unsecured claims, especially those filed by high volume claims filers and claims purchasers, to determine their rate of compliance with disclosure rules, such as identification of the initial creditor and the date of the last payment made on the account. The USTP reviewed more than 22,000 claims over about a ten-month period and found great variation in compliance amongst filers. Through our review and subsequent enforcement actions, we have had some success in changing the practices of at least one volume filer and have seen some improvement in the performance of others.

Based upon observations and lessons learned during the initial phase of the project, the Program produced a PowerPoint presentation that our field offices can deliver at trustee training and bankruptcy bar events. The presentation addresses effective means of claims review and how to determine if non-compliance with disclosure rules indicates infirmities with the underlying claims.

The Program is currently conducting the next phase of this project to identify the systemic or widespread abuses that may require more robust remedial actions. Among the matters currently under investigation by the Program are practices related to claims trading in consumer debt. The Program is seeking discovery in two key areas. First, we are reviewing bank practices in selling debt. The investigation is partially in response to debtor allegations that some banks fail to provide information to credit reporting agencies to show that debts were discharged in bankruptcy, thereby indirectly encouraging the violation of the bankruptcy injunction against the collection of these debts. Second, the Program is reviewing the practices of some claims buyers to determine if they routinely robo-sign proofs of claim that are filed in bankruptcy court under penalty of perjury and with an attestation as to the accuracy of the claim. The Program has documented in court filings evidence of an enormous volume of claims signed by a single individual at two major consumer claims buying companies.

As we continue to review the compliance and practices of unsecured claimants, we are mindful that, as the only national enforcer of the bankruptcy rules, we have a unique perspective to identify and address systemic abuse, and our interpretations of the requirements and our actions should be consistent and predictable throughout the country. Consistent government enforcement can be a major benefit to any business, including to creditors of debtors in bankruptcy.

Response to Questions for the Record from Andrew M. Grossman, Adjunct Scholar, Cato Institute, Associate, Baker & Hostetler L.L.P.

Congressional Testimony

Ongoing Oversight: Monitoring the Activities of the Justice Department's Environment and Natural Resources Division

Response to questions for the record submitted by the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, United States House

July 20, 2015

Andrew M. Grossman
Adjunct Scholar, Cato Institute
Associate, Baker & Hostetler LLP

My name is Andrew Grossman. I am an Adjunct Scholar at the Cato Institute and a litigator in the Washington, D.C., office of Baker & Hostetler LLP. The views I express here are my own and should not be construed as representing those of the Cato Institute, my law firm, or its clients.

Question submitted for the Record from Representative Doug Collins:

1. Mr. Grossman, in your testimony you provide a compelling argument that sympathetic government regulators are engaging in collusive lawsuits with "friendly 'foes'" to compel government action. However, Mr. Cruden, the head of the DOJ's Environment and Natural Resources Division, indicated that he would not accept a collusive lawsuit. Based on your knowledge of this issue and the numerous examples you cite in your testimony, would you maintain that there is evidence of collusive "sue-and-settle" agreements by government regulators and outside special interests?

Response:

I thank Representative Collins for his thoughtful question and respond in the affirmative. Yes, there is evidence of collusion. It is evident to any litigator who has participated in cases involving the Environmental Protection Agency and environmentalist organizations supporting the EPA's position. It is evident to anyone who has read about the correspondence regarding the EPA's preemptive veto of the Pebble Mine in Alaska.[1] And it is evidenced, as you observe, by the numerous examples discussed in my written testimony.

Although I am reluctant to characterize the oral testimony of Mr. Cruden—it is possible that he misspoke or that what seems to be his apparent meaning was not his intended one—it may be useful to discuss several reasons that our views may not be entirely opposed, at least not in any way that matters.

First is that, at the hearing, Mr. Cruden acknowledged that he had not read my testimony, and he did not comment on any specific instances of collusive action by regulators and outside organizations. It is not clear that we disagree on the specifics.

Second is that things may not always appear so "collusive" from Mr. Cruden's perch. If an agency (i.e., one of ENRD's clients) directs its attorneys at ENRD to settle a case, it may not be apparent to the government's attorneys that any collusion has taken place. After all, the government routinely settles litigation—even litigation in which it might prevail—for a variety of

[1] *See* Kimberly Strassel, The Greens' Back Door at the EPA, Wall St. J., May 14, 2015.

reasons. Another settlement may not raise eyebrows, or suspicions, at the Department of Justice.

Third is that "collusion" is, to at least some extent, in the eye of the beholder. What may appear, to an outside observer, to be an unnecessary, action-forcing settlement may be, to an insider, an efficient and expeditious way of ending a suit to compel the agency to do something it was inclined to do anyway. Indeed, when regulators and the parties suing them to take action share basically the same goals, there need not be any express "collusion" (i.e., coordination) between the parties for the result to be, in effect, meaningfully "collusive." There may be elements of collusion—for example, as described in my written testimony, the settlement may alter agency priorities or undercut opposition to the agency's intended course of action—but, particularly when the plaintiffs and defendants are of generally like mind, it can be difficult to identify the line that separates expedience from collusion. This seems to me more of a dispute over whether to use the word "collusion" as shorthand to describe the phenomenon of less-than-fully-adversarial litigation, as opposed to some other word, rather than a disagreement over the substance of what is actually happening.

My point is that even an unconditional denial by ENRD that it has participated in any collusive cases or settlements must be taken with a grain of salt. The evidence is manifestly to the contrary, it is not apparent that ENRD would be aware of collusion in every instance, and ENRD may be understandably reluctant to describe as "collusive" practices and effects that nonetheless fit the mold described in my testimony.

Rather than quibble over semantics—and I suspect that any disagreement here boils down to no more than how to label this phenomenon—it would be more productive to acknowledge (based on the undisputed facts) that greater transparency and accountability are necessary for settlements that compel government action and to take appropriate action to address those shortcomings under existing law.

Response to Questions for the Record from Lauren K. Saunders, Associate Director, National Consumer Law Center

NCLC
NATIONAL CONSUMER LAW CENTER
Advancing Fairness in the Marketplace for All

June 30, 2015

The Honorable Bob Goodlatte, Chairman
House of Representatives
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Chairman Goodlatte:

Thank you for the opportunity to testify at the May 19, 2015, hearing held by the Committee on the Judiciary's Subcommittee on Regulatory Reform, Commercial and Antitrust Law on "Ongoing Oversight: Monitoring the Activities of the Justice Department's Civil, Tax and Environment and Natural Resources Divisions and the U.S. Trustee Program."

You asked me to respond to the following additional question for the Record submitted from Subcommittee Chairman Marino:

> "Documents produced to the Judiciary Committee show that the Leadership Conference on Civil and Human Rights helped lobby DOJ to include mandatory donation terms in the mortgage lending settlements. The National Consumer Law Center (NCLC) is listed as a coalition member of the Leadership Conference. Do you know if anyone at the NCLC was part of the effort to include these controversial provisions in the settlements?"

The answer is no, to the best of my knowledge, no one at NCLC was part of any effort to include mandatory donation terms in the Department of Justice's recent mortgage lending settlements.

Yours very truly,

Lauren K. Saunders
Associate Director

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