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The Justice Department's bank settlement slush fund

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Because truth-in-labeling laws are among the laws from which Washington feels exempt, the titles of congressional legislation often take liberties with the facts (e.g., the Patient Protection and Affordable Care Act). The Stop Settlement Slush Funds Act, however, precisely names the ailment for which it is the remedy.

The Justice Department has negotiated "bank settlement agreements" whereby banks make restitution to the government for the damage they allegedly did in connection with the creation and sale of residential mortgage-backed securities in the subprime mortgage crisis. Our subject here is not, however, whether the sums extracted from the banks (e.g., Citigroup $7 billion, Bank of America $16.65 billion, JPMorgan $13 billion) are proportionate to their alleged culpabilities. Rather, our subject is what Justice does with millions of these dollars.

Justice allows banks to meet some of their settlement obligations by directing "donations" to various nongovernmental advocacy organizations that serve Democratic constituencies and objectives — organizations that were neither parties to the case nor victims of the banks' behaviors. These donations are from money owed to the government, money that otherwise would go to the Treasury, money the disposition of which is properly Congress's responsibility.

So the donations are, in effect, appropriations of public money. The pesky Constitution, however, says: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." As a congressman allied with Grover Cleveland once said to a fellow legislator who considered one of his initiatives unconstitutional, "What's the Constitution between friends?"

Progressives, who favor expansive notions of executive discretion, and hence the marginalization of Congress, regard the "donations" as just another anodyne manifestation of inherent presidential discretion in enforcing laws. At a May congressional hearing, three constitutional scholars — Georgetown University law professor Nicholas Quinn Rosenkranz, the Heritage Foundation's Paul Larkin, and C. Boyden Gray, White House counsel to George H.W. Bush — disagreed.

Because everything government does costs money, the appropriation power, Rosenkranz testified, is Congress's "most potent check on executive overreach" — "the ultimate backstop" against "a willful president." If presidents could disburse money without an appropriation, "the careful constitutional separation of powers would be thrown into disequilibrium." The current president relies on disbursements that circumvent the appropriations clause: The U.S. District

Court for the District of Columbia has held that his administration has, in supposedly enforcing the ACA, illegally disbursed billions of dollars to insurance companies without a congressional appropriation.

"Congress," Larkin reminded Congress, "does not give the president a credit card or a cashbox that he can use to purchase goods and services or disburse appropriations as he sees fit. Congress identifies precisely who may receive federal funds." With the "donations," Justice rewards congenial groups without any direction from Congress or judicial oversight. Although it is, Larkin said, "a federal offense for a government officer to spend money in excess of the sum that Congress has appropriated," he noted that the donations represent executive lawlessness known at the state level: When Chris Christie headed the U.S. Attorney's Office for the District of New Jersey, he "negotiated a nonprosecution agreement with Bristol-Myers Squibb in which the company agreed, among other things, to make a $5 million gift to Seton Hall University's law school — Christie's alma mater — in order to avoid prosecution for securities fraud."

Woodrow Wilson, a former New Jersey governor and the Democrats' first progressive president, was the first president to criticize the American founding. He was particularly hostile to the separation of powers, which he considered an anachronistic impediment to executive efficiency. The bank settlement donations are another step nullifying the appropriations clause's 16 words, which buttress the separation of powers.

"In the end," Gray testified, "every other constitutional power runs into the appropriations power." This is why presidents have "consistently endeavored to seize the appropriations power from Congress." The Constitution was just 20 years old when, in 1809, Congress felt the need to enact "legislation designed to prevent the president from repurposing appropriated funds from one object to another." Subsequent presidents have obligated funds in excess of appropriations, thereby forcing Congress to choose between appropriating the funds or impairing the country's credit. Congress often has been complicit in its own diminution, as when it empowered the Consumer Financial Protection Bureau to commandeer funding from the Federal Reserve System.

Base motives of self-aggrandizement have impelled many presidents to disregard the separation of powers. Progressive presidents do this as a matter of principle, which is worse.