

RESTORING THE POWER OF THE PURSE: LEGISLATIVE OPTIONS

JOINT HEARING BEFORE THE SUBCOMMITTEE ON GOVERNMENT OPERATIONS AND THE SUBCOMMITTEE ON HEALTH CARE, BENEFITS, AND ADMINISTRATIVE RULES OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTEENTH CONGRESS SECOND SESSION

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RESTORING THE POWER OF THE PURSE: LEGISLATIVE OPTIONS

Thursday, December 1, 2016

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT OPERATIONS JOINT
WITH THE
SUBCOMMITTEE ON HEALTH CARE, BENEFITS, AND
ADMINISTRATIVE RULES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittees met, pursuant to call, at 2:06 p.m., in Room 2154, Rayburn House Office Building, Hon. Mark Meadows [chairman of the Subcommittee on Government Operations presiding.

Present from the Subcommittee on Government Operations: Representatives Meadows, Jordan, Walberg, Massie, Carter, Grothman, and Connolly.

Present from the Subcommittee on Health Care, Benefits, and Administrative Rules: Representatives Jordan, Walberg, DesJarlais, Meadows, DeSantis, Walker, Hice, Carter, DeSaulnier, Boyle, and Lujan Grisham.

Also Present: Representative Palmer.

Mr. MEADOWS. The Subcommittee on Government Operations and the Subcommittee on Health Care, Benefits, and Administrative Rules will come to order.

And, without objection, the chair is authorized to declare a recess at any time.

Good afternoon. Thank you all for being here.

And as we will call this to order, in recent years, an alarming trend has emerged, as we see the executive branch collecting various moneys for fees, fines, penalties, and settlements—the use of this money without providing Congress a clear accounting of how much money is being collected and what it's being spent on.

For example, according to the President's fiscal year 2017 budget proposal, \$231.8 billion in user fee charges go directly to an agency which subsequently spent the fund without congressional action, and an additional \$302.2 billion in user fees will be spent according to the legislation that established the charge. These are enormous sums of money that have the possibility of being spent without any true congressional oversight.

This week, Chairman Chaffetz released a report which looked at the issue of government-collected fines and penalties, similar to—the user fees, fines, and penalties are not an insignificant sum of money. The 34 agencies in the survey reported over \$83 billion being collected between 2010 and 2015.

More startling than the sum of money collected was the complete lack of transparency, a failure of uniform accounting systems, and a slow agency response time. Some heavy-hitters, such as the Department of Treasury, were unable to provide the committee with a complete response regarding its various bureaus and offices, which is completely unacceptable.

I still have no idea how much the Internal Revenue Service collected with its fines and penalty authority, which we all know would be significant. Something that is deeply troubling is that, given the massive discretion that the IRS has to level the penalties against American taxpayers, this sum could be enormous.

Without a complete picture of the funds flowing into the government, Congress is limited in their ability to appropriate funds accurately and prevent waste, fraud, abuse, and mismanagement. The power of the purse is one of the most important responsibilities bestowed upon Congress in the Constitution, and we must ensure that this power is not obstructed by Federal agencies.

Now, while I recognize that Congress has allowed certain agencies to utilize collected funds to operate, rather than go through the appropriations process, under President Obama this has taken on a more meaningful role, as the executive branch has utilized these collected funds or settlements to the funds as administrative—as priorities.

So, in my opinion, this executive branch discretion has gone too far. We have lost the transparency needed to understand what is being collected and allocated. And, in light of these concerns, today's hearing is meant to examine the use of the fees, the fines, the penalties, and settlements by Federal agencies to engage in activities that have not been specifically appropriated or authorized by Congress.

We want to hear from our panel of witnesses about the appropriate legislative solutions to this concern and specifically hear feedback on the legislative options such as H.R. 5499, the Agency Accountability Act of 2016, which was proposed by my colleague, the gentleman from Alabama, Mr. Palmer.

This is an important topic, that we need to know what the Federal Government is truly spending and what they are collecting, in order to reduce the deficit to get the Americans' fiscal house in order.

I want to thank our panel of witnesses for being here today.

And I will recognize the gentleman from Virginia, my good friend, the ranking member of the Subcommittee on Government Operations, Mr. Connolly, for his opening statement.

Mr. CONNOLLY. I thank my good friend from North Carolina. And I welcome our witnesses today.

Today's hearing will examine one of Congress' most important constitutional powers. Article I, section 9 of the Constitution grants Congress the power of the purse—sole authority over the direction of public funds. The American people entrust Congress to wield that power in their best interests.

Over the course of history, Congress has at times appropriately delegated these powers to certain government agencies, and it's not done so carelessly or without parameters. When Congress has authorized agencies to collect fees, fines, penalties, or settlements, it's

also placed limitations on those agencies and exercised oversight over their use of collected funds.

Agency collection of fees is not a new concept. It was not invented by Barack Obama. The example of Customs comes to mind as one such authority that has existed since the beginning of the Republic. Agencies have retained import duty collections since the first United States Congress in 1789.

The practice of agency retention of collections continued into the 20th century with land grazing fees, an authority which has remained with the Bureau of Land Management for range improvement programs since the early 1900s when Teddy Roosevelt was in the Presidency.

Today, similar dedicated collections of funds available without further congressional action can be found in programs supporting the Department of Justice's Crime Victims Fund, the National Park Service fees, the Environmental Protection Agency Superfund settlements, the Tennessee Valley Authority collections, the Federal Protective Service fees, and the Federal Aviation Administration Franchise Fund customer fees, to name but a few.

In all cases, Congress allows agencies to retain collections and self-sustain certain programs in order to make government more efficient. Today's proposed legislative solution, H.R. 5499, the Agency Accountability Act, which has been referred to this committee, in my opinion, is the anthesis of efficiency.

From my reading of the bill, it seems that it would require every single collection currently retained at agencies instead to be deposited into the general fund and obligated by the Committee on Appropriations. Every victim compensation award and every whistleblower reward would require the Committee on Appropriations to act.

How many times in recent history has Congress failed to pass appropriations bills and instead passed an omnibus appropriations bill or a continuing resolution because Congress could not reach an agreement on critical government funding? We're about to do it again within the next week.

H.R. 5499 will have unintended consequences, many of which would be detrimental to the very good government mechanisms we're committed to on this committee on a bipartisan basis.

One essential good governance mechanism to which this legislation would render serious harm is the protection of whistleblowers, a cause championed by this committee. Much of government fraud detection relies upon whistleblowers. We'll hear from an expert today on how whistleblower funds sustained via agency collections are crucial to protecting and incentivizing those willing to shed light on fraud, waste, and abuse in our government, a mission that goes to the very core of this committee's mission.

We will hear that whistleblowers are only willing to risk their careers and blow the whistle if there is some protection in the form of an award. That's why Congress authorized agencies to issue those awards to whistleblowers—to guarantee that one of the incentives for whistleblowers to come forward is never in doubt and never tied up in uncertain appropriations processes. The effects of this bill would be to gut the guarantees to whistleblowers and the

services they provide. That alone is reason enough to question H.R. 5499.

I believe the sponsors of that bill intend to increase transparency. I don't doubt their motivation. That's a laudable goal. But H.R. 5499 is more than that; it's a sweepingly broad and radical proposal that I believe would seriously impair the ability of government to function.

Thank you, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman.

The chair welcomes the participation of our colleague, the Representative Mr. Palmer from Alabama. He's actually the sponsor of H.R. 5499, the Agency Accountability Act of 2016, which we look forward to discussing today.

I ask unanimous consent that Mr. Palmer be allowed to fully participate in today's hearing.

And, without objection, so ordered.

The chair now recognizes the ranking member of the Subcommittee on Health Care, Benefits, and Administrative Rules, Mr. Boyle, for his opening statement.

Mr. BOYLE. Well, thank you, Mr. Chairman.

And welcome to our witnesses. I look forward to hearing from you today.

As my esteemed colleague Mr. Connolly has stated, the ability of agencies to retain collections is not new. Congress has authorized agencies since the Nation's very beginning, and it has become a mechanism by which we ensure that the necessary work done by our Federal Government is financially self-sustained.

Congress alone makes the decision to authorize certain programs to retain and spend funds. Congress has made that decision many times—everything from the National Park Service user fees to anti-trust settlements at the DOJ, from whistleblower protections of pollution on ships to consumer protection funds at the newly created—I guess it's not so newly created—CFPB.

H.R. 5499, the Agency Accountability Act, was referred to this committee, and the chairman has called this hearing to consider the bill. This bill would put an end to that practice and prevent Congress from authorizing agencies to retain collections of user fees, fines, and settlements in the future. It is a solution in search of a problem.

It is also radical. This bill states, and I quote, "Notwithstanding any other provision of law, an agency that receives a fee, fine, penalty, or proceeds from a settlement shall deposit such amount in the general fund of the Treasury." Quote, "Notwithstanding any other provision of the law," unquote, is as broad and sweeping a term as can be used in the law. In this case, it means "notwithstanding the history of our country."

H.R. 5499 would damage mechanisms Congress has created to promote good governance. As my colleague Mr. Connolly stated, whistleblowers are crucial to government accountability. The bravery of whistleblowers to do the right thing and shine the light on fraud, waste, and abuse helps our government in its important efforts to increase transparency. H.R. 5499 would have the effect of disincentivizing whistleblowers from coming forward with helpful information.

Make no mistake about it, this bill is reckless. It will cost taxpayers more money, because it will discourage whistleblowers from coming forward to expose fraud. If transparency is a goal of this bill, then I support that goal, but there are better paths forward that would do none of the harm this heavy-handed bill would cause.

Now, with that, Mr. Chairman and to Ranking Member Connolly, I'm happy to yield the rest of my time.

Mr. MEADOWS. I thank the gentleman for his remarks.

I will hold the record open for 5 legislative days for any member who would like to submit a written statement.

We'll now recognize our panel of witnesses.

I'm pleased to welcome Ms. Heather Krause, Acting Director of Strategic Issues at the U.S. Government Accountability Office.

Welcome.

Ms. Krause will be accompanied by Edda Emmanuelli Perez, Managing Associate General Counsel at the Office of General—U.S. Accountability Office. Her expertise on this issue will be important for the subject matter of this hearing, so she will be sworn in as well.

Mr. Kevin Kosar, senior fellow and governance project director at R Street Institute.

Welcome.

Mr. Hudson Hollister, executive director of the Data Coalition.

Welcome. It's good to see you again.

And Mr. Stephen M. Kohn, executive director of the National Whistleblower Center.

Thank you for your work.

Welcome to you all.

And pursuant to committee rules, all witnesses will be sworn in before they testify. So if you would please rise and raise your right hand.

Do you solemnly swear or affirm that the testimony you're about to give will be the truth, the whole truth, and nothing but the truth?

All right. Thank you. Please be seated.

And let the record reflect that all witnesses answered in the affirmative.

In order to allow enough time for discussion, we would appreciate it if you would limit your oral testimony to 5 minutes. However, your entire written statement will be made part of the record.

Ms. Krause, you are now recognized for 5 minutes.

WITNESS STATEMENTS

STATEMENT OF HEATHER KRAUSE

Ms. KRAUSE. Thank you, Mr. Chairman.

Chairmen Meadows and Jordan, Ranking Members Connolly and Boyle, and members of the subcommittees, thank you for the opportunity to discuss our work on Federal fees, fines, penalties, and settlements.

Congress exercises its constitutional power of the purse by appropriating funds and prescribing conditions for their use. As you know, Congress provides agencies with budget authority to make

financial obligations for specified purposes. Budget authority may be provided through appropriations acts or through other laws that constitute permanent appropriations.

In addition to tax revenues, the Federal Government receives funds from a variety of sources, including fees, fines, penalties, and settlements. These collections involve billions of dollars annually and fund many programs, including those integral to our Nation's security, the security of our financial systems, and the protection of natural resources.

The design and structure of the statutory authorities for these collections varies widely. My statement today focuses on four types of statutory authorities that establish how agencies can use their fee, fine, and penalty collections and the varying degrees of agency flexibility and congressional control.

These types of are: one, collections deposited to the Treasury as miscellaneous receipts; two, collections dedicated to a related program and available subject to a further appropriation; three, collections dedicated to a related program and available without further congressional action; and, four, collections available based on a combination of these authorities.

First, Congress has specified that certain fees, fines, and penalties be deposited to the Treasury as miscellaneous receipts. These funds are not dedicated to the agency or program under which they are collected and are used for general support of Federal Government activities. For example, \$2.7 billion in civil monetary penalties collected from financial institutions for certain enforcement actions were deposited to the Treasury as miscellaneous receipts from 2009 to 2015.

Second, Congress has specified that some collections be dedicated to a related program but cannot be used by an agency without further appropriation. For example, cargo importers pay merchandise processing fees to Customs and Border Protection. These fees are deposited in the Customs user fee account and are only available to CBP through annual appropriations.

Third, Congress has authorized some agencies to collect and use their fees, funds, and penalties without additional congressional action. This is considered permanent funding authority. Agencies with this authority have varying degrees of autonomy, depending on the extent to which the statute limits when, how much, and for what purpose funds may be used.

For example, USDA's Animal and Plant Health Inspection Service is authorized to set and collect user fees to cover the cost of Agriculture Quarantine Inspection services. These collections are available without fiscal year limitations and may be used for inspection-related purpose without further appropriation.

Even if an agency has a permanent authority to use collections, Congress can still place limitations on the funds in any given year. For example, in recent fiscal years, annual appropriations acts limited the amount of fines and penalties from the Crime Victims Fund that could be used to fund victims assistance programs and other activities.

Last, in some cases, Congress has provided agencies with a combination of different authorities. For example, each year, the Drug Enforcement Administration deposits the first \$15 million in fees

that it collects from drug manufacturers and other registrants to the Treasury as miscellaneous receipts. Fees collected beyond that amount are available to the agency and used to recover the full cost of DEA's Diversion Control program.

These different design options involve different tradeoffs on agency flexibility versus congressional control. For example, Congress gains more oversight opportunities when it requires collections to be annually appropriated. Conversely, if Congress grants an agency authority to use collections without further congressional action, the agency may be able to respond more quickly to customers or changing conditions.

This concludes my statement. My colleague Edda Emmanuelli Perez and I would look forward to answering any questions.

[Prepared statement of Ms. Krause follows:]



United States Government Accountability Office

Testimony
Before the Subcommittees on Government
Operations and Health Care, Benefits, and
Administrative Rules, Committee on
Oversight and Government Reform,
House of Representatives

For Release on Delivery
Expected at 2:00 p.m. ET
Thursday, December 1, 2016

FEDERAL FEES, FINES, AND PENALTIES

Observations on Agency Spending Authorities

Statement of Heather Krause, Acting Director, Strategic
Issues and
Edda Emmanuelli Perez, Managing Associate General
Counsel, Office of General Counsel

GAO Highlights

Highlights of GAO-17-268T, a testimony before the Subcommittee on Government Operations and the Subcommittee on Health Care, Benefits, and Administrative Rules, Committee on Oversight and Government Reform, House of Representatives

Why GAO Did This Study

Congress exercises its constitutional power of the purse by appropriating funds and prescribing conditions governing their use. Through annual appropriations and other laws that constitute permanent appropriations, Congress provides agencies with authority to incur obligations for specified purposes. The federal government receives funds from a variety of sources, including tax revenues, fees, fines, penalties, and settlements. Collections from fees, fines, penalties, and settlements involve billions of dollars and fund a wide variety of programs.

The design and structure—and corresponding agency flexibility and congressional control—of these statutory authorities can vary widely. In many cases, Congress has provided agencies with permanent authority to collect and obligate funds from fees, fines, and penalties without further congressional action. This authority is a form of appropriations and is subject to the fiscal laws governing appropriated funds. In addition, annual appropriation acts may limit the availability of those funds for obligation. Given the nation's fiscal condition, it is critical that every funding source and spending decision be carefully considered and applied to its best use.

This testimony provides an overview of key design decisions related to the use of federal collections outlined in prior GAO reports, with examples of specific fees, fines, and penalties from GAO reports issued between September 2005 and November 2016.

View GAO-17-268T. For more information, contact Heather Krause at (202) 512-6806 or krauseh@gao.gov or Edda Emmanuelli Perez at (202) 512-2853 or emmanuelperez@gao.gov.

December 1, 2016

FEDERAL FEES, FINES, AND PENALTIES

Observations on Agency Spending Authorities

What GAO Found

GAO's prior work has identified four key design decisions related to how fee, fine, and penalty collections are used that help Congress balance agency flexibility and congressional control.

Key Design Decisions for Use of Collections

Use of collections

What Congressional action triggers the use of collections?	What is the period of availability for the collections?	For what purposes may the collections be used?	To what degree will Congress limit the amount of collections that can be used?
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Source: GAO | GAO-17-268T

One of these key design decisions is the congressional action that triggers the use of collections. The table below outlines the range of structures that establish an agency's use of collections and examples of fees, fines, and penalties for each structure.

Design Decision on Agency Use of Fees, Fines, and Penalties and Related Examples

Design decision: Congressional action triggering use of collections	Example of fee, fine, or penalty
Collections deposited to the Treasury as miscellaneous receipts	Civil monetary penalty payments from financial institutions received by certain financial regulators
Collections dedicated to the related program with availability subject to further appropriation	Food and Drug Administration prescription drug user fees
Collections dedicated to the related program and available without further congressional action (i.e., a permanent appropriation)	National Park Service fees
Collections available based on a combination of these authorities	Department of Justice Drug Enforcement Administration Diversion Control fees

Source: GAO analysis of applicable laws | GAO-17-268T

As GAO has previously reported, these designs involve different tradeoffs and implications. For example, requiring collections to be annually appropriated before an agency can use the collections increases opportunities for congressional oversight on a regular basis. Conversely, if Congress grants an agency authority to use collections without further congressional action, the agency may be able to respond more quickly to customers or changing conditions. Even when an agency has the permanent authority to use collections, the funds remain subject to congressional oversight at any point in time and Congress can place limitations on obligations for any given year.

Chairmen Meadows and Jordan, Ranking Members Connolly and Cartwright, and Members of the Subcommittees:

We are pleased to be here today to discuss our prior work on federal fees, fines, penalties, and settlements. Congress exercises its constitutional power of the purse by appropriating funds and prescribing conditions governing their use. As you know, through appropriations, Congress provides agencies with budget authority to make financial obligations for specified purposes. An appropriations act is the most common means of providing appropriations; however, Congress may provide appropriations through other laws as well.

The federal government receives funds from a variety of sources during the fiscal year, including tax revenues, federal fees, fines, penalties, and settlements. Collections from fees, fines, penalties, and settlements fund a wide variety of programs integral to our nation's security, to the security of our financial system, and to the protection of our natural resources and involve billions of dollars annually. For example, some user fees—including U.S. Postal Service charges for stamps and other fees, Medicare premiums, and Tennessee Valley Authority proceeds from the sale of energy—exceed \$1 billion in annual collections. Annual collections of fines and penalties fluctuate. For example, the federal government collected civil penalties paid in connection with the 2010 Deepwater Horizon oil spill ranging from about \$400 million in fiscal year 2013 to about \$160 million in fiscal year 2016.

The design and structure—and corresponding agency flexibility and congressional control—of statutory authorities for fees, fines, penalties, and settlements can vary widely. In many cases, Congress has provided agencies with permanent authority to collect and obligate for specific purposes funds from sources such as fees, fines, and penalties without further congressional action. Such authorities are part of a broader category of budget authority provided in laws other than appropriations acts, which also includes contract and borrowing authorities, as well as spending on entitlement programs such as Social Security. These collections, known as "offsetting collections" are a form of appropriation and are subject to the fiscal laws governing appropriated funds. Although the laws authorizing permanent budget authority make them available for obligation without further legislative action, it is not uncommon for annual appropriation acts to include limitations on the obligations to be financed by these collections. Given the nation's fiscal condition, it is critical that every funding source and spending decision be carefully considered and applied to its best use.

Our testimony provides an overview of key design decisions and statutory authorities and controls related to the availability of funds collected from federal fees, fines, and penalties. In preparing this testimony, we relied on our September 2013 and May 2008 reports on the design of federal user fees and our February 2015 report on Department of Justice alternative funding sources, and drew examples from other work on specific fees, fines, and penalties that we issued between September 2005 and November 2016.¹ Detailed information about the scope and methodology used to conduct this work can be found in each of the issued products. We conducted the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

The federal government receives amounts from numerous sources in addition to tax revenues, including user fees, fines, penalties, and intragovernmental fees. Whether these collections are dedicated to a particular purpose and available for agency use without further appropriation depends on the type of collection and its specific authority.²

- *User fees:* User fees are fees assessed to users for goods or services provided by the federal government. They are an approach to financing federal programs or activities that, in general, are related to some voluntary transaction or request for government services above and beyond what is normally available to the public. User fees are a broad category of collections, whose boundaries are not clearly

¹GAO, *Federal User Fees: Fee Design Options and Implications for Managing Revenue Instability*, GAO-13-820 (Washington, D.C.: Sept. 30, 2013), *Federal User Fees: A Design Guide*, GAO-08-386SP (Washington, D.C.: May 29, 2008), and *Department of Justice: Alternative Sources of Funding Are a Key Source of Budgetary Resources and Could Be Better Managed*, GAO-15-48 (Washington, D.C.: Feb. 19, 2015). A full list of our related work is included at the end of this statement.

²Unless otherwise authorized by statute, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury without deduction for any charge or claim. 31 U.S.C. § 3302(b) (also known as the miscellaneous receipts statute).

defined.³ They encompass charges for goods and services provided to the public, such as fees to enter a national park, as well as regulatory user fees, such as fees charged by the Food and Drug Administration for prescription drug applications. Unless Congress has provided specific statutory authority for an agency to use (i.e., obligate and spend) fee collections, fees are deposited to the Treasury as miscellaneous receipts and are generally not available to the agency.⁴

- *Fines, penalties, and settlement proceeds:* Criminal fines and penalty payments are imposed by courts as punishment for criminal violations. Civil monetary penalties are not a result of criminal proceedings but are employed by courts and federal agencies to enforce federal laws and regulations. Settlement proceeds result from an agreement ending a dispute or lawsuit. As with user fees, unless Congress has provided specific statutory authority for an agency to use fines, penalties, and settlements, those collections are deposited as miscellaneous receipts and are generally not available to the agency.
- *Intragovernmental fees* are charged by one federal agency to another for goods and services such as renting space in a building or cybersecurity services. Unlike user fees, fines, and penalties, unless Congress has specified otherwise, agencies generally have authority to use intragovernmental fees without further appropriation.⁵

In 2013, we identified six key fee design decisions related to how fees are set, used, and reviewed that, in the aggregate, enable Congress to design fees that strike its desired balance between agency flexibility and congressional control.⁶ Four of the six key design decisions relate to how

³The legal distinction between a “fee” and a “tax” can be complicated and depends largely on the context of the particular assessment. Whether a particular assessment is statutorily referred to as a tax or a fee is never legally determinative. Instead, federal courts will examine the structure and the context of the assessment’s application.

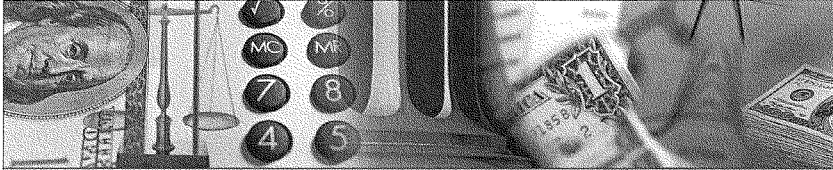
⁴Fees assessed under the authority of the Independent Offices Appropriation Act of 1952 (codified at 31 U.S.C. § 9701), rather than under a specific authorizing statute, must be deposited to the Treasury as miscellaneous receipts and are not available to the agency or program that collected the fees, unless otherwise authorized by law.

⁵For example, the Economy Act, 31 U.S.C. § 1535 and 1536, is a statutory exception to the miscellaneous receipts statute, authorizing a performing agency to credit reimbursements to the appropriation or fund charged in executing its performance.

⁶GAO-13-820.

the fee collections are used and in 2015 we reported that they are applicable to fines and penalties (see figure 1).⁷

Figure 1: Key Design Decisions for the Use of Federal Fees, Fines, and Penalties



Key design questions		Options increasing agency flexibility	Options increasing congressional control
Use of collections	What Congressional action triggers the use of collections?	Offsetting collection authority	Offsetting receipt authority Government receipt authority
	What is the period of availability for the collections?	No year	Limited year
	For what purposes may the collections be used?	Broadly defined uses	Narrowly defined uses
	To what degree will Congress limit the amount of collections that can be used?	No limit	Limit set in statute

Source: GAO | GAO-17-268T

Congress determines the availability of collections by defining the extent to which an agency may use (i.e., obligate and spend) them, including the availability of the funds, the period of time the collections are available for obligation, the purposes for which they may be used, and the amount of collections that are available to the agency.

- **Availability.** Congressional decisions about the use of a fee, fine, or penalty will determine how the funds will be considered within the context of all federal budgetary resources. Collections are classified into 3 major categories: offsetting collections, offsetting receipts, or

⁷GAO-15-48.

governmental receipts. Funds classified as offsetting collections can provide agencies with more flexibility because they are generally available for agency obligation without further legislative action. In contrast, offsetting receipts and governmental receipts offer greater congressional control because, generally, additional congressional action is needed before the collections are available for agency obligation.

- *Time.* When Congress provides that an agency's collections are available until they are expended, agencies have greater flexibility and can carry over unobligated amounts to future fiscal years. This enables agencies to align collections and costs over a longer time period and to better prepare for, and adjust to, fluctuations in collections and costs. Funds set aside or reserved can sustain operations in the event of a sharp downturn in collections or increase in costs. Carrying over unobligated balances from year to year, if an agency has multi- or no-year collections, is one way agencies can establish a reserve.
- *Purpose.* Congress sets limits on the activities or purposes for which an agency may use collections. Congress has granted some agencies broad authority to use some of their collections for any program purpose, but has limited the use of other collections to specific sets of activities. Narrower restrictions may benefit stakeholders and increase congressional control. On the other hand, statutes that too narrowly limit how collections can be used reduce both Congress's flexibility to make resource decisions and an agency's flexibility to reallocate resources. This can make it more difficult to pursue public policy goals or respond to changing program needs, such as when the activities intended to achieve the purposes of the related program change.
- *Amount.* Congress determines the specific level of budget authority provided for a program's activities by limiting the amount of collections that can be collected or used by the agency; however, these limits can also pose challenges for the agency. For example, when a fee-funded agency is not authorized to retain or use all of its fee collections and no other funding sources are provided, the agency may not have the funds available to produce the goods or services that it has promised or that it is required to provide by law.

Design Options Related to Agency's Access to and Use of Its Collections

Our design guides can help Congress consider the implications and tradeoffs of various design alternatives. One key design element is whether the funds will be (1) deposited to the Treasury as miscellaneous receipts for general support of federal government activities, (2) dedicated to the related program with availability subject to further appropriation, (3) dedicated to the related program and available without further congressional action, or (4) available based on a combination of these authorities.

Collections Deposited to the Treasury as Miscellaneous Receipts

Some authorities to collect fees, fines and penalties specify that the funds will be deposited to the Treasury as miscellaneous receipts. These funds are not dedicated to the agency or program under which they were collected; they are used for the general support of federal government activities. For example,

- *Penalties from financial institutions:* Civil monetary penalty payments collected from financial institutions by certain financial regulators, including the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation, are deposited to the Treasury as miscellaneous receipts. In March 2016, we reported that, from January 2009 through December 2015, financial regulators and components within the Department of the Treasury deposited \$2.7 billion to the Treasury as miscellaneous receipts from enforcement actions assessed against financial institutions for violations related to anti-money laundering, anti-corruption, and U.S. sanctions programs requirements.⁸
- *Federal Communications Commission (FCC) Application Fees:* The FCC regulates interstate and international communications by radio, television, wire, satellite, and cable, and telecommunications services for all people of the United States. FCC collects application fees from companies for activities such as license applications, renewals, or requests for modification. As we reported in September 2013, these fees are deposited to the Treasury as miscellaneous receipts.⁹

⁸GAO, *Financial Institutions: Fines, Penalties, and Forfeitures for Violations of Financial Crimes and Sanctions Requirements*, GAO-16-297 (Washington, D.C.: Mar 22, 2016).

⁹GAO-13-820.

Dedicated Collections with Availability Subject to Further Appropriation

Some fees, fines, and penalties cannot be used by an agency without being further appropriated to the agency. For example,

- *Customs and Border Protection's (CBP) Merchandise Processing Fee:* Importers of cargo pay a fee to offset the costs of "customs revenue functions" as defined in statute, and the automation of customs systems. CBP deposits merchandise processing fees as offsetting receipts to the Customs User Fee Account, with availability subject to appropriation. In July 2016, we reported that in fiscal year 2014 merchandise processing fee collections totaled approximately \$2.3 billion.¹⁰

Requiring an appropriation to make the funds available to an agency increases opportunities for congressional oversight on a regular basis. When the amount of collections exceeds the amount of the appropriation, however, unobligated collection balances that are not available to the agency may accumulate. For example,

- *Security and Exchange Commission (SEC) Fees:* When SEC collects more in Section 31 fees than its annual appropriation, the excess collections are not available for obligation without additional congressional action.¹¹ In September 2015, we reported that at the end of fiscal year 2014, the SEC had a \$6.6 billion unavailable balance in its Salaries and Expenses account because the fee collections exceeded appropriations.¹²
- *Environmental Protection Agency (EPA) Motor Vehicle and Engine Compliance Program (MVECP) Fees:* MVECP fee collections are deposited into EPA's Environmental Services Special Fund.¹³ As we

¹⁰GAO, *DHS Management: Enhanced Oversight Could Better Ensure Programs Receiving Fees and Other Collections Use Funds Efficiently*, GAO-16-443 (Washington, D.C.: Jul. 21, 2016).

¹¹National securities exchanges and the Financial Industry Regulatory Authority (FINRA) pay Section 31 transaction fees to SEC, generally based on the sales of securities (15 U.S.C. § 78ee).

¹²In 2015 we reported that, according to SEC officials, this large unavailable balance resulted from historical features of its Section 31 fee structure that are no longer in place. GAO, *Federal User Fees: Key Considerations for Designing and Implementing Regulatory Fees*, GAO-15-718 (Washington, D.C.: Sept. 16, 2015).

¹³A *Special Fund Receipt Account* is a receipt account credited with collections that are earmarked by law but included in the federal funds group rather than classified as trust fund collections. These collections are presented in the President's budget as either governmental (budget) receipts or offsetting receipts.

reported in September 2015, according to officials, Congress had not appropriated money to EPA from this fund for MVECP purposes.¹⁴ EPA instead received annual appropriations which may be used for MVECP purposes. As a result, the unavailable balance of this fund steadily increased and totaled about \$370 million at the end of fiscal year 2014.

- *U.S. Army Corps of Engineers Harbor Maintenance Fee:* The authorizing legislation generally designates that the purpose for the fee collections is harbor maintenance activities but, as we reported in February 2008, fee collections have substantially exceeded spending on harbor maintenance.¹⁵ In July 2016, we reported that the Harbor Maintenance Trust Fund had a balance of over \$8 billion at the end of fiscal year 2014.¹⁶
- *U.S. Patent and Trademark Office (USPTO) Fees:* In September 2013, we reported that in some years Congress chose not to make available to USPTO the full amount of its collections which, according to USPTO officials, contributed to USPTO's inability to hire sufficient examiners to keep up with USPTO's workload and invest in technology systems needed to modernize the USPTO.¹⁷ According to USPTO officials, patent fee collections can only be used for patent processes, and trademark fee collections can only be used for trademark processes, as well as to cover each processes' proportionate share of the administrative costs of the agency. USPTO officials stated that patent and trademark customers are typically two distinct groups and this division helps to assure stakeholders that their fees are supporting the activities that affect them directly.

Some programs include mechanisms to link the amount of collections with the amount of collections appropriated to the program, over time. For example,

- *Food and Drug Administration (FDA) Prescription Drug User Fees:* If FDA prescription drug user fee collections are higher than the amount of the collections appropriated for the fiscal year, FDA must adjust fee rates in a subsequent year to reduce its anticipated fee collections by

¹⁴GAO-15-718.

¹⁵GAO, *Federal User Fees: Substantive Reviews Needed to Align Port-Related Fees with the Programs They Support*, GAO-08-321 (Washington, D.C.: Feb. 22, 2008).

¹⁶GAO-16-443.

¹⁷GAO-13-820.

the excess amount.¹⁸ In March 2012, we reported that in fiscal year 2010, Prescription Drug User Fee Act user fees collected by FDA—including application, establishment, and product fees—totaled more than \$529 million, including over \$172 million in application fees.¹⁹

Dedicated Collections Available without Further Congressional Action

Legislation authorizing a fee, fine, or penalty may give the agency authority to use collections without additional congressional action. We refer to the legal authorities that provide agencies with permanent authority to both collect and obligate funds from sources such as fees, fines, and penalties as “permanent funding authorities.”²⁰ Agencies with these permanent funding authorities have varying degrees of autonomy, depending in part on the extent to which the statute limits when, how much, and for what purpose funds may be obligated. Some examples include the following:

- *National Park Service (NPS) Fees:* NPS fees include recreation fees—primarily entrance and amenity fees—and commercial service fees paid by private companies that provide services, such as operating lodges and retail stores in park units. In December 2015, we reported that in fiscal year 2014 the NPS collected about \$186 million in recreation fees and about \$95 million in commercial service fees.²¹
- *U.S. Department of Agriculture Animal and Plant Health Inspection Service (APHIS) Agricultural Quarantine Inspection (AQI) Fees:* The

¹⁸21 U.S.C. 379h(g)(4).

¹⁹GAO, *Prescription Drugs: FDA Has Met Most Performance Goals for Reviewing Applications*, GAO-12-500 (Washington, D.C.: Mar. 30, 2012).

²⁰We will be issuing a report on permanent funding authorities later this month. As mentioned earlier, permanent funding authorities are part of a broader category of budget authority provided in laws other than appropriations acts. We last published an inventory of budget accounts with spending authority and permanent appropriations in 1996. At that time, we reported that agencies identified 558 budget accounts as having spending authority and permanent appropriations. In our 1998 update to that inventory, we determined that 20 of the 558 budget accounts identified by agencies in the 1996 report did not possess spending authority and permanent appropriations. See GAO, *Budget Issues: Inventory of Accounts with Spending Authority and Permanent Appropriations, 1996*, GAO/AIMD-96-79 (Washington, D.C.: May 31, 1996) and *Budget Issues: Inventory of Accounts With Spending Authority and Permanent Appropriations, 1997*, GAO/OGC-98-23 (Washington, D.C.: Jan. 19, 1998). We are currently updating this inventory.

²¹GAO, *National Park Service: Revenues from Fees and Donations Increased, but Some Enhancements Are Needed to Continue This Trend*, GAO-16-166 (Washington, D.C.: Dec. 15, 2015).

AQI program provides for inspections of imported agricultural goods, products, passenger baggage, and vehicles to prevent the introduction of harmful agricultural pests and diseases. APHIS is authorized to set and collect user fees sufficient to cover the cost of providing and administering AQI services in connection with the arrival of commercial vessels, trucks, railcars, and aircraft, and international passengers.²² AQI fee collections are available without fiscal year limitation and may be used for any AQI-related purpose without further appropriation. In March 2013, we reported that in fiscal year 2012, AQI fee collections totaled about \$548 million.²³

- *Environmental Protection Agency (EPA) Superfund Settlements:* Under the Superfund program, EPA has the authority to clean up hazardous waste sites and then seek reimbursement from potentially responsible parties. EPA is authorized to retain and use funds received from certain types of settlements with these parties in interest-earning, site-specific special accounts within the Hazardous Substance Superfund Trust Fund. EPA generally uses these funds for future cleanup actions at the sites associated with a specific settlement or to reimburse appropriated funds that EPA had previously used for response activities at these sites. In January 2012, we reported that as of October 2010 EPA held nearly \$1.8 billion in unobligated funds in 947 open special accounts for 769 Superfund sites.²⁴
- *Tennessee Valley Authority Collections (TVA):* The TVA, the nation's largest public power provider, has authority to use payments it receives from selling power to the public without further appropriation. In October 2011, we reported that TVA had annual revenues of about \$11 billion.²⁵
- *Presidio Trust Collections:* The Presidio Trust, a congressionally chartered organization, manages The Presidio, an urban park in San

²²Section 2509(a) of the Food, Agriculture, Conservation, and Trade (FACT) Act of 1990, 21 U.S.C. 136a.

²³GAO, *Agricultural Quarantine Inspection Fees: Major Changes Needed to Align Fee Revenues with Program Costs*, GAO-13-268 (Washington, D.C.: Mar. 1, 2013).

²⁴GAO, *Superfund: Status of EPA's Efforts to Improve Its Management and Oversight of Special Accounts*, GAO-12-109 (Washington, D.C.: Jan. 18, 2012).

²⁵GAO, *Tennessee Valley Authority: Full Consideration of Energy Efficiency and Better Capital Expenditures Planning Are Needed*, GAO-12-107 (Washington, D.C.: Oct. 31, 2011).

San Francisco, and sustains its operations in part by rental income from residential and commercial buildings on its grounds.²⁶

Agencies can also be authorized to retain intragovernmental fees charged to other agencies in exchange for a good or service. Some agencies are fully supported by intragovernmental fees; for others, intragovernmental fees are one of their sources of funds.

- *Federal Protective Service (FPS) Fees:* The FPS is a fully fee-funded organization authorized to charge customer agencies fees for security services at federal facilities and to use those offsetting collections for all agency operations. In July 2016, we reported that, at the end of fiscal year 2014, FPS had an unobligated balance of approximately \$193 million and that FPS had not established targets to determine the extent to which that balance was appropriate to fund its operations.²⁷
- *Federal Aviation Administration (FAA) Franchise Fund Customer Fees:* FAA's Administrative Services Franchise Fund provides goods and services—including training and specialized aircraft maintenance—to customer agencies on a fee-for-service basis.²⁸
- *National Park Service Fees (NPS):* NPS collections include intragovernmental fees, as well as user fees and appropriations. For

²⁶GAO, *Congressionally Chartered Organizations: Key Principles for Leveraging Nonfederal Resources*, GAO-13-549 (Washington, D.C.: June 7, 2013). Congress has chartered independent organizations which are authorized to receive and retain financial and nonfinancial resources from nonfederal partners to help meet their core mission and goals. Presidio Trust funds are deposited to a public enterprise fund account, a type of revolving fund that conducts cycles of businesslike operations—mainly with the public—in which proceeds from the sale of products or services are used to finance spending, usually without requirement for annual appropriations. See GAO, *A Glossary of Terms Used in the Federal Budget Process* (Supersedes AFMD-2.1.1), GAO-05-734SP (Washington, D.C.: Sept. 1, 2005).

²⁷GAO-16-443.

²⁸FAA is authorized to retain an amount not to exceed 4 percent of the total annual income to the fund as a reserve; amounts in excess of the reserve limitation are to be transferred to the Treasury. See Pub. L. No. 104-205, title I, Sept. 30, 1996, 110 Stat. 2957 (now appears as 49 U.S.C. § 40113 note). Franchise funds are a type of intragovernmental revolving fund that provides common administrative services benefitting other federal entities. *Intragovernmental Revolving Fund Accounts* are appropriation accounts authorized to be credited with collections from other federal agencies' accounts that are earmarked to finance a continuing cycle of business-type operations. For our work on FAA's Administrative Services Franchise Fund, see GAO, *Revolving Funds: Additional Pricing and Performance Information for FAA and Treasury Funds Could Enhance Agency Decisions on Shared Services*, GAO-16-477 (Washington, D.C.: May 10, 2016).

example, in October 2016, we reported that NPS received funding from the Department of the Army to contract with the National Symphony Orchestra for holiday concerts on the U.S. Capitol Grounds.²⁹

Even when an agency has a permanent authority to use collections, collections remain subject to congressional oversight at any point in time and Congress can place limitations on obligations for any given year. For example,

- *U.S. Citizenship and Immigration Services (USCIS) Fees:* USCIS is authorized to charge fees for adjudication and naturalization services, including a premium-processing fee for employment-based petitioners and applicants. The House Report to the fiscal year 2008 Department of Homeland Security Appropriations Bill, H.R. 2638, directed USCIS to allocate all premium-processing fee collections to information technology and business-systems transformation. In January 2009, we reported that, consistent with this directive, USCIS's 2007 fee review stated that the agency intended to use all premium processing collections to fund infrastructure improvements to transform USCIS's paper-based data systems into a modern, digital processing resource.³⁰ In July 2016, we reported that USCIS estimated that the unobligated carryover balance for the premium processing fee could grow to \$1.1 billion by fiscal year 2020, as fee collections are expected to exceed Transformation initiative funding requirements in fiscal years 2015 through 2020.³¹
- *Department of Justice's (DOJ) Crime Victims Fund (CVF) Fines and Penalties:* Criminal fines and penalties collected from offenders, among other sources, are deposited in the CVF and can be used without further appropriation to fund victims' assistance programs and directly compensate crime victims. In February 2015, we reported that in fiscal years 2009 through 2013, annual appropriations acts limited the CVF amounts the DOJ's Office of Justice Programs may obligate for these purposes.³²

²⁹GAO, *U.S. Capitol Grounds Concerts: Improvements Needed in Management Approval Controls over Certain Payments*, GAO-17-44 (Washington, D.C.: Oct. 25, 2016).

³⁰GAO, *Federal User Fees: Additional Analyses and Timely Reviews Could Improve Immigration and Naturalization User Fee Design and USCIS Operations*, GAO-09-180 (Washington, D.C.: January 23, 2009).

³¹GAO-16-443.

³²GAO-15-48.

Collections with a Combination of Different Authorities

In some cases, Congress has provided agencies with permanent authority to use a portion of collections and designated other portions of the collections for another use or to be deposited to the Treasury as miscellaneous receipts.

- *Bureau of Land Management (BLM) Grazing Fees:* Since the early 1900s, the federal government has required ranchers to pay a fee for grazing their livestock on millions of acres of federal land located primarily in western states. The relevant authorities designate a portion of the grazing fees collected by the BLM for range improvement, a portion to states, and a portion to be deposited to the Treasury as miscellaneous receipts.³³ For example, in September 2005, we reported that in fiscal year 2004 the BLM collected about \$11.8 million in grazing fees, half of which was deposited to a special fund receipt account in the Treasury for range rehabilitation, protection, and improvements.³⁴ Of the other half of the collections, about \$2.2 million was distributed to states and counties and about \$3.7 million was deposited to the Treasury as miscellaneous receipts.
- *Department of Housing and Urban Development (HUD) Mutual Mortgage Insurance Fund Settlement:* HUD's Mutual Mortgage Insurance Fund receives payments resulting from violations related to single-family programs. The primary purpose of the Mutual Mortgage Insurance Fund is to pay lenders in cases where borrowers default on their loan and the lender makes a claim for mortgage insurance benefits. In November 2016, we reported on a case involving False Claims Act violations and loans backed by HUD's Federal Housing Administration (FHA) in which a portion of the settlement was paid to the company that filed a complaint in regard to the False Claims Act

³³Under the Federal Land Policy and Management Act of 1976, 50 percent or \$10 million, whichever is greater, of fees collected in a year for grazing on BLM lands managed under the Taylor Grazing Act and the Act of August 28, 1937, and on Forest Service land in the 16 western states, are to be credited to a special fund receipt account in the Treasury for range rehabilitation, protection, and improvements. In addition, under the Taylor Grazing Act, the Act of August 28, 1937, and the Bankhead-Jones Farm Tenant Act, BLM also distributes a portion of grazing fee collections to states and the Treasury.

³⁴GAO, *Livestock Grazing: Federal Expenditures and Receipts Vary, Depending on the Agency and the Purpose of the Fee Charged*, GAO-05-869 (Washington, D.C.: Sept. 30, 2005).

on behalf of the government.³⁵ The other FHA-related settlement proceeds were divided among, and deposited to, the Mutual Mortgage Insurance Fund, the Treasury as miscellaneous receipts, and DOJ's Three Percent Fund.

- *DOJ Drug Enforcement Administration (DEA) Diversion Control Fees:* The first \$15 million of fees collected each year from DEA registrants such as manufacturers, distributors, dispensers, importers, and exporters of controlled substances (such as narcotics and stimulants) and certain listed chemicals (such as ephedrine) is deposited to the Treasury as miscellaneous receipts. As we reported in February 2015, fees collected beyond \$15 million are available to the agency and obligated to recover the full costs of DEA's diversion control program.³⁶
- *DOJ Three Percent Fund Penalties:* Most civil penalties resulting from DOJ litigation are eligible to be assessed up to a 3 percent fee disbursed to DOJ's Three Percent Fund—which is primarily used to offset DOJ expenses related to civil debt collection.³⁷ The remainder of the civil penalty amount collected may be deposited to the Treasury as miscellaneous receipts or to another account. For example, in February 2015, we reported on a civil settlement involving fraud against the U.S. Postal Service. Of the \$13 million that was awarded to the U.S. Postal Service, DOJ deposited \$390,000 into the Three Percent Fund.³⁸

Chairmen Meadows and Jordan, Ranking Members Connolly and Cartwright, and Members of the Subcommittees, this concludes our

³⁵GAO, *Financial Institutions: Penalty and Settlement Payments for Mortgage-Related Violations in Selected Cases*, GAO-17-11R (Washington, D.C.: Nov. 10, 2016). In accordance with the *qui tam* provisions of the False Claims Act, a person or company that files suit for violations of the False Claims Act on behalf of the government is entitled to receive between 15 percent and 25 percent of the amount recovered by the government through the *qui tam* action. See 31 U.S.C. § 3730(d).

³⁶GAO-15-48.

³⁷See Pub. L. No. 107-273, § 11013, 116 Stat. 1758, 1823 (2002) (codified at 28 U.S.C. § 527 note). The Three Percent Fund is available for expenses related to processing and tracking civil and criminal debt collection litigation. Thereafter, it is available for financial systems and debt collection-related personnel, administrative, and litigation expenses. Available amounts are determined by calculating 3 percent of eligible amounts collected.

³⁸GAO-15-48.

prepared statement. We would be pleased to respond to any questions you may have at this time.

**GAO Contact and
Staff
Acknowledgments**

If you or your staff members have any questions about this testimony, please contact Heather Krause, Acting Director, Strategic Issues at (202) 512-6806 or krauseh@gao.gov or Edda Emmanuelli Perez, Managing Associate General Counsel, Office of General Counsel at (202) 512-2853 or EmmanuelliPerezE@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this testimony. GAO staff who made key contributions to this testimony are Susan J. Irving, Director; Julia Matta, Assistant General Counsel for Appropriations Law; Susan E. Murphy, Assistant Director; Laurel Plume, Analyst-in-Charge; and Amanda Postiglione, Senior Attorney. Allison Abrams, Dawn Bidne, Elizabeth Erdmann, Chris Falcone, Valerie Kasindi, and Jeremy Manion also contributed.

Mr. MEADOWS. Thank you, Ms. Krause. You said her name much better than I did, so I appreciate that.

Mr. Kosar, you are recognized for 5 minutes.

STATEMENT OF KEVIN KOSAR

Mr. KOSAR. I thank the chairman and ranking member and the rest of the committee and its staff for having me here. My name is Kevin Kosar. I'm a senior fellow at R Street Institute, a think tank here in Washington, D.C. And previous to that, I spent 11 years at the Congressional Research Service.

In my current position, I co-direct the Legislative Branch Capacity Working Group, a nonpartisan gathering of scholars and congressional experts who aim, as we like to put it, to make Congress great again. We meet each month here on the Hill to discuss aspects of congressional capacity, produce research on it, and we do all this in the hopes that Congress will empower itself to carry out its constitutional duties and do what the public expects of it.

So I'm obviously delighted to be here today, because the power of the purse is a fundamental legislative authority. It's a power that aims to limit executive power, encourage agency accountability to elected officials, and to curb corruption. And it is a power, unfortunately, that Congress has delegated away, in many instances.

I was asked to testify on the subject of Federal agencies and their self-funding activities, and it's a large and obviously complex topic, to say the least. The President's budget reports the government collected \$516 billion from the public this past year in the form of fees, user charges, and the like, which is a significant portion of the government's total revenues.

Now, the principle that the collection expenditure of the funds should flow through Congress is longstanding. It is in our Constitution. All authority for collecting moneys from the public and expending it are explicated in Article I, which established the legislative branch. One will find no authorities over spending or collecting money in Article II. Instead, the President is to ensure that the executive branch take care that the law be faithfully executed.

The principle of congressional control over spending is also expressed in Miscellaneous Receipts Act, first enacted in 1849. It obliged executive agents who collect funds from the public to promptly deposit the moneys in the Treasury, whereafter Congress may reappropriate the funds or not and also may direct to what the funds will be appropriated.

While the principle is age-old and clear, congressional practice has frequently veered from it. As I note in my written testimony, the very first Congress passed a law that allowed customs officers and collectors in our young Nation's ports to pay themselves from the moneys they collected on the ships that arrived at the ports.

Over the past 200-plus years, Congress repeatedly has enacted exceptions to the principle that all funds should flow into the Treasury, and the rationales have been many and varied. Here are just a few of them:

One rationale is that allowing the agency to expend some portion of its fees is logistically more sensible and that it creates incentives for higher productivity. Such was the case with the aforementioned 1789 customs act. Customs officials were actually compensated

based on the number of ships they inspected, and it was at a rate that was written into the law.

In the second instance, Congress' rationale has been that an agency should be a self-funding commercial enterprise and its activities should not be borne by the taxpayers as a whole. And, therefore, if it's to operate in a financially self-sustaining manner, it needs to have broad discretion over the spending of its receipts and immediate access to their use. We see this with the Postal Service.

A third rationale one finds is a political one. And this one is much more complicated, in that we often will have a majority in Congress who wants to insulate agency spending from congressional influence by the minority because the minority may disagree with what the agency is going to do with the spending.

The Consumer Financial Protection Bureau may well be an example of this line of thinking, wherein it is able to derive revenues through the Federal Reserve, but then it also has this fund, through which it can use these moneys for very, very broad purposes put in the statute. It is largely insulated, therefore, from appropriations.

Now, assuredly, these aren't all the reasons Congress has created exceptions to the principle but just a few.

To anyone but experts in this room and appropriators, the government's practices for collecting funds from the public are bewildering, but I think the basic takeaway is fairly obvious: The progressive delegating away of the power of the purse, by definition, diminishes legislative authority. By how much I am not sure, and I think that would be something that would be interesting to discuss. It seems a difficult thing to quantify.

It is heartening, therefore, to see Congress discussing this topic and discussing H.R. 5499. And I'm hopeful that fruits of these discussions are that Congress can reclaim some of its powers of the purse.

Thank you.

[Prepared statement of Mr. Kosar follows:]



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Nov. 29, 2016

To: House Oversight and Government Reform, Subcommittee on Government Operations and Healthcare, Benefits, and Administrative Rules

From: Kevin R. Kosar, Director of the Governance Project, R Street Institute

Re: Written testimony concerning the agencies' expenditures of fees and H.R. 5499 for the hearing, "Restoring the Power of the Purse," Dec. 1, 2016

I thank the subcommittee for inviting me to testify on the subject of federal agencies and their self-funding activities.

As the committee may know, I co-direct the Legislative Branch Capacity Working Group, a nonpartisan gathering of scholars and congressional staff that aims to "make Congress great again."¹ We meet each month here on the Hill to discuss aspects of congressional capacity, and commission and produce research on the subject.²

This hearing strikes me as particularly important because it considers a fundamental and potent power of Congress: the power of the purse. The president's budget reports the government collected \$516 billion from the public.³

We also will discuss today an important piece of legislation, H.R. 5499, the Agency Accountability Act of 2016. This legislation aims to reassert congressional authority over a greater portion of federal spending by requiring agencies—with two exceptions—to turn over fees, fines, penalties and settlement proceeds to the U.S. Treasury, allowing Congress to choose whether to re-appropriate them.⁴

¹ The group is co-directed by Lee Drutman of New America. Details are at <http://www.LegBranch.com>.

² E.g., "How to Strengthen Congress," *National Affairs*, fall 2015.

<http://www.nationalaffairs.com/publications/detail/how-to-strengthen-congress>

³ Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2017: Analytical Perspectives*, p. 211. Table included on the final page of this testimony.

https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/ap_13_offsetting.pdf

⁴ H.R. 5499, 114th Congress. <https://www.congress.gov/bills/114th-congress/house-bill/5499>

2 | Kosar testimony on restoring the power of the purse

Congress and the Power of the Purse

The authority to raise revenues and to direct their expenditure was assigned to Congress by the Founders.

Article I, section 8 and section 9, respectively, state:

“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”

“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”

Among Article II’s explication of the powers of the president and the executive branch generally, one will find no constitutional provision permitting the raising of revenues.

None of this was accidental. As the House of Representatives’ Office of the Historian has noted, the Founders clearly wanted to

“ensure that the executive would not spend money without congressional authorization ... The framers were unanimous that Congress, as the representatives of the people, should be in control of public funds—not the President or executive branch agencies. This strongly-held belief was rooted in the framers’ experiences with England, where the king had wide latitude over spending once the money had been raised.”⁵

The power of the purse, then, is a matter fundamental to the nature of our democratic republic. Congress is the first branch. Thus, the Constitution empowers Congress alone to impose taxes, collect duties and impost and to impose fees, as well as to direct if and how these funds will be spent by the executive branch. Individuals and businesses may be compelled by government to pay only by consequence of a law. To ensure that law does not offend the public, the Constitution requires revenue-raising bills to originate in its most democratic body: the House of Representatives.

⁵ “Power of the Purse,” undated. <http://history.house.gov/Institution/Origins-Development/Power-of-the-Purse/>

This principle of Congress as the keeper of the purse⁶ was embodied in the Miscellaneous Receipts Act,⁷ which was first enacted in 1849. The statute directs a federal employee in receipt of “public money” to “deposit the money without delay in the Treasury or with a depository designated by the Secretary of the Treasury under law.” The Government Accountability Office (GAO) explains:

“The term ‘miscellaneous receipts’ does not refer to any single account in the Treasury. Rather, it refers to a number of receipt accounts under the heading ‘General Fund.’ ... Once money is deposited into a ‘miscellaneous receipts’ account, it takes an appropriation to get it out.”⁸

Law professor Andy Spalding provides an instructive example:

“Say the [Department of Justice] settles a financial fraud case for \$100 million. Someone over in the agency feels that some of this money should be spent on providing educational programs for the public on how to detect financial fraud. So he deposits \$90 million in the U.S. Treasury, and gives the remaining \$10 million to a local community organization. Yes, this would violate the MRA. Why? Because once that money is placed in the federal government’s hands, it’s Congress’ to spend. The statute makes this unmistakably clear: if the government ‘receives’ the money, it’s to go to the Treasury and allocated as Congress sees fit. For an executive agency to receive money and then turn around and spend it would be to usurp Congress’ power of the purse. It violates the separation of powers. It violates the MRA.”⁹

Practice vs. Principle

The principle is indisputable: Congress must appropriate and direct the expenditure of public funds. Funds collected must go to the U.S Treasury, and Congress may re-appropriate them subsequently. Practice, however, has often been different.

⁶ The District of Columbia Circuit Court has written the MRA “derives from and safeguards a principle fundamental to our constitutional structure, the separation-of-powers precept embedded in the Appropriations Clause.” *Scheduled Airlines Traffic Offices v. Department of Defense*, 87 F.3d 1356, 1361 (D.C. Cir. 1996). <http://openjurist.org/87/f3d/1356/scheduled-airlines-traffic-offices-inc-v-department-of-defense>

⁷ 9 Stat. 398 (1849); 31 U.S.C. 3302(b). <https://www.law.cornell.edu/uscode/text/31/3302#>

⁸ Government Accountability Office, “Principles of Federal Appropriations Law,” 3rd ed., vol. 2, pp. 6-167 - 6-168.

⁹ Andy Spalding, “The Much Misunderstood Miscellaneous Receipts Act (part 1),” *The FCPA Blog*, Sept. 29, 2014. <http://www.fcpcablog.com/blog/2014/9/29/the-much-misunderstood-miscellaneous-receipts-act-part-1.html>

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During the very first Congress, a law was enacted to raise revenues through customs duties and tonnage.¹⁰ The federal “collectors, naval officials, and surveyors” who worked in the ports were paid out of fees they collected from vessels they examined.¹¹ In part, this arrangement was driven by the realities of the day: appropriating tax dollars upfront to pay for port operations and having all fees collected returned to the Treasury was burdensome and logistically difficult.¹² The arrangement also aimed to incentivize work. Federally commissioned port employees were compensated on the basis of the quantity of work they completed.¹³

“That there shall be allowed and paid to the collectors, naval officers and surveyors, to be appointed pursuant to this act, the fees and per centage following, that is to say: To each collector, for every entrance of any ship or vessel of one hundred tons burthen or upwards, two dollars and a half; for every clearance of any ship or vessel of one hundred tons burthen and upwards, two dollars and a half; for every entrance of any ship or vessel under the burthen of one hundred tons, one dollar and a half...”

Over the ensuing two centuries, Congress enacted statutes *ad hoc* that authorized agencies to hold and expend revenues they collected in the form of fees, penalties and duties. For example, a 1902 statute authorized the proceeds from the sale of public lands to be placed in a special Treasury fund, which could then be drawn upon by the secretary of the Interior to spend on irrigation projects of his choosing.¹⁴ Congress also established various self-funding governmental entities and enterprises, such as government corporations.¹⁵ Entities that were designed to be self-funding by selling goods and services, such as the U.S. Postal Service, were freed from many government operational rules.¹⁶ Sometimes they were given broad discretion to

¹⁰ An Act to regulate the collection of the duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States, July 31, 1789.
http://www.constitution.org/uslaw/sal/001_statutes_at_large.pdf

¹¹ On licit and illicit augmentations to agency appropriations, see Government Accountability Office, “Principles of Federal Appropriations Law,” 3rd ed., vol. 2, pp. 6-166 et seq.
<http://www.gao.gov/special.pubs/d06382sp.pdf>

¹² The young nation was broke, and it was not at all obvious how many ships would land each year.

¹³ In these days before income taxes, customs fees comprised a substantial portion of federal revenues.

¹⁴ An Act Appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands, June 17, 1902.
http://www.constitution.org/uslaw/sal/032_statutes_at_large.pdf

¹⁵ Ronald C. Moe, “Managing the Public’s Business: Federal Government Corporations,” U.S. Congress, U.S. Senate, Committee on Governmental Affairs, S. Prt. 104-18, April 1995.
http://www.mindserpent.com/American_History/books/Business/govt_bus.html

¹⁶ Government Accountability Office, “Government Corporations: Profiles of Existing Government Corporations,” GAO/GGD-96-14, December 1995. <https://www.gpo.gov/fdsys/pkg/GAOREPORTS-GGD-96-14/pdf/GAOREPORTS-GGD-96-14.pdf> A list of existing government corporations may be found in Kevin R. Kosar, “Federal Government Corporations: An Overview,” Congressional Research Service, RL30365, Jan. 7, 2009.
http://www.kevinrkosar.com/RL30365_Kosar_Federal_Government_Corporations_An_Overview_01-07-09.pdf

spend their revenues, the rationale being that they needed to upgrade their operations regularly so as to ensure prompt and high-quality service for customers.

As government grew and became more complex, so too did its policies for the collection of fees, settlements and the like.

Congress made a conceptual and legal differentiation between the types of funds agencies collected, which carried ramifications for how said funds were treated in the budget and utilized by agencies.

“Receipts... are classified into the following major categories: (1) budget receipts and (2) offsetting collections... Budget receipts are collections from the public that result from the exercise of the Government's sovereign or governmental powers, excluding receipts offset against outlays. These collections, also called governmental receipts, consist mainly of tax receipts (including social insurance taxes), receipts from court fines, certain licenses, and deposits of earnings by the Federal Reserve System. Refunds of receipts are treated as deductions from gross receipts.

“Offsetting collections are from other Government accounts or the public that are of a business-type or market-oriented nature. They are classified into two major categories: (1) offsetting collections credited to appropriations or fund accounts, and (2) offsetting receipts (i.e., amounts deposited in receipt accounts). Collections credited to appropriation or fund accounts normally can be used without appropriation action by Congress. These occur in two instances: (1) when authorized by law, amounts collected for materials or services are treated as reimbursements to appropriations and (2) in the three types of revolving funds (public enterprise, intra governmental, and trust); collections are netted against spending, and outlays are reported as the net amount. Offsetting receipts in receipt accounts cannot be used without being appropriated. They are subdivided into two categories: (1) proprietary receipts - these collections are from the public and they are offset against outlays by agency and by function, and (2) intra governmental funds - these are payments into receipt accounts from Governmental appropriation or fund accounts.”¹⁷

What agencies could and could not do with fees became very confusing. GAO reported in the late 1990s:

“The 27 fee-reliant agencies in our review varied in how their user fees were classified, what kind of account they were deposited into, the legislative controls on the amount or

¹⁷ U.S. Treasury, “Final Monthly Statement Treasury Statement,” October 2016, p. 35.
<https://www.fiscal.treasury.gov/fsreports/rpt/mthTreasStmnt/mts0916.pdf>

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use of these fees, and how they were treated under BEA. As a result, user fees for similar programs were often treated quite differently in the federal budget process. For example, some agricultural inspection fees were netted against their accounts' budget authority and outlays, which reduced spending counted against BEA discretionary spending limits. Other agricultural fees were appropriated as new budget authority and were counted as discretionary spending. While these fees offset spending, they do so at the department and subfunction levels. In this case, the offset can be used to provide room under the spending caps elsewhere and not necessarily for the program generating the fee."¹⁸

Annual appropriations acts, meanwhile, often include language limiting how agencies may use fees. The FY2016 Consolidated Appropriations Act carried various provisions on fees and collections, including these two:

Department of Justice

*"For expenses necessary for the enforcement of antitrust and kindred laws, \$164,977,000, to remain available until expended: Provided, That notwithstanding any other provision of law, fees collected for premerger notification filings under the Hart-Scott Rodino Antitrust Improvements Act of 1976 (15 U.S.C. 18a), regardless of the year of collection (and estimated to be \$124,000,000 in fiscal year 2016), shall be retained and used for necessary expenses in this appropriation, and shall remain available until expended: Provided further, That the sum herein appropriated from the general fund shall be reduced as such offsetting collections are received during fiscal year 2016, so as to result in a final fiscal year 2016 appropriation from the general fund estimated at \$40,977,000."*¹⁹

Nuclear Regulatory Commission

*"That revenues from licensing fees, inspection services, and other services and collections estimated at \$872,864,000 in fiscal year 2016 shall be retained and used for necessary salaries and expenses in this account, notwithstanding 31 U.S.C. 3302, and shall remain available until expended: Provided further, That the sum herein appropriated shall be reduced by the amount of revenues received during fiscal year 2016 so as to result in a final fiscal year 2016 appropriation estimated at not more than \$117,136,000."*²⁰

¹⁸ Government Accountability Office, "Federal User Fees: Budgetary Treatment, Status, and Emerging Management Issues," GAO/AIMD-98-11, December 1997, p 12. <http://www.gao.gov/assets/230/225030.pdf>

¹⁹ Consolidated Appropriations Act 2016, 129 Stat 2298, Dec. 18, 2015. <https://www.congress.gov/114/plaws/publ113/PLAW-114publ113.pdf>

²⁰ Consolidated Appropriations Act 2016, 129 Stat 2421, Dec. 18, 2015. <https://www.congress.gov/114/plaws/publ113/PLAW-114publ113.pdf>

Conclusion: What Next?

Clearly, in the 21st century, the budgetary and appropriations treatment of fees, fines, penalties and settlements often deviates from the simple principle outlined above. Indeed, the situation is sufficiently complex that it is difficult even to generalize as to how much discretion agencies have to spend these collections and receipts.²¹

Congress should expand its authority to direct the usage of funds collected by agencies through the annual appropriations process. This would increase its power over the purse.

As it proceeds, I would suggest that legislators should first get help mapping the scope of the problem. It simply is not clear how many agencies collect monies from the public and businesses, or what discretion they have over them. The president's budget has chapters on governmental receipts and offsetting collections and offsetting receipts, but it aggregates the funds received into broad categories.²² What is needed is more fine-grained data that is then mapped against statutory provisions (in authorizations and appropriations) that set the terms for use of the monies collected. Both GAO and the Congressional Research Service's executive and legislative budget-process experts could help in this endeavor. Once this sort of analysis is available, Congress could better consider how to ensure greater consistency across agencies.

In closing, I reiterate that more annualized direction from Congress on how agency-collected monies may be spent is desirable. However, some agencies, particularly those that are self-funding, likely deserve greater discretion—so long as they have proven historically responsive to congressional oversight.²³

I thank the subcommittee for inviting me to testify and would be happy to answer any questions, today or subsequently.

²¹ And to make matters even more confounding, some of the funds collected should be categorized as governmental receipts but are treated as offsetting collections and receipts. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2017: Analytical Perspectives*, p. 211.

²² Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2017: Analytical Perspectives*, pp. 153 and 211.

https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/ap_13_offsetting.pdf

²³ As an example, the National Academy of Public Administration reported this particular downside of excessive congressional direction. "The inherent nature of the appropriations process prevents some fees from reaching USPTO in unanticipated high-volume years because USPTO's budget is set months prior to the start of the fiscal year. Simulations using USPTO's patent resource model, which the Academy Panel independently evaluated before using, show that if USPTO had been given access to these fees and applied all or most of them to patent staffing, it would have had the ability to consistently hire staff" and respond more quickly to filings. "U.S. Patent and Trademark Office: Transforming to Meet the Challenges of the 21st Century," August 2005, p. xx. http://www.napawash.org/wp-content/uploads/2005/05_06.pdf

Table 13-1. OFFSETTING COLLECTIONS AND OFFSETTING RECEIPTS FROM THE PUBLIC
(In billions of dollars)

	Actual 2015	Estimate	
		2016	2017
Offsetting collections (credited to expenditure accounts):			
User charges:			
Postal Service stamps and other USPS fees (off-budget)	73.5	74.8	75.3
Defense Commissary Agency	5.5	6.0	5.7
Employee contributions for employees and retired employees health benefits funds	13.9	15.1	16.1
Sale of energy:			
Tennessee Valley Authority	43.2	40.8	41.5
Donnerville Power Administration	3.3	4.0	4.2
All other user charges	68.7	65.2	71.8
Subtotal, user charges	208.1	206.0	214.6
Other collections credited to expenditure accounts:			
Commodity Credit Corporation fund	5.5	6.8	7.0
Supplemental Security Income (collections from the States)	2.6	2.7	2.7
Other collections	17.6	8.2	7.5
Subtotal, other collections	25.7	17.7	17.2
Subtotal, offsetting collections	233.9	223.7	231.8
Offsetting receipts (deposited in receipt accounts):			
User charges:			
Medicare premiums	67.1	72.1	79.1
Spectrum auction, relocation, and licensee	30.1	12.9	13.9
Outer Continental Shelf rents, bonuses, and royalties	3.5	2.8	3.2
All other user charges	34.2	35.7	40.1
Subtotal, user charges deposited in receipt accounts	134.9	123.5	136.3
Other collections deposited in receipt accounts:			
Military assistance program sales	32.4	36.0	37.4
Interest received from credit financing accounts	38.7	60.0	65.3
Proceeds, GSE equity related transactions	20.7	16.0	18.7
All other collections deposited in receipt accounts	55.5	51.1	44.4
Subtotal, other collections deposited in receipt accounts	147.3	163.1	165.8
Subtotal, offsetting receipts	282.2	286.6	302.2
Total, offsetting collections and offsetting receipts from the public	516.0	510.3	534.0
Total, offsetting collections and offsetting receipts excluding off-budget	442.4	435.4	458.6
ADDENDUM:			
User charges that are offsetting collections and offsetting receipts ¹	343.0	329.5	350.9
Other offsetting collections and offsetting receipts from the public	173.0	180.8	183.1

¹ Excludes user charges that are classified on the receipts side of the budget. For total user charges, see Table 13-3.

Mr. MEADOWS. Thank you, Mr. Kosar.
Mr. Hollister, you're recognized for 5 minutes.

STATEMENT OF HUDSON HOLLISTER

Mr. HOLLISTER. Chairman Meadows, Ranking Member Connolly, Chairman Jordan, Ranking Member Boyle, thank you for inviting me to testify today.

In 1802, President Thomas Jefferson wrote to Albert Gallatin, the fourth Secretary of the Treasury, supporting Gallatin's plan to, quote, "simplify our system of finance and bring it within the comprehension of every Member of Congress." President Jefferson believed that Federal spending information had become so complex and so fragmented that only the experts could understand it.

But Jefferson had a solution. By expressing Federal spending as, quote, "one consolidated mass" he wrote, "We might hope to see the finances of the Union as clear and intelligible as a merchant's books so that every Member of Congress and every man of any mind in the Union should be able to comprehend them and consequently to control them."

Two hundred and fourteen years later, we face the same problem, and we need the same solution. The Federal Government is the largest and most complex organization in human history, but by expressing all Federal spending information as one consolidated data set, we can use commercially available software to make it, quote, "clear and intelligible" so that Congress and the people can comprehend it and control it.

The Federal spending information is complex and fragmented. Hundreds of agencies separately report their receipts and their account balances to Treasury, their budget information to the White House OMB, and their contracting details to the GSA. But 2 years ago, this committee unanimously approved the Digital Accountability and Transparency Act, or DATA Act, which directs Treasury and OMB to create a single government-wide data structure for all Federal spending information.

In May 2017, this May, when every agency begins to report standardized spending information using that structure, they will create a single electronic picture of all spending. In a few minutes, I'm going to show you what that picture should look like.

I know this committee is particularly interested in non-appropriated receipts—fines, fees, penalties, settlements that agencies receive outside the appropriations process. So far, the DATA Act structure focuses on money going out, expenditures, not on money coming in, receipts. So that single picture, the single electronic picture, won't be able to provide full detail on how fines, fees, penalties, and settlements are spent.

However, this information already exists. It is already being reported to Treasury. It is maintained in the Central Accounting Reporting System at Treasury. And it could be reflected in the DATA Act structure. Congress can direct Treasury and OMB to expand the DATA Act to accommodate that information, and, in my view, Congress should.

When I served as counsel to this committee, I worked on the first version of what became the DATA Act. I resigned from the staff in 2012 in order to start the Data Coalition and helped then-Chair-

man Issa and Ranking Member Cummings to get the DATA Act passed.

The Data Coalition is a trade association of nearly 40 companies whose commercially available software can inform decisions, illuminate fraud, and automate compliance—but only if we have consolidated and standardized data to work with. Starting in May 2017, if all goes well, commercially available software will use that single data set to portray an electronic picture of Federal spending.

And I want to ask if we could have slide 7 displayed for just a minute. This will be very familiar to Chairman Meadows, who has demonstrated this himself.

The DATA Act should allow us to navigate from the entire government all the way to specific agencies, specific appropriations. This picture you see is interactive. If you click on one of the agencies or you click on one of the items there, you can go down all the way to individual items. You can navigate from the entire HHS to a particular contract. This level of interactivity will be possible across the entire executive branch.

Now, the reliability of this picture is going to depend on how well agencies comply with the DATA Act starting in May 2017. They have to report high-quality data.

As I mentioned, even after the DATA Act, there will be some limitations. The data structure that Treasury and OMB have created focuses on expenditures, not receipts. That means we won't easily be able to differentiate between appropriated and nonappropriated funding sources. It is possible for Congress to amend the DATA Act to direct Treasury and OMB to expand the data structure so that it does include receipts.

I asked our Data Coalition members to come up with a prototype visualization that shows what an expanded electronic picture of Federal spending might look like. And I would like to ask for slide 14 to be displayed, please.

Here we see a navigation that itemizes the Federal Government's nonappropriated receipts, and it allows us to zoom in on a particular agency, programs within that agency. This information comes from the information Treasury is already collecting and maintaining, but if this information's incorporated into the DATA Act, this means we can see the connection between the receipts and the outlays. We can follow this all the way to the contracts and the expenditures.

The coalition has prepared recommendations for the committee on how to amend the DATA Act to expand the data structure and ensure that receipts and payments are brought into the picture.

By tracking all the complexity of Federal spending using a single government-wide data structure and by publishing all that information as one data set, we can realize President Jefferson's vision of, quote, "one consolidated mass," quote, "clear and intelligible." This committee began that work by passing the DATA Act. By holding the executive branch accountable to follow the law and by expanding that law where necessary, the committee can finish it.

Thank you.

[Prepared statement of Mr. Hollister follows:]

DATA COALITION

Committee on Oversight and Government Reform
Subcommittee on Government Operations
Subcommittee on Health Care, Benefits and Administrative Rules

United States House of Representatives
December 1, 2016

Testimony
Hudson Hollister
Executive Director, Data Coalition

Using the DATA Act to Restore the Power of the Purse

[Slide 1 - Introductory Slide]

Chairman Meadows, Ranking Member Connolly, Chairman Jordan, Ranking Member Norton:
thank you for inviting me to testify.

In April of 1802, President Thomas Jefferson wrote to Albert Gallatin,¹ the fourth Secretary of the Treasury, supporting Gallatin's plan to "simplify our system of finance, and bring it within the comprehension of every member of Congress." Jefferson believed that federal spending information had become so complex and so fragmented that only the experts could understand it.

Jefferson's solution to this problem was a "simplification in the form of accounts in the treasury department, and in the organization of it's [sic] officers, so as to bring every thing to a single center." By expressing federal spending as "one consolidated mass," he wrote, "we might hope to see the finances of the Union as clear and intelligible as a merchant's books, so that every member of Congress, and every man of any mind in the Union, should be able to comprehend them, and consequently, to control them."

Two hundred and fourteen years later, we face the same problem and we need the same solution. The federal government is the largest and the most complex organization in human history. But by expressing all federal spending as one consolidated data set, we can use

¹ <http://founders.archives.gov/documents/Jefferson/01-37-02-0132#TSJN-01-37-02-0132-kw-0001>

commercially-available software to make it “clear and intelligible,” so that Congress and the people can comprehend it, and control it.

Federal spending information is complex and fragmented. Agencies must report their receipts and account balances to Treasury, their budget information to the White House Office of Management and Budget, and their contracting details to the General Services Administration. This information is handled by thousands of incompatible software systems.

But two years ago this Committee unanimously approved, and President Obama signed, the reform necessary to express federal spending information as a single data set. The Digital Accountability and Transparency Act, or DATA Act, directs Treasury and OMB to create a single, government-wide data structure for all federal spending information.

The most important deadline is five months away. In May of 2017 every federal agency must begin to report spending information using the same data format, creating a single electronic picture of all spending. In the next few minutes I am going to show you what that picture is going to look like.

I know the Committee is particularly interested in fees, fines, penalties, and settlements that agencies receive outside the appropriations process. So far, the data structure that Treasury and OMB are using under the DATA Act focuses on expenditures, not on receipts, so our single electronic picture of all spending won't be able to provide full detail on how fees, fines, penalties, and settlements are spent.

But Congress can direct Treasury and OMB to expand the data structure. And Congress should.

When I served as counsel to this Committee, I worked on the first version of what became the DATA Act. I resigned from the staff in 2012 in order to start the Data Coalition and help then-Chairman Issa and Ranking Member Cummings get the DATA Act passed. The Data Coalition is a trade association of nearly 40 companies whose commercially-available software can inform decisions, illuminate fraud, and automate compliance - but only if we have a single data set to work with.

Earlier this year we established the Data Foundation, a nonprofit organization whose mission is to illuminate the benefits of open government data through research and education. For more on the DATA Act's history, goals, and potential, you can read the Data Foundation's first research paper, *The DATA Act: Vision & Value*,² co-published with MorganFranklin last July.

[Slide 2 - Life Cycle of Federal Spending Information]

² <http://www.datafoundation.org/data-act-vision-and-value-report/>

Federal spending information is not just fragmented across agencies, systems, and reporting requirements. It is also separated into stages. Here is the full life cycle of federal spending information.

Federal funds flow into receipt accounts. Some receipts are available for spending immediately. Other receipts are unavailable to be spent until Congress appropriates the funds.

In 2006, the Federal Funding Accountability and Transparency Act, or FFATA, required the executive branch to begin publishing a summary of each federal grant and contract on the USASpending.gov website. The light gray arrow shows the information that is published under FFATA.

The DATA Act - shown here with the dark gray arrow - requires the government to publish more of the life cycle and match appropriations to the grant and contract awards that are paid out of them. One of the most important expansions in transparency is not shown in this diagram: the DATA Act requires the publication of the direct spending that doesn't go out in the form of grants or contracts, like salaries and benefits.

By requiring Treasury and OMB to set up a single government-wide data structure for appropriations, grants, and contracts, the DATA Act gives us a single electronic picture of all that information - or, to use President Jefferson's phrase, "one consolidated mass" that allows Congress and the public to "comprehend ... and consequently, to control" spending.

The rest of my testimony has three parts. First, I will explain the information that is available to Congress and the public before the DATA Act comes into effect this May. Second, I will preview the single electronic picture of spending that will become available after agencies begin reporting appropriations, grants, and contracts using the standardized data structure. Third, I will show how even after the DATA Act, there will still be a need to expand the data structure to include more information for a more complete picture, and suggest how Congress might do that.

[Slide 3 - Federal Spending Information Before the DATA Act]

Before the DATA Act, federal spending is mostly available as static documents, not as searchable data.

[Slide 4 - Monthly Treasury Statement Example]

The Monthly Treasury Statement of Receipts and Outlays, a document published every month by the Bureau of the Fiscal Service, is the most complete breakdown of federal funds received and spent by the government.

The Monthly Treasury Statement summarizes all receipts, both those that are available to be spent immediately and those that cannot be spent until a Congressional appropriation. But

because it is a static document, there is no way to access more detail or follow a particular category of receipts to see what happened to it.

[Slide 5 - USASpending.gov]

Under the Federal Funding Accountability and Transparency Act of 2006, federal agencies must report a summary of every grant and a summary of every contract, and that information is published on the USASpending.gov portal. It is fully searchable and interactive.

However, because USASpending.gov is solely focused on grants and contracts, it does not give us the full picture of federal spending. It does not allow us to navigate back and forth between larger appropriations categories and specific grant and contract awards.

[Slide 6 - Federal Spending Information After the DATA Act]

Under the DATA Act, Treasury and OMB have created a government wide data structure that connects expenditure accounts to grants and contracts for the first time. Once all the information is expressed using this data structure, starting in May 2017, we will have a single, authoritative data set that shows all expenditures, broken down by account, by grant, and by contract.

Commercially available software will use this single data set to portray an electronic picture of federal spending. Several of our Data Coalition members are working on software that will provide agencies, and Congress, and the public with new ways to comprehend, and control spending.

[Slides 7-12 - Spending Visualizations]

Here we see a navigation from an overall appropriation category all the way to a particular contract. This level of interactivity will be possible across the whole executive branch.

This set of visualizations was created by Booz Allen Hamilton, but we expect other software companies will compete, once federal spending is publicly available as a single data set.

The reliability of this electronic picture of federal spending will depend on how well agencies comply with the DATA Act, starting in May 2017. They must report complete, timely, accurate, high-quality data that matches the data structure Treasury and OMB have created.

The DATA Act requires every inspector general to evaluate the data its agency reports. Last month, the inspectors general of most agencies published readiness reviews, and most came out positive, but some agencies are not ready. The Data Coalition has published a summary of

the readiness reviews.³ I understand this committee intends to conduct further oversight on agencies' DATA Act work.

[Back to Slide 6 - Federal Spending Information After the DATA Act]

Even after the DATA Act, some limitations will remain. First, the data structure that Treasury and OMB have created focuses on expenditures, not receipts. That means we won't easily be able to differentiate between appropriated and non-appropriated funding sources.

Second, the data structure does not go all the way down to the checkbook level, with details for each payment. That means we won't yet be able to navigate all the way from the whole federal government to see the date and amount of every payment the government makes. Many states, led by Ohio, are providing this level of transparency already. In fact, Ohio allows the public to view every payment, see which accounts and budget categories the money came from, and see the name and contact information of the state official who was responsible for that payment.

[Slide 13 - Federal Spending Information if the DATA Act is Amended]

Congress should amend the DATA Act to direct Treasury and OMB to expand their data structure. Here is what the life cycle of federal spending information would look like if the DATA Act covered both receipts at the beginning and payments at the end, as shown by the green arrow.

I asked our Data Coalition members to come up with a prototype visualization that shows what this expanded electronic picture of federal spending might look like.

[Slides 14-17 - Receipts Visualizations]

Here we see a navigation that itemizes the federal government's receipts between those that are unavailable, and require Congressional appropriation to be spent, and those that are available for spending immediately.

If the data structure is expanded as we are recommending, we will also be able to navigate all the way down to the payment level, just as is possible today in Ohio and other states.

[Slide 18 - Conclusion: Expand the Data Structure; Eliminate Duplicative Systems; End the DUNS Monopoly]

We have prepared recommendations for the Committee on how to amend the DATA Act to expand the data structure and ensure that receipts and payments are brought into the picture. Our legislative recommendations for the DATA Act are based on the Center for Open Data

³ <http://www.datacoalition.org/blog/>.

Enterprise's Transition Report,⁴ which explains how the next Presidential administration can work with Congress to use open data to deliver transparency, accountability, and efficiency across all government operations.

In addition to expanding the data structure to provide a more complete electronic picture of federal spending, we believe Congress should clarify how the DATA Act should streamline the federal government's reporting processes. Beginning in May 2017, agencies will be reporting their spending information spending twice - first the old-fashioned way, as static documents and through disconnected databases, using legacy systems like the Federal Procurement Data System (FPDS), and a second time as searchable, standardized data under the DATA Act.

Congress should eliminate this duplication as soon as possible. The DATA Act process, based on data instead of on documents, must become the only way that agencies report spending. Our legislative recommendations provide a foundation to accomplish this.

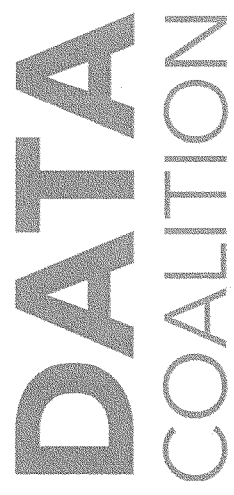
Finally, Congress must address the biggest obstacle to the public's access to spending information. The federal government uses an identification code called the DUNS Number to identify every grantee and contractor across all of its systems. The DUNS Number is proprietary. It is owned by Dun & Bradstreet, Inc., which is itself a contractor. Nobody can download federal grant or contract data without purchasing a license from Dun & Bradstreet. Taxpayers paid for this information to be compiled, and yet they cannot download or analyze it without paying again, every time.

Congress should end Dun & Bradstreet's monopoly by directing the government to adopt a nonproprietary, freely reusable identification code for grantees and contractors. Our legislative recommendations would phase out the DUNS Number and replace it with an identification code that everyone can freely download, such as the globally-adopted Legal Entity Identifier (LEI).

President Jefferson's 1802 letter to Secretary Gallatin complained that the government's financial position had taken on "the most artificial and mysterious form," "until the whole system was involved in impenetrable fog" and beyond the comprehension of Congress and the public. To anyone but a Treasury expert, the distinction between appropriated and non-appropriated receipts is indeed artificial and mysterious, and it allows the government to operate beyond Congress' comprehension and beyond public accountability.

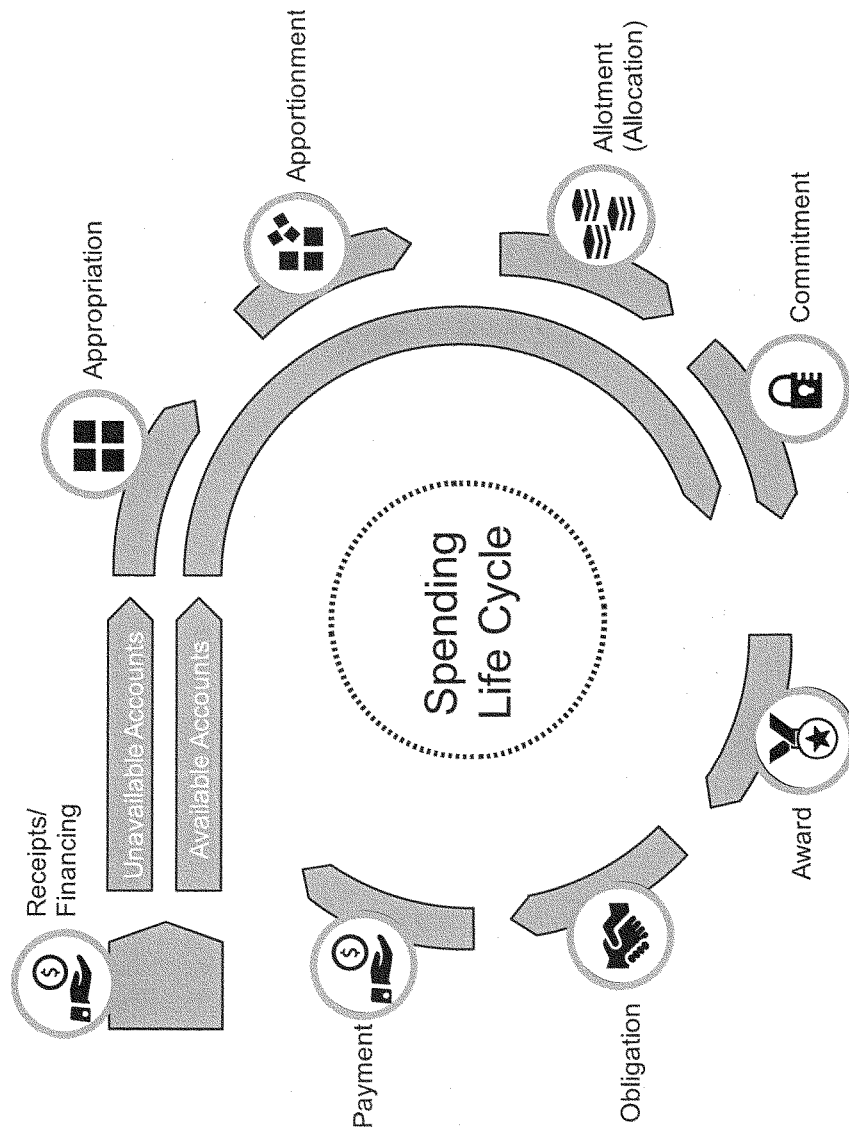
But by tracking all the complexity of federal spending using a single, government-wide data structure, and by publishing all that information as one data set, we can realize Jefferson's vision of "one consolidated mass," "clear and intelligible." This Committee began this work by passing the DATA Act. By holding the executive branch accountable to follow the law, and by expanding the law where necessary, this Committee can finish it. Thank you.

⁴ <http://opendataenterprise.org/transition-report.html>



Using the DATA Act to Restore the Power of the Purse

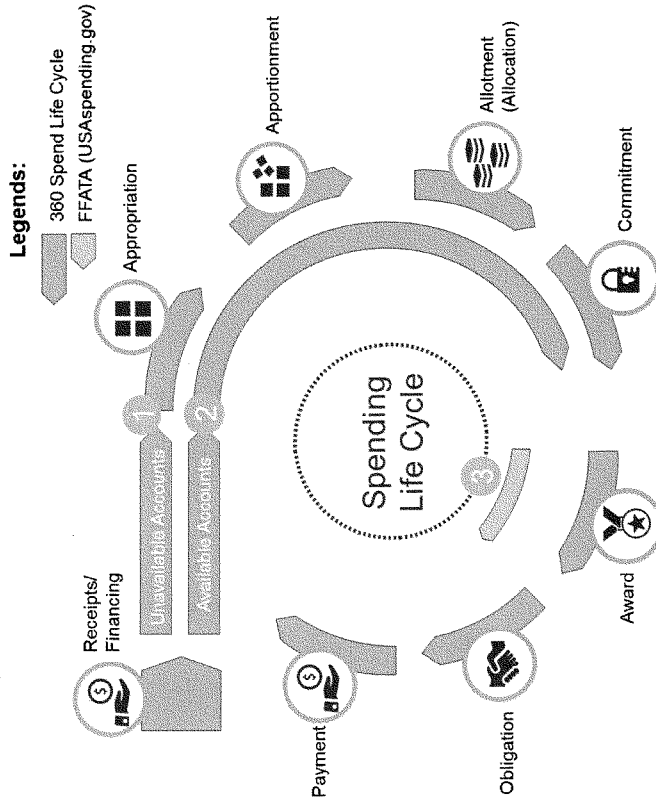
Hudson Hollister, Executive Director



Federal Spending Information Before the DATA Act

There is no platform that shows the whole picture of federal spending, from receipt all the way to outlay.

- 1 **Receipt of appropriated funds -** Monthly Treasury Statement of Receipts and Outlays provides a summary but there is no way to drill down.
- 2 **Receipt of non-appropriated funds -** Monthly Treasury Statement of Receipts and Outlays provides a summary but there is no way to drill down.
- 3 **Grants and Contracts -** Under FFATA, USASpending.gov provides basic information on every grant and every contract, but there is no way to see where the money came from.




Monthly Treasury Statement

Table 3. Summary of Receipts and Outlays of the U.S. Government, October 2015 and Other Periods
[in millions]

Classification	This Month	Current Fiscal Year to Date	Comparable Prior Period Year to Date	Budget Estimates Full Fiscal Year ¹
Budget Receipts				
Individual Income Taxes	109,220	109,220	106,661	1,540,274
Corporation Income Taxes	4,256	4,256	10,228	346,895
Social Insurance and Retirement Receipts:				
Employment and General Retirement (Off-Budget)	55,112	55,112	52,255	771,323
Employment and General Retirement (On-Budget)	19,270	19,270	18,139	240,458
Unemployment Insurance	2,156	2,156	3,187	54,980
Other Retirement	311	311	293	3,660
Excise Taxes	5,577	5,577	5,915	96,146
Estate and Gift Taxes	2,132	2,132	1,418	19,660
Customs Duties	3,435	3,435	3,485	36,332
Miscellaneous Receipts	9,577	9,577	11,138	138,741
Total Receipts	211,046	211,046	212,719	3,248,469
(On-Budget)	155,934	155,934	160,464	2,477,146
(Off-Budget)	55,112	55,112	52,255	771,323

USAspending.gov



USA

SPENDING.GOV

An official website of the U.S. Government

HOME

ABOUT

WHERE IS THE MONEY GOING

REFERENCES

DOWNLOAD CENTER

CONTACT US

Search Data by Keyword

Go

Enter Keyword

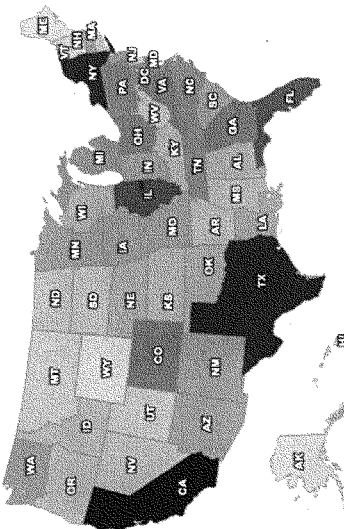
Advanced Data Search

WHAT IS USASPENDING.GOV?

USAspending.gov is the publicly accessible, searchable website mandated by the Federal Funding Accountability and Transparency Act of 2006 to give the American public access to information on how their tax dollars are spent. [Learn More...](#)

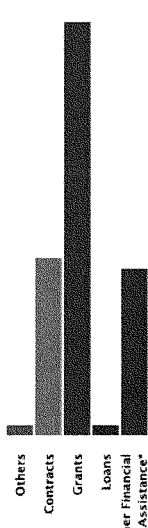
AWARDS BY STATE - FY 2017

Roll over map to see data. Click on state for more details



OVERVIEW OF AWARDS - FY 2017

The federal agencies distribute funding through federal contracts, grants, loans, and other financial assistance. See the [Overview of Awards by Fiscal Year](#) trend graph for spending by all Fiscal Years.



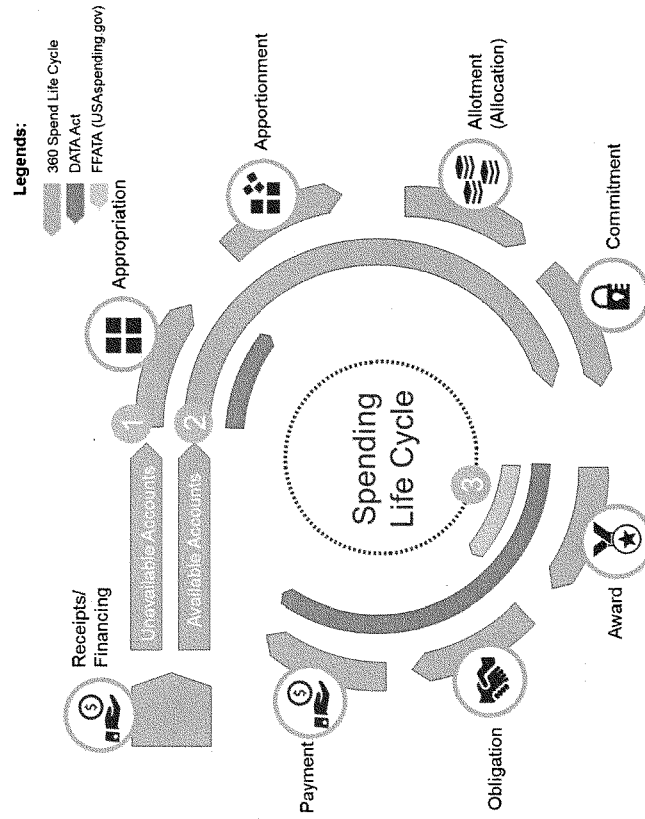
Award Type	Relative Spending (FY 2017)
Others	Low
Contracts	Medium-High
Grants	High
Loans	Low
Other Financial Assistance*	Medium

[*See explanation in Glossary](#)
[Text View of Overview of Awards](#)

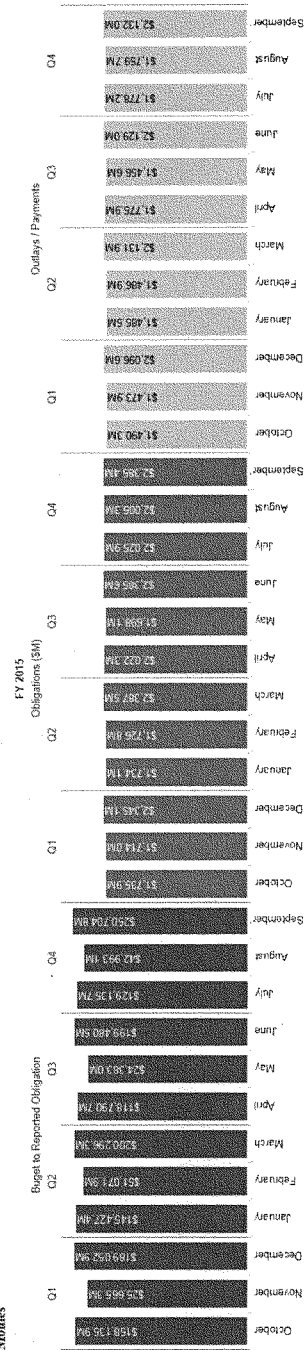
Federal Spending Information After the DATA Act

As agencies begin to report standardized data in May 2017, they will create a government-wide electronic picture of appropriations, awards, and payments.

- 1 **Receipt of appropriated funds -** We will be able to use the DATA Act's data structure to track each appropriations account.
- 2 **Receipt of non-appropriated funds -** Because the DATA Act's data structure covers expenditure accounts but not receipt accounts, the total amount of non-appropriated funds will be mixed with other budgetary resources.
- 3 **Grants and contracts -** Because the data structure connects expenditures with awards, we can flexibly navigate from expenditure accounts all the way through to the specific grant and contract spending that they fund. Powerful visualizations become possible.



360° Federal Spending

Agency
All

USDA Spending

USDA 360° Federal Spending

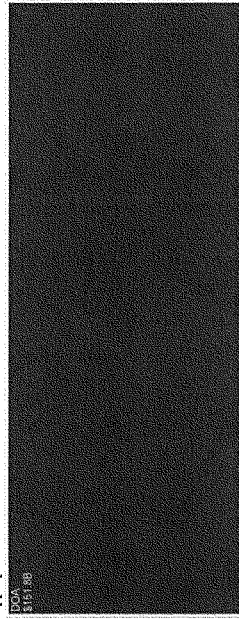
Agency
Department of Agriculture

Bureau
FA

States
All

Recipient County Name
All

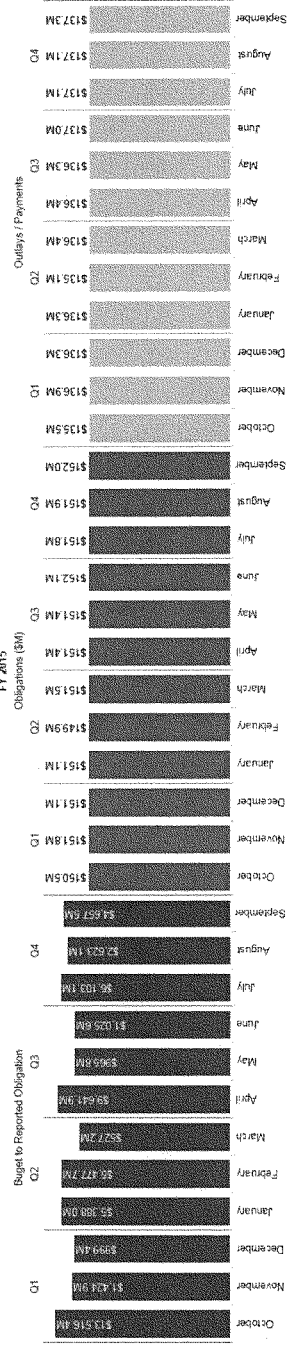
Appropriations



Allocations and Allotments for All



Monies



USDA Spending: Breakdown

USDA Appropriation Breakdown

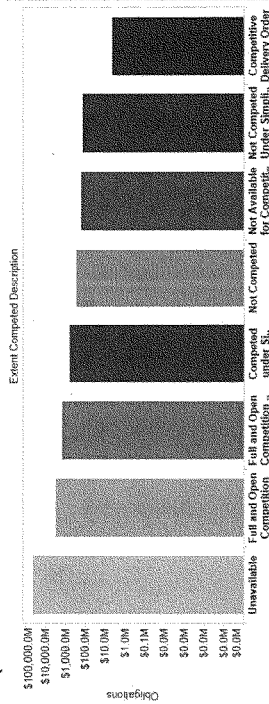
Bureau	Account Name	Section	Section List	Total Amount (in Thousands)
AI	AI	AI	AI	
Agency Department of Agriculture	Bureau Food and Nutrition Services	Account Name Child Nutrition Programs	LMO	
			4000	
			Disc: Budget authority, gross	\$42,004
			4011	
			Disc: Outlays from balances	\$4,094
			4020	
			Disc: Outlays, gross (total)	\$4,094
			4070	
			Disc: Budget authority, net	\$42,004
			4080	
			Disc: Outlays, net	\$4,094
			4090	
			Mand: Budget authority, gross	\$21,376,161
			4100	
			Mand: Outlays from new authority	\$9,711,164
			4101	
			Mand: Outlays, gross (total)	\$3,014,417
			4110	
			Mand: Outlays, gross (total)	\$11,725,641
			4123	
			Mand: Offsets, BA and OL: Collections, notified arcs	(\$65)
			4130	
			Mand: Offsets against gross BA and outlays (total)	
			4160	
			Mand: Budget authority, net	\$21,376,106
			4170	
			Mand: Outlays, net	\$11,725,587
			4180	
			Budget authority, net (disc. and mand.)	\$11,729,881
			4190	
			Outlays, net (disc. and mand.)	\$651,561
			1000	
			Unob Bal: Brought forward, Oct 1	\$0
			1020	
			Unob Bal: Adj to SOY bal brought forward, Oct 1	\$128,031
			1021	
			Unob Bal: Recov of prior year unpaid obligations	\$79,592
			1050	
			Unob Bal: Unobligated balance (total)	\$42,004
			1100	
			BA: Disc: Appropriation	\$42,004
			1160	
			BA: Disc: Appropriation (total)	\$12,905,746
			1200	
			BA: Mand: Appropriation	\$8,474,671
			1221	
			BA: Mand: Approps transferred from other accounts	(\$4,310)
			1230	
			BA: Mand: New/Unob bal of approps perm reduced	\$55
			1260	
			BA: Mand: Appropriation (total)	\$21,376,106
			1800	
			BA: Mand: Spending auth: Collected	\$55
			1850	
			BA: Mand: Spending auth: Total	\$55
			1900	
			Budget authority total (disc. and mand.)	\$21,418,165
			1910	
			Total budgetary resources (disc. and mand.)	\$22,197,757
			3000	
			Ob Bal: SOY Unpaid obs brought fwd, Oct 1	\$3,259,507
			3001	
			Ob Bal: SOY Adj to unpaid obs brought fwd Oct 1	\$0
			3010	
			Ob Bal: Obligations incurred: Unexpended accounts	\$11,760,887
			3020	
			Ob Bal: Outlays (gross)	(\$11,729,736)
			3040	
			Ob Bal: Recov, prior year unpaid obs, unexp accts	(\$128,031)
			3050	
			Ob Bal: EOY Unpaid obligations	\$3,162,428

USDA Contracts

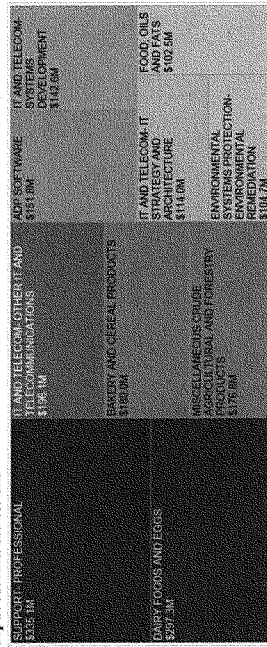
Contract Details

Congressional Agency Name Department of Agriculture	Bureau Name AI	Account Name AI	States AI	Recipient County Name AI
Type of Contract Pricing Type of Contract Pricing (group) Firm Fixed Price 61.33% Fixed Price with Economic Price Adjustment 19.71% Fixed Price with Incentive 9.61% Labor Hour 3.68% Labor Hour with Incentive 2.93% Time and Materials 0.48% Cost Plus Award Fee 0.32% Cost Plus Fixed Fee 0.17% Fixed Price Award Fee 0.11% Other Dependent (DD only) 0.07% Fixed Price Incentive 0.85% Cost Not Fee 0.02% Fixed Price Redetermination 0.90% Cost Sharing				
Contract Financing Contract Financing (group) Not Available Not Applicable Performance Based Financing FAR 52.232-16 Progress Payments Commercial Financing Percentage of Completion Progress Payments				
Obligations \$61,967.1M \$392.5M \$0.0M \$0.0M \$0.2M \$0.0M				
CO Business Size Selection Small Business 48.33% Other 51.66%				

Competition Information



Top 10 Products and Services



USDA Assistance Details

[illegible]

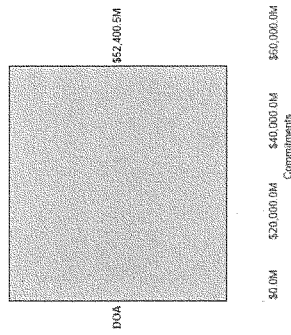
USDA Spending: Citizen View

USDA

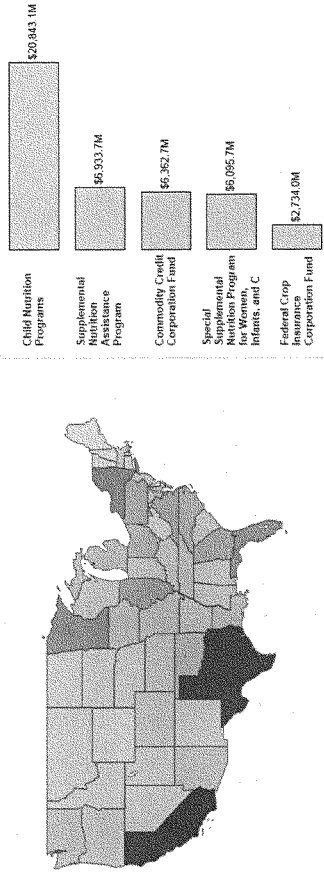
Choose Agency
Department of Agriculture

Choose Program(s)
All

Top 10 Agencies by Commitments



Top 5 Programs by Commitments



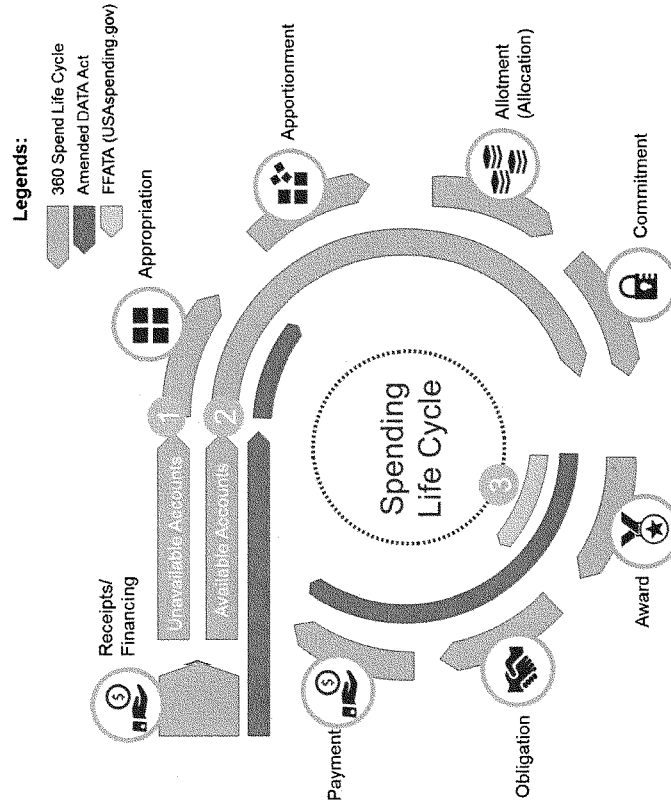
Top 25 Recipients by Recipient Category

Government	Commitments
TX DEPT OF AGRICULTURE	\$2,513.9M
CA Department of Education	\$2,299.4M
PR DEPARTMENT OF THE FAMILY	\$1,832.4M
CA DEPT OF HEALTH	\$1,655.3M
CA Dept of Social Services	\$863.1M
CA STATE DEPT OF EDUCATION	\$702.5M
NY DEPT OF HEALTH	\$693.8M
FL DEPT OF HEALTH	\$633.3M
NY DEPT OF EDUCATION	\$591.5M
IL STATE BOARD OF EDUCATION	\$168.8M
FL DEPT OF AGES & CONSERV	\$107.8M
TX DEPT OF EDUCATION	\$503.1M
PA DEPARTMENT OF HEALTH	\$503.1M
TX DEPARTMENT OF HEALTH SERVICES	\$503.2M
TX DEPT OF EDUCATION	\$425.5M
NY DEPT OF AGRICULTURE	\$424.7M
NY Office of Temporary and Disability Assistance	\$424.8M
LA DEPT OF PUBLIC INSTRUCTION	\$532.8M
AL STATE DEPT OF EDUCATION	\$352.4M
IL DEPT OF HUMAN SERVICES	\$423.6M

Federal Spending Information with Amended DATA Act

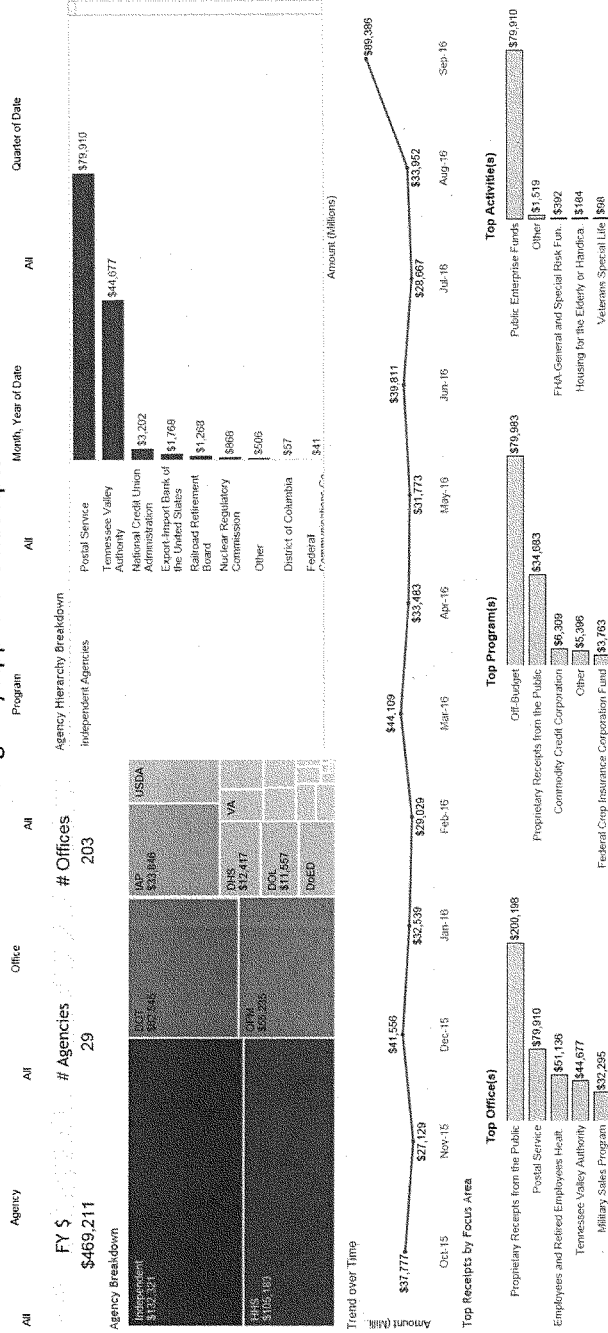
If the DATA Act's data structure is expanded to include receipt accounts, the electronic picture can show the full life cycle of federal spending.

- 1 **Receipt of appropriated funds -**
An expanded data structure could provide a dynamic view of appropriated funds.
- 2 **Receipt of non-appropriated funds -** If receipt accounts were part of the data structure, we could track the receipt of non-appropriated funds to the same degree of detail as appropriated.
- 3 **Grants and contracts –** Grants and contracts could be matched to the receipts from which they are funded.

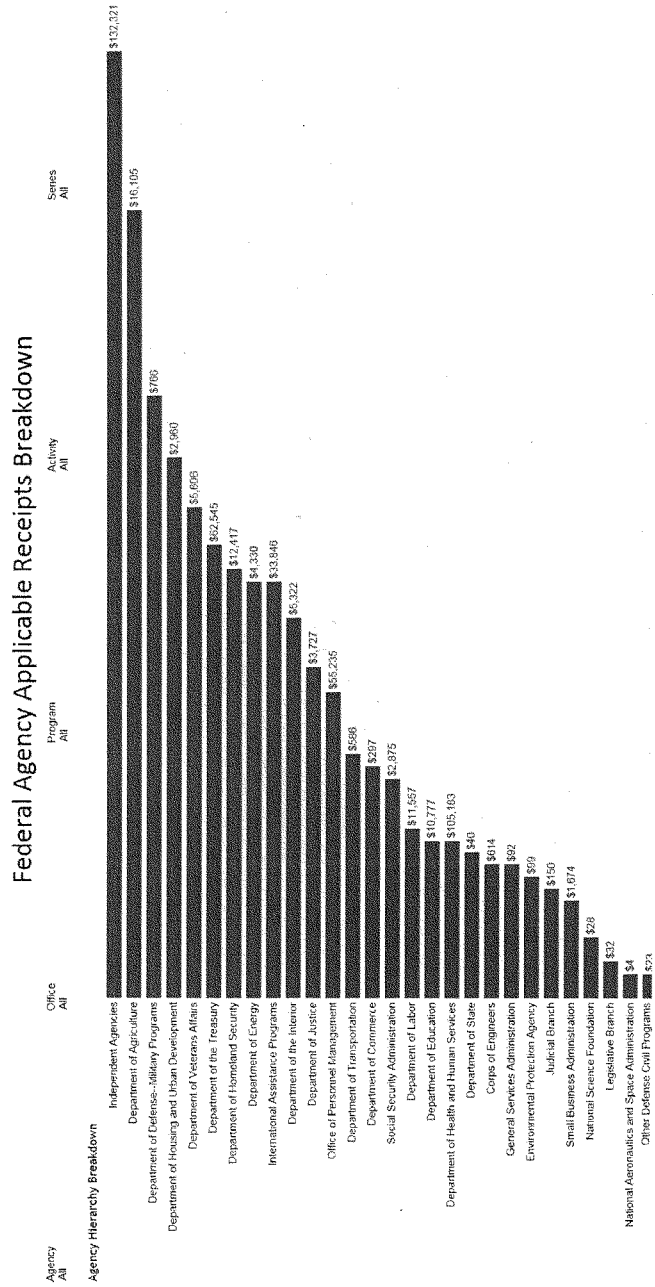


All Federal Receipts

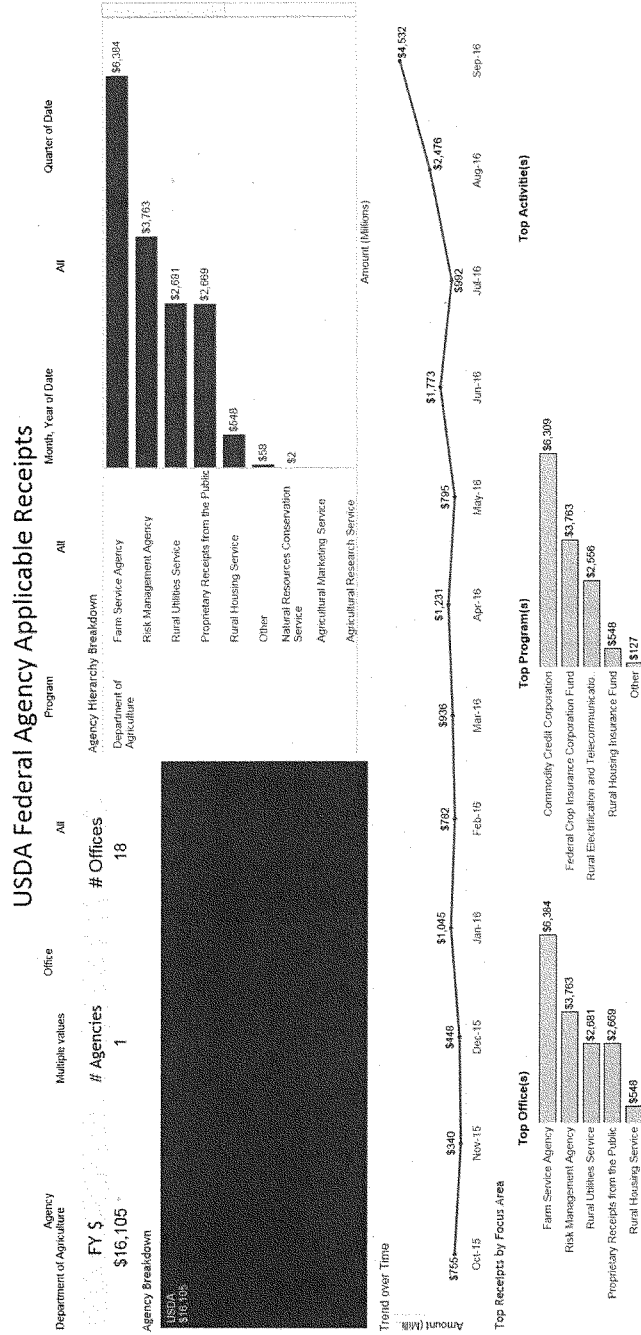
Federal Agency Applicable Receipts



Federal Receipts: Breakdown

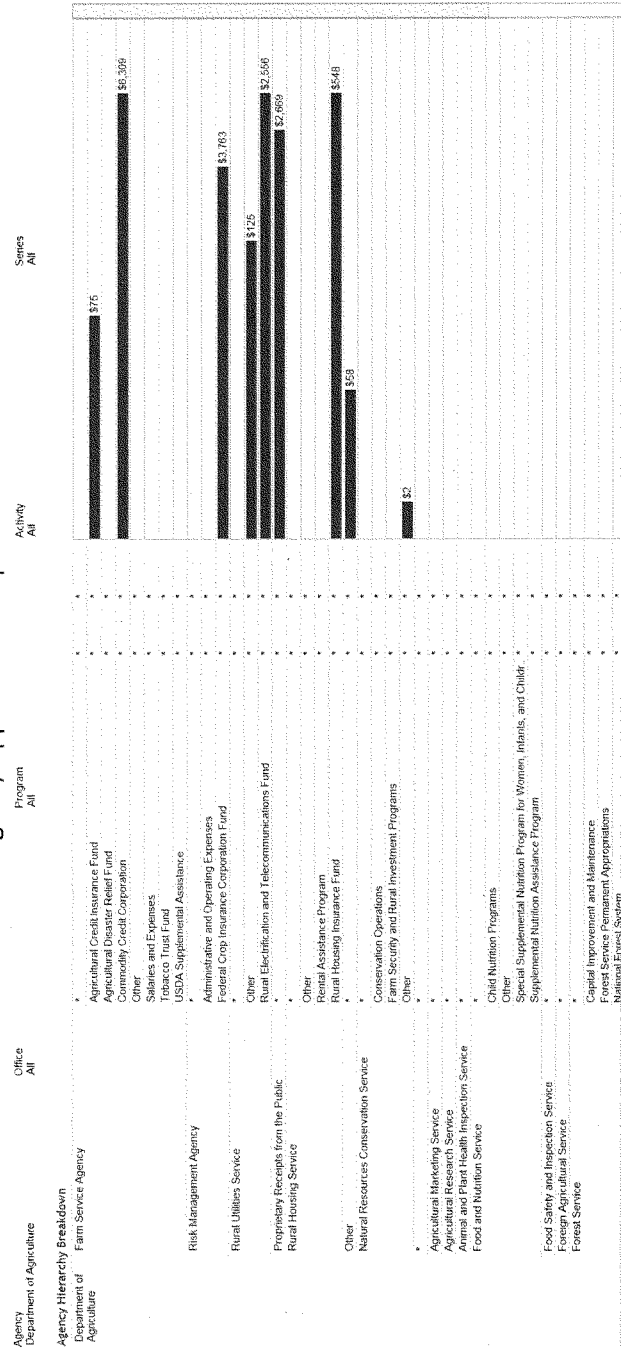


USDA Receipts



USDA Receipts: Breakdown

Federal Agency Applicable Receipts Breakdown



DATA COALITION

Legislative Recommendations:

Expand the Data Structure.
Eliminate Duplicative Systems.
End the DUNS Monopoly.

Mr. MEADOWS. Thank you, Mr. Hollister. And thank you for illuminating what we may be able to do in terms of giving greater transparency. We look forward to seeing the progress as we—I know the ranking member and I have been very in tune in a bipartisan way of following your work.

Mr. Kohn, you are now recognized for 5 minutes.

STATEMENT OF STEPHEN M. KOHN

Mr. KOHN. Thank you. Thank you, Chairmen, Ranking Members, members of the committee—

Mr. MEADOWS. If you can pull that a little closer to you. Yeah.

Mr. KOHN. Thank you Chairman, ranking members, members of the committee, for this opportunity to share with you the benefit of my 32 years of representing whistleblowers and how H.R. 5499 may impact on those cases.

This committee has a long and distinguished bipartisan record of supporting whistleblowers, and I am confident that you will ensure that nothing will inadvertently harm the existing statutory structure that works extremely well, is transparent, and saves the taxpayers billions of dollars.

To understand how this process works, we need to look at the current laws and why whistleblowing is so effective.

The Founding Fathers were true visionaries. They understood the importance of using citizens as a bulwark for ensuring accountability. On July 30, 1778, the Continental Congress passed perhaps the world's first whistleblower law, encouraging every American and declaring it their duty to report crimes and misdemeanors to appropriate authorities.

The very first Congress, starting in 1789, passed 18 whistleblower reward laws. They didn't call them whistleblowers then; they called them informants. Eighteen. And that structure of those laws has been passed on, and the modern whistleblower laws that are most effective are modeled on what the Founding Fathers did.

And let's see why it works. Slide 1, or my chart 1 in my testimony, shows how fraud is actually detected in real life. As in my testimony, these are statistically verifiable numbers. And you'll see to the far right, the tip, or the whistleblower, is the number-one source of all fraud. Without a program to encourage fraud detection by tipsters or whistleblowers, crime will pay.

Slide 2, which is, again, statistically verifiable, shows the real life of what happens at the job. And it shows that only 2 percent of the witnesses to fraud and misconduct actually report that fraud outside their agency—2 percent. And that's to anyone, not going to the proper law enforcement authority.

If you want to have an effective accountability system, you need to figure out how to make that 2 percent real and effective. And guess what? The model used by the Founding Fathers works.

And if we can go to the next slide, which is chart 5 in my testimony.

When Chuck Grassley passed the False Claims Act in 1986 and reinstated these models used by the Founding Fathers, which permits a reward to the whistleblower paid immediately from the collected proceeds, not through an appropriations process—they get the reward based on the fruits of their original information, the

sacrifice they go through, the risks they take—look what happened. These are the Department of Justice figures to the penny. The ability to detect fraud skyrocketed. The ability to hold fraudsters accountable skyrocketed. Look how it went from a handful of millions before you activated the whistleblower to billions and billions every year.

The final chart shows that—the next slide shows that, today, 70 percent of all fraud detection coming in is coming from the whistleblower.

The legislation being proposed does not take the reality of whistleblowing into consideration, but I know this committee will act and make sure it is protected.

I also want to state that there is an appropriate oversight for these funds, and whistleblowers are dependent upon them. And I look forward to working with the committee to have better oversight.

Thank you.

[Prepared statement of Mr. Kohn follows:]

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
SUBCOMMITTEE ON GOVERNMENT OPERATIONS AND THE
SUBCOMMITTEE ON HEALTH CARE, BENEFITS AND ADMINISTRATIVE RULES

“Restoring the Power of the Purse: Legislative Options”

Testimony of Stephen M. Kohn
Executive Director
National Whistleblower Center
www.whistleblowers.org
email: contact@whistleblowers.org

December 1, 2016

Chairman Meadows, Chairman Jordan, Ranking Member Connelly and Members of the Subcommittees:

Thank you for this opportunity to testify regarding H.R. 5499 and issues concerning federal spending outside the appropriation process.

The Committee on Oversight and Government Reform has a long bi-partisan record of supporting whistleblowers.¹ I am confident that as H.R. 5499 works its way through the legislative process, your subcommittees will ensure that whistleblowers are not inadvertently harmed by this legislation.

¹ For example, Chairman Jordan eloquently explained the “importance of whistleblowers to good government” in his Opening Statement during a joint oversight hearing: “These *brave individuals shed light on waste, fraud and abuse, often at great personal or professional risk* and make what we do in Congress a whole lot easier. We should always be grateful for the sacrifice these individuals make and proud of their contributions to the Nation. *Perhaps the most important tools that whistleblowers have are the qui tam provisions of the False Claims Act.* Senator Grassley, who we will hear from shortly, was instrumental in amending the False Claims Act in 1986 to ensure whistleblowers are protected. This year, of the \$4.9 billion of False Claims Act recoveries, \$3.3 billion came from whistleblower suits, a record amount.” Joint Hearing before the Subcommittee on Economic Growth, Job Creation and Regulatory Affairs of the Committee on Oversight and Government Reform, and the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary, House of Representatives (May 7, 2013) (Serial No. 113–23) (Committee on Oversight and Government Reform) (Serial No. 113–6) (Committee on Judiciary) (emphasis added).

In its current form, H.R. 5499 could have a devastating impact on critical whistleblower laws, including the False Claims Act and other *qui tam* whistleblower laws.² The proposed changes to the appropriations process contained in H.R. 5499 do not take into consideration reward provisions contained in the False Claims Act and similar laws. H.R. 5499 would interfere with the well-established process for compensating whistleblowers who risk their careers, jobs and reputations to serve the public interest.

Before addressing the specifics of H.R. 5499, it is imperative to understand why the False Claims Act and its progeny have been so effective in protecting the taxpayers from fraud.

WHO REPORTS FRAUD?

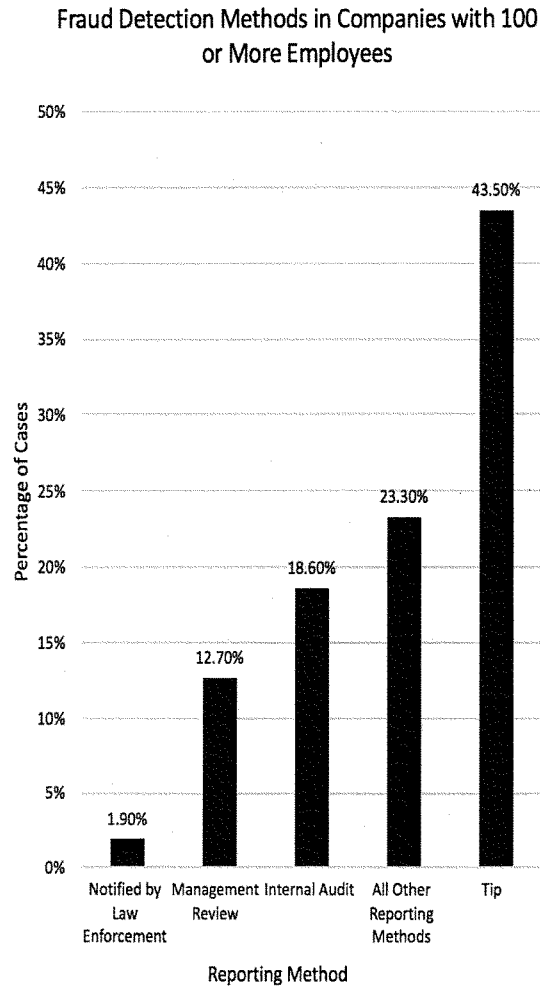
The foundation of any effective anti-fraud/anti-corruption program is predicated on detection. Without the ability to detect and document frauds, crime pays. In the wake of the ENRON and WORLD COM fiascos, respected trade associations and corporate-sponsored groups studied the science of fraud detection. Here is what they found:

First, as set forth in Chart 1,³ the heart of any successful fraud detection program is encouraging employee “tips.” Tips or whistleblower information is unquestionably the single most important source of information on frauds.

Without a program to encourage tips, fraud detection will be crippled.

² As noted in footnote 2, the *qui tam* provisions of the False Claims Act have played an invaluable role in incentivizing whistleblowers to report frauds. They permit whistleblowers to obtain a portion of the sanctions obtained directly from the criminal or fraudster. Whistleblowers are compensated for the risk they take and only obtain compensation when their “original information” is truthful, accurate and results in an actual conviction, settlement or plea agreement. Instead of using taxpayer monies to compensate the whistleblower, the whistleblower’s original information results in additional revenue to the United States, paid entirely by fraudsters. In addition to the False Claims Act, Congress has enacted other *qui tam* styled whistleblower laws, including provisions that incentivize reporting tax, securities and commodities frauds, illegal international wildlife trafficking, pollution on the high seas and, most recently, the Motor Vehicle Safety Whistleblower Act passed under the leadership of Senator John Thune in 2015.

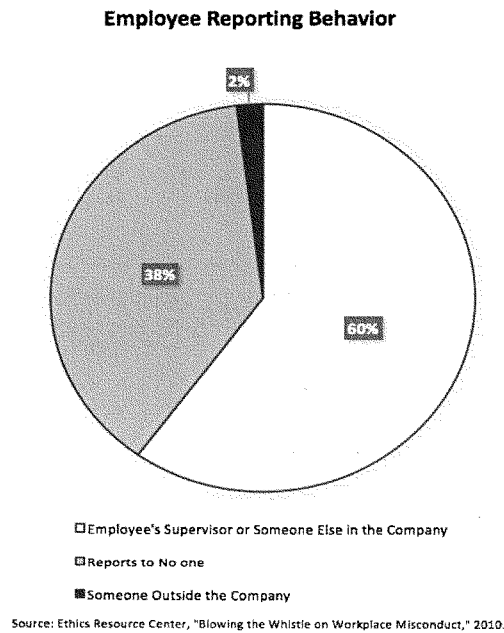
³ Chart 1 is from the 2016 Annual Report of the Association of Certified Fraud Examiners (ACFE), a trade association with nearly 80,000 members. Their annual report, “Report to the Nations” is compiled from a valid statistical survey of its members, and is conducted annually. The numbers reported in 2016 are consistent with its reports since 2010, and before.

Chart 1:

Source: Association of Certified Fraud Examiners, "Report to the Nations on Occupational Fraud and Abuse," (2016).

Chart 2 is based on the findings of the Ethics Resource Center and represents the reporting behavior of employees who witness misconduct at work.⁴ It demonstrates that strong plurality of employees never discloses the misconduct they witness. Only 2% report “outside” their organizations, which would include reports to non-law enforcement agencies. The number of employees who actually report misconduct to appropriate law enforcement agencies is miniscule.

Chart 2:



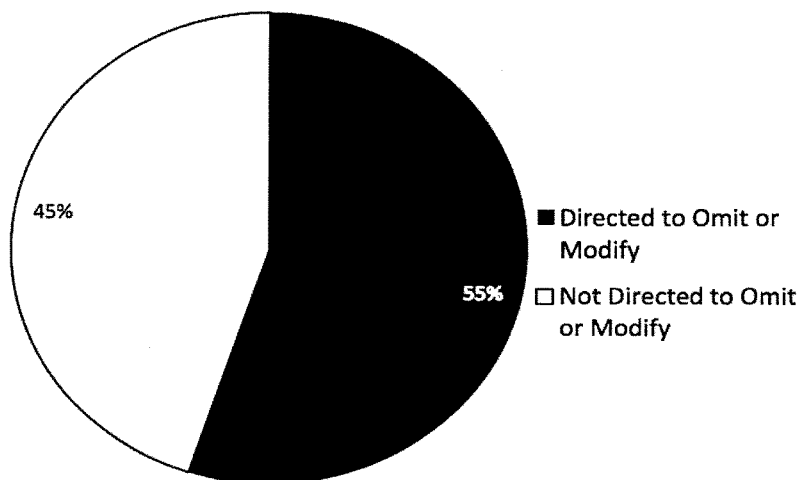
⁴ The Ethics Resource Center is the oldest corporate ethics organization in the United States. Chart 2 is based on the statistics from their report, *Inside the Mind of a Whistleblower: A Supplemental Report*, Ethics Resource Center, (2012) available at http://www.whistleblowers.org/storage/docs/Inside_the_mind_of_a_whistleblower.pdf. That report, was sponsored by Google, Boeing, the Deloitte Foundation, Walmart, Northrop Grumman, Altria, The Defense Industry Initiative, and Lockheed Martin.

Although employee tips are the most important source of fraud detection, the overwhelming majority of potential whistleblowers do not report their allegations to law enforcement.

Charts 3 and 4 further highlight the need to create programs that encourage reporting frauds and misconduct. Chart 3 demonstrates the day-to-day pressures placed on auditors to ignore material findings or alter their reports in a material manner. Over half of North American chief auditors working for companies with over 100 employees reported these improper pressures or demands.⁵

Chart 3:

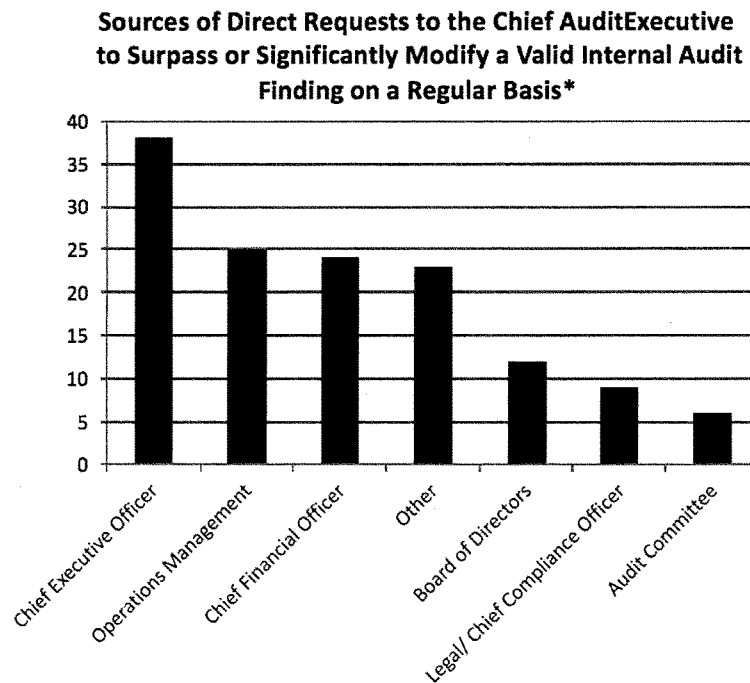
North American Chief Auditing Executives Instructed to Omit or Modify an Audit Finding



Source: IIA Research Institute, "Political Pressure Intense on Internal Audit," (Mar. 10, 2015).

Chart 4 represents where the requests to alter or falsify material audit findings originated.

Chart 4:



Source: IIA Research Foundation, Global Internal Audit Practitioner

* Total percentage is greater than 100 because more than one person can make a request.

A breakthrough study, originally published by the University of Chicago's Booth School of Business, was authored by three leading economists.⁶ They studied, "in depth all reported

⁶ See Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?* University of Chicago Booth School of Business (2006), available at <http://faculty.chicagobooth.edu/luigi.zingales/papers/research/whistle.pdf>.

fraud cases in large U.S. companies between 1996 and 2004” in order to determine the most effective mechanisms for detecting corporate fraud. They determined that whistleblowers were the key to fraud detection. Like the ACFE study, the Booth School study also found that “*employees clearly have the best access to information*. Few, if any, fraud can be committed without the knowledge and often the support of several of them. Some might be accomplices, enjoying some of the benefits of the fraud, but most are not.”

They also found that retaliation was prevalent in the workplace: “Not only is the honest behavior not rewarded by the market, but it is penalized.” Thus, “given these costs, however, the surprising part is not that most employees do not talk; it is that some talk at all.”

The Booth School economists then reviewed the positive impact the False Claims Act *qui tam* whistleblower reward provisions had on employee behavior, and recommend that these types of laws be expanded: “The idea of extending the *qui tam* statue to corporate frauds (i.e. providing a financial award to those who bring forward information about a corporate fraud) is very much in the Hayekian spirit of sharpening the incentives of those who are endowed with information.”

The False Claims Act *qui tam* provisions (the only major whistleblower reward law in-place during the study) was the key to developing these indispensable sources.

Their findings speak for themselves:

“A strong monetary incentive to blow the whistle does motivate people with information to come forward.”

“Having . . . monetary rewards has a significant impact on the probability a stakeholder becomes a whistleblower.”

“[T]here is no evidence that having stronger monetary incentives to blow the whistle leads to more frivolous suits.”

“Monetary incentives seem to work well, without the negative side effects often attributed to them.”

DOES WHISTLEBLOWING WORK?

Chart 5 quantifies the recoveries obtained by the U.S. taxpayers over the 30-year history of the modernized False Claims Act.⁷ It quantifies how important the reward laws are to addressing the problems identified in Charts 1-4⁹.

⁷ Charts 5 and 6 are based on the fraud recovery statistics annually reported by the U.S. Department of Justice. See *Fraud Statistics - Overview*, U.S. Department of Justice (2015) available at <https://www.justice.gov/opa/file/796866/download>.

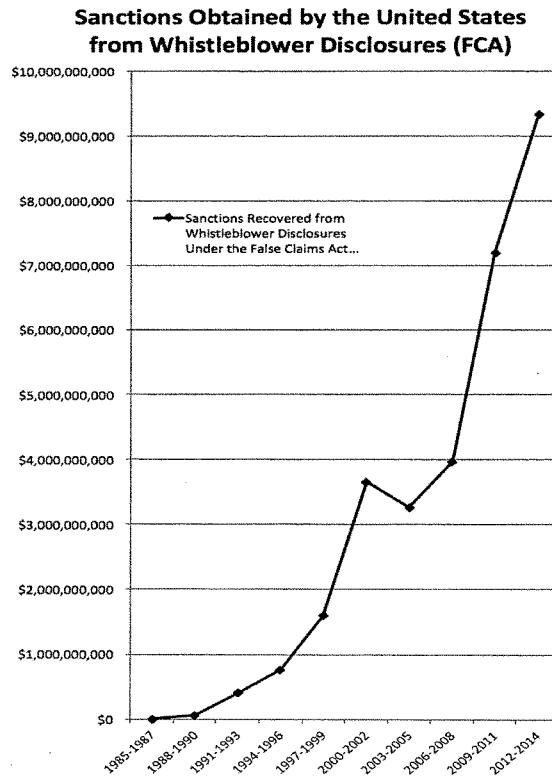
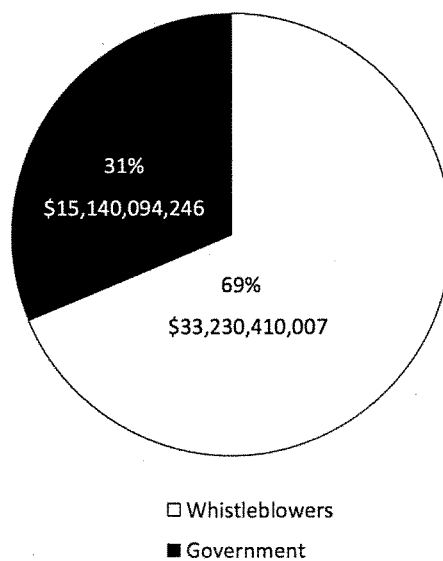
Chart 5:

Chart 6 demonstrates that incentivizing whistleblowers is extremely successful in generating high quality tips that result in successful prosecutions. Because the government must pay a reward when the whistleblower's information leads to a successful enforcement action, civil fraud cases prosecuted by the Justice Department are categorized. Chart 6 reflects that fact that over the 30-year history of the False Claims Act whistleblowers disclosures account for over 70% of the fraud recoveries from corrupt government contractors. These numbers will further increase over time.

Chart 6:

**Total U.S. Civil Recovery: From
Whistleblowers and Government
Investigation**

October 1, 1987 - Sept. 30, 2015



Civil Division, U.S. Department of Justice, "Fraud Statistics - Overview," (Oct. 1, 1987 - Sept. 30, 2015).

Charts 5 and 6 objectively demonstrate that whistleblower reward laws work. Every government official with responsibility for overseeing the False Claims Act, or similar reward laws, have praised these programs as having “profound” impact,⁸ and recognize that the laws are “the most powerful tool the American people have to protect the government from fraud.”⁹ Whistleblower reward programs are the most effective mechanism for encouraging citizens to report criminal activities.¹⁰

CURRENT WHISTLEBLOWER REWARDS ARE MODELED ON LAWS ENACTED BY THE FOUNDING FATHERS

At the heart of all of the whistleblower reward programs is a simple mechanism in which the whistleblower obtains a portion of the “collected proceeds.” This payment is not part of any formal appropriations process. Instead, the relevant executive agencies authorize the payment of the reward if the whistleblower’s information conforms to the requirements that Congress established when it enacted the relevant whistleblower law. The proceeds can come from the Treasury Department or a specialized fund established to pay rewards, but there is no requirement under any whistleblower law for Congress to pass a special appropriation. Such a requirement is not necessary, is not constitutionally required, and is inconsistent with both the U.S. Constitution and the specific practices endorsed by the Founding Fathers of the United States.

In a landmark decision authored by U.S. Supreme Court Justice Antonin Scalia (and endorsed by all nine members of the Court), the whistleblower reward provisions of the False Claims Act were upheld after a vigorous assault on a whistleblower’s “standing” to pursue a claim under the law’s *qui tam* provisions. Justice Scalia carefully reviewed the history behind whistleblower reward laws and explained that there was a “long tradition of *qui tam* actions in

⁸ The “impact” of the reward laws “has been nothing short of profound. . . . Some of these [False Claims Act cases] may have saved lives. All of them saved money,” Attorney General Eric Holder, U.S. Department of Justice, “Attorney General Eric Holder Speaks at the 25th Anniversary of the False Claims Act Amendments of 1986” (Jan. 31, 2012).

⁹ Assistant Attorney General, U.S. Department of Justice, “Remarks at American Bar Association’s 10th National Institute on the Civil False Claims Act and Qui Tam Enforcement,” (June 5, 2014) (Whistleblower reward laws are “the most powerful tool the American people have to protect the government from fraud”).

¹⁰ See, *Remarks at the Securities Enforcement Forum*, Securities and Exchange Commission Chairman (Oct. 9, 2014) (The “whistleblower program . . . has rapidly become a tremendously effective force-multiplier, generating high quality tips, and in some cases virtual blueprints laying out an entire enterprise, directing us to the heart of the alleged fraud”); “Information of this nature is otherwise difficult, if not virtually impossible to obtain [without help from the whistleblower]” (U.S. Department of Justice, *USA v. Consultores De Navegacion S.A.*, 1:08-cr-10274, (Sept., 22, 2009) (US District Court, Massachusetts) (filing in support of whistleblower reward application).

England and the American Colonies.”¹¹ He pointed to numerous laws passed by the First Congress of the United States in 1789-90, in which many of the drafters of the U.S. Constitution participated as members of Congress approving informant reward laws, paid directly by federal officials, with no appropriation from Congress. Justice Scalia held:

Qui tam actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution . . . Moreover, immediately after the framing [of the Constitution], the First Congress enacted a considerable number of informer statutes. Like their English counterparts, some of them provided both a bounty and an express cause of action; others provided a bounty only.

In upholding the constitutionality of the False Claims Act Justice Scalia explained that the payment to these whistleblowers (or informants) was not effectuated by an appropriation, but instead constituted an “assignment” of interests, a well-known procedure in the common law in which the rights of one party are transferred, in whole or in part, to another party in exchange for valuable consideration. Justice Scalia held that “the False Claims Act can reasonably be regarded as effecting a partial assignment of the Government’s damage claim.”

As far back as the First Congress, in which numerous drafters of the U.S. Constitution were prominent members, including Elbridge Gerry, Rufus King, Robert Morris and James Madison, it was clear that paying an informant’s reward was not dependent upon an appropriations process. Indeed, the First Congress passed 18 such laws, none of which were dependent upon the Congressional appropriations process. *See* Addendum. As the U.S. Supreme Court has noted, the actions of the First Congress can provide “contemporaneous and weighty evidence” of the Constitution’s “true meaning.”¹² Many of the major revenue laws enacted by the First Congress, in order to generate the revenues for which Congress could eventually appropriate, contained whistleblower reward laws, including the laws establishing the Treasury Department, the United States Bank, and regulating the collection of duties on the tonnage of ships and merchandise.¹³

For example, the fifth law passed by the First Congress (relating to the collection of customs duties), had a special section concerning the distribution of “penalties, fines and forfeitures recovered” from those who violated the law. The collected proceeds from these sanctions was divided as follows: one-half was sent to the U.S. Treasury and one-half was equally divided between the “collector, naval officer and the surveyor by virtue of this act.” However, if any “person” gave “information” that resulted in the United States obtaining the collected proceeds, that person would receive one-half of the total amount not remitted to the Treasury Department. In

¹¹ *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000).

¹² *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888)(because “many “of the “members” of the “first Congress” had “taken part in framing that instrument,” that Congress’ actions are “contemporaneous and weighty evidence” of the Constitution’s “true meaning”).

¹³ *See* First Congress. Sess. I. Ch. 5 (July 31, 1789)(collecting duties); Ch. 11 (Sept. 1, 1789)(regulating coastal trade); Ch. 12 (Sept. 2, 1789)(establishing Treasury Department); Sess. II, Ch. 35 (Aug. 4, 1790)(collection of duties).

other words, the whistleblower would obtain 25% of the monies collected as a result of his or her finishing the information.

The First Congress provided as follows:

That all penalties, fines and forfeitures, recovered by virtue of this act (and not otherwise appropriated), shall, after deducting all proper costs and charges, be disposed of as follows: One moiety shall be for the use of the United States, and paid into the treasury thereof; the other moiety shall be divided into three equal parts, and paid to the collector, naval officer and surveyor of the district wherein the same shall have been incurred . . . provided nevertheless, That in all cases where such penalties, fines and forfeitures shall be recovered in pursuance of information given to such collector, by any person, other than the said naval officer and surveyor, the one half of such moiety shall be given to the informer, and the remainder shall be disposed of between the collector, naval officer and surveyor, in manner and form as above limited and expressed.¹⁴

In consideration of the risk and effort undertaken by the whistleblower/informant to provide high quality information to the government, the First Congress assigned to these persons a future interest in a portion of the proceeds actually collected by the government based on his or her sacrifices/contribution. These monies were not part of an official appropriation by Congress, but were assigned by a statute approved by Congress for direct payment to the whistleblower. The payment of the 25% informant share would be made by members of the executive branch of government, before (or simultaneous to) these officials transmitting to the United States Treasury its 50% portion of the sanctions.

Because the whistleblower's right to the collection of a reward arises from an assignment of interests, not from a formal appropriation, any interference with such a lawful assignment would itself raise a host of legal and constitutional issues.

TRANSPARENCY

The modern whistleblower reward process is extremely transparent, with numerous checks and balances. For example, the False Claims Act has strict limits on a whistleblower's ability to dismiss a case or settle a case, and the court has authority to approve settlements (which include specific provisions setting forth an amount of any reward) over a whistleblower's objection, if such settlements are determined to be "fair, adequate and reasonable."¹⁵ In practice, False Claims Act settlements are done in public, the Department of Justice places on the public record the terms of each settlement, including the amount of money assigned to the whistleblower. These settlement agreements are all publicly disclosed before a court dismisses an action. In the 30 plus years of the False Claims Act, this witness is unaware of Congress taking issue with the validity of a reward paid to a whistleblower under that Act.

¹⁴ First Congress, Ch. 5, Section 38 (July 31, 1789)(emphasis in original).

¹⁵ 31 U.S.C. § 3730(c)(2)(A) and (B).

The False Claims Act, and similar laws, create a safe, effective, and highly successful method for employees to disclose fraud in government programs to the appropriate authorities. The method for compensating whistleblowers for their original information, whether the rewards are paid for from specialized funds, by court order, or directly from the federal treasury, are irrelevant. Once it is adjudicated that the whistleblower provided the service directed by Congress, and once monies are obtained as fines and penalties from the wrongdoer, the entitlement for payment is effectuated. The whistleblower has a right to collect on the portion of the sanction assigned to him or her by law. Interference with this lawful payment, mandated by the government's partial assignment of interest, would undermine the whistleblower laws, cripple effective anti-fraud programs, destroy the whistleblower's confidence in the reward system and violate the whistleblower's constitutionally protected property interest in the partial assignment.

CONCLUSION

Thank you again for this opportunity to testify. The Founding Fathers were true visionaries. They understood the importance of using the citizens as a bulwark for the enforcement of laws and ensuring accountability. On July 30, 1778 the Continental Congress passed America's first whistleblower, stating that it was the "duty of all persons" to give "the earliest information" to "proper authority of any misconduct, frauds or misdemeanors."¹⁶ After the formation of our current government, the First Congress reinforced the message it sent on July 30, 1778, and enacted 18 separate whistleblower reward laws, covering many important laws. I am certain that it was not the intent of the authors of H.R. 5499 to interfere with the whistleblower reward programs. The National Whistleblower Center stands ready to assist this Committee in ensuring that no government whistleblower reward program is harmed by the passage of H.R. 5499.

Respectfully submitted,

/s/

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¹⁶ Kohn, "The Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself," (Lyons Press, 2011)(setting forth the complete history behind Congress' enactment of the July 30th resolution, found at *Journal of the Continental Congress*. XI, p. 732). Also see, Senate Resolution 522 (114th Congress, 2nd Session), setting forth July 30, 2016 as National Whistleblower Appreciation Day, in honor of contributions made by whistleblowers and the foresight of the Founding Fathers.

Mr. MEADOWS. Thank you, Mr. Kohn. I can assure you that whistleblowers are a vital part of what we do, from an oversight standpoint. There is not a month that goes by that I don't get a call on my private cell phone from some whistleblower somewhere suggesting that we look at something.

And so, with that, let me make sure I understand. So if we were to exempt out the whistleblower provision in this and make sure that it's not included in Mr. Palmer's piece of legislation, you wouldn't have an issue with this legislation. Is that correct?

Mr. KOHN. Well, I'm only here—I'm only really an expert on the whistleblower part.

Mr. MEADOWS. So if we exempted it, you wouldn't have an issue. Is that correct?

Mr. KOHN. Exactly. As National Whistleblower Center, that's our concern.

Mr. MEADOWS. Okay. Well, I think we look forward to hearing from others on that, but I believe that a friendly amendment that would protect our whistleblowers would be in order. And I know I've talked to the gentleman from Alabama about that very subject, and he seems very willing to accommodate.

The chair recognizes the gentleman from Michigan, the vice chair of the Subcommittee on Government Operations, Mr. Walberg.

Mr. WALBERG. Thank you, Mr. Chairman.

And thank you to the panel for being here today.

In my other life, other committee work, chairing the Subcommittee on Workforce Protections, we look at regulatory issues and the high cost of regulations that go on. So this discussion today focuses very clearly on additional costs resulting from regulation.

Mr. Kosar, last year, I believe it was, you authored an article on increasing Federal regulations and how Congress should reassert their authority in the regulatory process.

I recently introduced a series of regulatory reform measures which focus specifically on harmful labor regulations. When you see the costs last year, approaching almost \$2 trillion of regulatory costs to business alone—that's it—not including collections and everything that goes on, it's an important thing to consider.

One of the measures that I introduced, H.R. 6325, the Workforce Regulatory Review Act, creates an independent regulatory review commission tasked with removing a third of all the regulatory obligations created by Department of Labor alone.

So let me ask you, Mr. Kosar, do you have any thoughts on proposals to establish commissions tasked with reviewing and eliminating regulations?

Mr. KOSAR. Thank you for the question. I have not reviewed your piece of legislation, regrettably, but I will say, as a general proposition, yeah, I favor commissions to take a look at these things.

I mean, when you consider the size of the corpus of regulations, no human being could fully appreciate or understand what's in there. And it just seems self-evident that there is some value in having a group dedicated to looking at it and going through and saying, this is anachronistic, or, guess what, this regulation didn't actually work out and we should consider getting rid of it.

Mr. WALBERG. Any other ideas beyond a commission like that that you might have that could more effectively monitor the output

of new regulations and the costs that are inherent in those regulations?

Mr. KOSAR. Well, I think two leading proposals, the ones that have certainly gotten a lot of discussion, are some mechanism similar to a REINS Act, wherein, you know, you would look at a whole ball of these things and figure out which ones are problematic or undesirable for whatever reason and then have a fast-track-type authority to run them through. That's a commission version or the REINS Act, which has the tripwire where a regulation of a certain size, with a certain quantity of cost, cannot actually take effect until Congress affirmatively acts upon it. So that would be another way to go. And then regulatory budgeting.

Mr. WALBERG. Yeah. Certainly familiar with that and supportive of it.

Your written testimony mentions that the complexities for collection of fees and settlements had increased as government has grown. Could you elaborate further on this point?

Mr. KOSAR. You know, that line is self-evident but is one of those things that came out as I have this past week stuck my nose back in the President's fiscal year 2017 budget. It's unbelievably complex.

And there's a basic principal-agent relationship between legislative branch and executive branch. As the persons who authorize the taking of money from the public, the legislators want to keep an eye to make sure that the money is being well-spent. When that amount grows to \$4 trillion or some such number, it's really hard to keep track of all those dollars, especially if you're not doing the appropriating.

Mr. WALBERG. So your method of simplifying the complexities of collecting fees and settlements specifically is what?

Mr. KOSAR. Well—

Mr. WALBERG. Review that for us.

Mr. KOSAR. The first thing that I find vexing is the separation, the kind of conceptual separation, that's been around since at least 1967 between government receipts and then the offsetting receipts and collections, and how is an offsetting collection different from an offsetting receipt. And, in fact, Congress has often written into statute exceptions to these rules, so something that should be a receipt is instead a collection or something like that.

Maybe in an effort to be too precise, we got too complex. You know, if you have smart people in this town who are looking at the Federal budget and having a hard time understanding it, I don't quite know how the rest of the country can understand it.

So I know some folks who are working at a Brookings budget group, and one of the ideas that's being frequently brought up is we need to simplify budget concepts, we need to rethink, because we're relying on stuff that was ginned up a long time ago.

Mr. WALBERG. Thank you.

Mr. Chairman, I yield back.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes Mr. Connolly for his questions.

Mr. CONNOLLY. Thank you, Mr. Chairman.

Mr. Kosar, I want to make sure I understood your testimony. Is it your testimony that Congress has been too whimsical or careless

over the years in devolving these powers to agencies and ought to re-arrogate them back to itself through the appropriations process?

Mr. KOSAR. I would suggest that the various incidents where the authority has been delegated away should be reviewed. Do the rationales that originally propelled the delegation still make sense, or have they become anachronistic, or has it just not worked out?

Mr. CONNOLLY. Fair enough.

It is not your contention, however, that you or R Street Institute have looked at in depth the other impacts, the negative impacts, on agencies that currently engage in that practice legally through the delegation of authority by the Congress. For example, you haven't looked at the potential impact of doing that in the Department of Justice's Crime Victims Fund.

Mr. KOSAR. Oh, no. No, we have not done an assessment, and we certainly—

Mr. CONNOLLY. Right.

Mr. KOSAR. —haven't looked at each program and tried to—

Mr. CONNOLLY. Or what it might do to the Superfund clean-up process.

Mr. KOSAR. Correct.

Mr. CONNOLLY. Or Tennessee Valley Authority collections and what it uses those for.

Mr. KOSAR. Uh-huh.

Mr. CONNOLLY. Right?

Mr. KOSAR. You're right.

Mr. CONNOLLY. And likewise the Federal Protective Service program through the use of its fees.

Mr. KOSAR. Correct.

Mr. CONNOLLY. Or the Federal Aviation Administration Franchise Fund customer fees.

Mr. KOSAR. No, sir, we haven't looked into those.

Mr. CONNOLLY. Right. Okay. I just want to make sure. It's one thing to say: Yeah, we looked at it, maybe some of these authorities are too broad. But that's not the same as testifying: I've looked in depth at the impact and it's negligible, or it's tolerable. We don't know, sitting here.

So we can—not that you are, because you've just clarified your testimony. But one needs to be careful, in terms of impacts. And my view is, before we do any of this, we have to understand what the impacts would be. Because over well over 200 years of history, this has a lot of entanglements and commitments, and the disruption could be profound to the operations of government, which is my contention. That doesn't mean don't do some of it. It might not even mean don't do all of it. But we've got to know a lot more than we know right now.

Ms. Krause, I want to make sure I understand what you're testifying to. GAO looked at this why?

Ms. KRAUSE. This is really based on—we have a body of work that's looked at fees, fines, and penalties, often individual ones. But we also have a body of fee work that's looked at design principles to consider when you're establishing fees. It also applies to fines and penalties. So things to consider in structuring these, especially related to congressional control.

As I mentioned in my oral statement, one of those decisions is related to what triggers the use—the congressional trigger of use of funds, so whether it requires further appropriation after it has been collected or whether an agency is allowed to use it through—

Mr. CONNOLLY. But it's not your testimony this practice should end.

Ms. KRAUSE. We don't take a position, no.

Mr. CONNOLLY. And nor do you contend in this study, like my questioning of Mr. Kosar, that you've looked in depth at the potential impacts of curtailing or conditioning or revoking these authorities that we've delegated.

Ms. KRAUSE. No.

Mr. CONNOLLY. No.

Ms. KRAUSE. We have not.

Mr. CONNOLLY. Thank you.

And, Mr. Kohn, your testimony is that if we had a carve-out for whistleblowers you'd be fine?

Mr. KOHN. Well, as I say, I don't have a position on the entire bill—

Mr. CONNOLLY. Right.

Mr. KOHN. —but it absolutely needs a carve-out for whistleblowers.

Mr. CONNOLLY. Right. But I'm bigger than whistleblowers, though I share your concern, as you heard my opening statement. I think that's an unintended consequence, but my concern is there could be lots of other unintended consequences, and we haven't looked at them.

So to act with haste on a bill that I think is well-intentioned and that makes a good point about the kind of willy-nilly delegation of authority that has crept up over the years—that is worthy of examination, and I share my friend from Alabama's commitment to doing that. I think this bill raises a very important subject we ought to reexamine.

But revoking those authorities or putting them on ice, whether it's whistleblower or any of the other fees I listed—there are plenty of others we could talk about—I think would be very disruptive.

And I just want to be clear. You're not saying, give me a carve-out and you've got my acquiescence and all the rest? You're only addressing your own issue, which is whistleblowers. And your testimony is limited to the fact that this would have an unintended but devastating impact on whistleblowers and contravene the intent of the Whistleblower Protection Act. That's your testimony. Is that correct?

Mr. KOHN. Yes, that's correct.

Mr. CONNOLLY. I thank you.

Thank you, Mr. Chairman.

Mr. MEADOWS. The chair recognizes the chairman of the full committee on Health Care and Administrative Rules, Mr. Jordan, the gentleman from Ohio, for a series of questions.

Mr. JORDAN. Thank you, Mr. Chairman. Thank you for having this hearing.

And, Mr. Palmer, thank you for bringing a good piece of legislation forward.

Thank you to our witnesses.

And, Mr. Kohn, I agree with you. There's nothing wrong with an amendment that would carve out the whistleblowers, much like Mr. Palmer's legislation already exempts the Patent Office and the Postal Service. But I want to try to get a handle on the overall picture here.

So, as I understand it, there are three major categories—there's fees, there's fines and penalties, and then there's settlements—money that the people's representatives don't get a direct say on what happens with that money when it comes to the Federal Government.

So, Director Krause, what is the total number—let's just go in that order. Fees. What is the amount of fees collected in fiscal year 2017 by the Federal Government and all the various agencies?

Ms. KRAUSE. Unfortunately, that number is unknown. When we have looked at issues particularly related to fees, government-wide sources don't necessarily track back to the specific legal authorities related to the—

Mr. JORDAN. Here's what the President said. The White House said it was \$534 billion. Are you familiar with that number?

Ms. KRAUSE. I am not familiar with that number.

Mr. JORDAN. This is from their budget. For 2017, the table shows that total offsetting collections and offsetting receipts from the public are estimated to be \$534 billion.

Do you accept that number?

Ms. KRAUSE. I would have to take a look at it closer to understand it.

Mr. JORDAN. Is the White House right or wrong?

Ms. KRAUSE. I don't—unfortunately, I don't—

Mr. JORDAN. Is it in the ballpark?

Ms. KRAUSE. Like I said, when we have—so we have work ongoing—

Mr. JORDAN. For the sake of argument, let's accept what the White House said. It's their budget. They are the head of the executive branch. They're saying it's—that's a lot of money.

Do you know how much we spend in discretionary spending each year? Or last year, do you know how much we spent in discretionary last year?

Ms. KRAUSE. I don't know that number off—

Mr. JORDAN. One-point-two trillion. So we have a number that's collected in just fees, just one-third of the three areas, that's almost half of what we spend annually in discretionary spending. That's a pretty big number. That \$534 billion is approaching what we spend on national defense each year.

And, again, the people's representatives in the United States Congress don't have a direct say on how that money is spent once it's collected, right?

Let's move on to fines and penalties. Do you know how much we collect annually in fines and penalties?

Ms. KRAUSE. I do not know that based on the data sources that are available.

Mr. JORDAN. Yeah, that's stuff we need to know. But the study the committee did over a 5-year period determined that number

was \$83 billion over a 5-year period. So, again, we're talking billions of dollars.

Now, what's interesting in what the committee found out is Treasury couldn't give us any numbers. Specifically, Treasury and the IRS couldn't give us the numbers. This is the IRS. They collect a few fines and penalties, my guess is, some amount. So then you have this \$83 billion figure that excludes the Internal Revenue Service and any numbers coming from Treasury.

And then, finally, you have the third category, settlements. Which now we know "settlements" is a nice way of saying, for some people—particularly when you think about the Justice Department—"settlements" is another word for a shakedown. Certain companies have reached a settlement with the Justice Department, and then they tell this particular company: It's not just about penalizing you or compensating the real victims. We want you to give money to some nonprofit that we deem as appropriate, and we're going to call it a donation. Interesting use of the word "donation."

So, when you add all these together, could you even hazard a guess, how much money in fees, fines and penalties, and settlements the Federal Government collects in 1 year?

Ms. KRAUSE. As I mentioned, when we've looked at this, there isn't a government-wide source that would allow us to give a reliable total on the amount.

Mr. JORDAN. So who can give us that number?

I mean, this is what Mr. Palmer's legislation gets to the heart of. We can't even get someone in the Federal Government to tell us what that total number—we know fees, based on what the White House told us, is roughly equivalent to what we spend on national defense each year. It's roughly equivalent to half of all discretionary spending we did in 2017. We know it's a big number just in the fees category alone. But we'd like to know what it is, fees, fines and penalties, and settlements, what that number totals up to.

So who can give us that number?

Ms. KRAUSE. That is something—we have ongoing work looking at what we call backdoor spending authority, and it is to do an inventory of the accounts that are out there, the budget accounts that are out there, for funding that supports outside of the——

Mr. JORDAN. Does anyone else on the panel know?

I mean, I would think Office of Management and Budget should be able to give us that number. I would think someone at the Treasury Department, the department in charge of the Nation's money and how we—I would think someone there could give us that number.

Why can't we get that number in an important hearing on an important piece of legislation that Mr. Palmer has brought forward?

Mr. Hollister, it looks like you want to offer a——

Mr. HOLLISTER. I sure do. Mr. Jordan, my understanding is that the Treasury Department's fiscal service has that information, it's maintained by the Central Accounting Repository Service, and that, on the other hand——

Mr. JORDAN. Well, Mr. Hollister, why won't they give that information to this nice lady over here, Director Krause, so that she

could come here today and give it to Mr. Meadows in this committee?

Mr. HOLLISTER. If I understand right, there are some organizational problems that exist between Treasury's leg. affairs office and their fiscal service.

Mr. JORDAN. What does mean?

Mr. HOLLISTER. That means that sometimes the fiscal service and the leg. affairs office don't get along.

Mr. JORDAN. Does that mean they're just not going to—well, you know, Mr. Meadows is a nice guy, but we're not going to give him the information? Is that what they're saying?

Mr. HOLLISTER. Well, what it does mean is that the information that's in the President's budget that you cited and the information that's in the monthly Treasury statement that comes out every month that has at least a line item for miscellaneous receipts, that's coming from somewhere. It's coming from the system that Treasury maintains.

Mr. JORDAN. Yeah. Well, we'd like that information so that we can actually get moving on Mr. Palmer's legislation with the appropriate amendments, like Mr. Kohn has offered. But this is exactly why the gentleman from Alabama is on the right track with an important piece of legislation.

With that, I yield back, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes Mr. Boyle for 5 minutes.

Mr. BOYLE. Thank you, Mr. Chair.

And I wanted to narrow in specifically on this whistleblower portion of it, because beyond just the two pieces of legislation that we're talking about today, I think it's actually important for reasons far beyond that and for all the members who are here to better understand this.

Because just in—I was interested in reading all of your testimony, particularly the charts, but the exponential growth has been staggering in the amount of money collected—we're talking about from the early 1990s, roughly 1990–1991, until today. So, over 25 years, by my back-of-the-envelope math, a nine times increase in the amount of revenue.

I'm curious what specific rewards or programs within the umbrella of whistleblowing would you say has been most effective in cutting out waste, fraud, and abuse and, of course, generating revenue?

Mr. KOHN. Thank you.

And that growth is triggered by empowering the insiders, who are critical for fraud. Fraud is designed to be hidden.

Mr. BOYLE. Right.

Mr. KOHN. You need the insider.

The False Claims Act is really the model, because it has been around for 30 years and you can test it. And the Department of Justice, unlike, apparently, in other programs, to the penny figures out how much the whistleblowers are bringing in and how much the government is finding on its own. Because they have to—if the whistleblower brings it in, they have to give the reward.

Mr. BOYLE. Right.

Mr. KOHN. So these numbers are literally to the cent. And it's just incredible, the growth.

Other programs that are more modern, they don't have the track record, but the SEC is reporting incredible findings. The Chair is talking about blueprints and unbelievably high-quality information. Why? Think about it. If your reward is based on the truthfulness of your information, the accuracy of your information, and the quality of your information, you're going to be weeding out, you're going to get the best sources, it's going to help the government, it's going to get the big fish. SEC is seeing that, although they're still relatively new.

In offshore illegal accounts, illegal Swiss banking, one whistleblower, Bradley Birkenfeld, literally broke the bank—\$780 million fine to UBS. They had 18,000 illegal U.S. accounts. And that triggered a voluntary program of 50,000 Americans, millionaires and billionaires, coming back and paying fines. I totaled it up to about \$13 billion—triggered by a whistleblower because the people didn't want to get caught.

If you empower the insider, the positive results are truly remarkable.

Mr. BOYLE. Another way of thinking about this is essentially we've created a market where the insider now can bring this information forward, and there's essentially a market for this information that previously did not exist at all.

I'm—you wanted to add to that?

Mr. KOHN. Absolutely true. The University of Chicago, their school of economics—you know, these are no liberals—you know, these guys looked at it and concluded that without rewards there's no incentive. And, in fact, they couldn't even understand why anyone would blow the whistle.

But with those rewards—and they've studied every major fraud case in a period of time; it was an incredible study—they said they worked, they worked remarkably well, they're not frivolous, and they recommended expanding the use of that process.

You're talking about, to just put it bluntly, the goose that lays the golden egg. And I'm just saying, don't kill it.

Mr. BOYLE. So let's take the next step then. If it were killed, either purposely or inadvertently, through this or any other legislation, what specifically would be the ramifications?

Mr. KOHN. I will tell you, I will have a \$500 hammer I can sell you. It's as simple as that.

When you look at the state of Federal procurement before Senator Grassley fixed it, if you look at that state, it was so bad. Yet I have the opportunity to talk to people within business, and they tell me the impact, far from just the recoveries—the increasing compliance programs; the fear of detection making people do the right thing; and guess what, making honesty pay, making the markets more fair, where people who are cheating can get caught so the honest businesses aren't at a disadvantage.

The benefits are literally overwhelming. Every regulating agency that has looked at this has turned around and said, whoa, this is great.

Mr. BOYLE. I thank you.

Mr. Chairman, I see my time has expired, so thank you.

Mr. KOHN. Thank you.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the gentleman from Florida, Mr. DeSantis, for 5 minutes.

Mr. DESANTIS. Thank you, Mr. Chairman.

Mr. Kosar, what is the reason why the Founding Fathers put the power of the purse with the Congress?

Mr. KOSAR. Well, they had had plenty of experience of abuse at the hands of the crown. And I think there was just more philosophical agreement that, if money was to be taken, it should only be taken by elected officials who are, therefore, accountable and could be taken out of office if they take more than they should.

Mr. DESANTIS. So you have an executive—and they believed in separation of powers. So you have an executive branch. If the executive branch is acting in a way that's contrary to either the interests or the rights of the public, then those elected representatives in the legislature would be able to remedy that by simply refusing to provide funds going forward, correct?

Mr. KOSAR. The wealth and property of individuals would be better protected under a scheme by which only those who are able to be recalled through election or put out of office are able to extract it, yes.

Mr. DESANTIS. And I think the problem with what we've pointed out here—and I commend the chairman for doing this—is, when you have the agencies that are effectively on autopilot with fees and whatnot—and we saw this with the dispute about illegal immigration, when the President, even though he had said 20 times, you know, you can't do this, was then effectively issuing legal status unilaterally to certain people who were in the country illegally. The Congress said, wait a minute, you can't do that. But it turned out—we said, we're not going to fund it. Well, it turned out we didn't even need to take an affirmative act to fund it. They already had the fees through the USCIS, and it was just on and on they went without any need for congressional appropriation or authorization.

And the problem with that is that that takes the default—the default should always be, if we just simply decide not to act, then the offending conduct stops. It should require Congress to take an affirmative act to appropriate funds for a given activity.

And the way we've gone, we're insulating the Congress—well, we're insulating the agencies from accountability from the Congress, but, more importantly, from the American people, because they don't have a direct way to hold the agencies accountable.

And I think that what frustrates me is that it's not like Congress had this power taken from us. Congress has given away the power and has offered to do this over the years.

Mr. DESANTIS. So let me ask you this. Well, this could be for anyone that wants to jump in. In terms of transparency, some agencies are not transparent at all, some are very transparent. What agency would you say is the most transparent? Examples?

Mr. HOLLISTER. Mr. DeSantis, I would point to—we were doing a lot of work on the overall spending and the transparency of expenditures as is going to be required beginning this May under the DATA Act, and I would point to the Small Business Administration, for instance. They have been able to take all of their spending

information, they've been able to conform it to the new data structure, and they're now able to navigate seamlessly from their appropriation all the way down to each grant they issue and put all of that in a map in one click.

Mr. DESANTIS. Anyone else? Go ahead.

Mr. KOHN. Sure. Under the False Claims Act, those settlements are all made public, they're subject to court approval. Every dime given to the whistleblower is accounted for in a public document. It's been around for 30 years, and I don't know of any time that a Member of Congress or even the public has said the way the whistleblower was awarded was somehow bad, except for a whistleblower claiming they should have gotten more, but—so there is transparency in the False Claims Act.

Mr. DESANTIS. Let me ask about examples of Congress relieving agencies from the appropriation process, as I mentioned. When did this start? Ms. Krause, is that—I think you had mentioned it.

Ms. KRAUSE. Sorry. I was looking back to my colleague.

Ms. PEREZ. Actually, there—excuse me. There have actually been examples going back—

Mr. MEADOWS. We'll get you a chair. Okay.

Ms. PEREZ. Oh, thank you. Sorry about that.

There have been examples going back to, as was mentioned earlier, the Customs officials early on in the republic. There have also been a number of authorities just in this past 100 years where agencies are collecting fees, and Congress has either provided limitations on how they can use them or made them available without further appropriation.

Mr. DESANTIS. And that process has become more conspicuous over the last hundred years? Is that fair to say?

Ms. PEREZ. Yes, that would be fair to say.

Mr. DESANTIS. Okay. Well, look, I think that my friend from Alabama has a good bill. I think at some point, if we want to be anything more than a debating society, we're going to have to start reclaiming some of this authority. You know what? It requires Congress to do more work. You actually have to legislate more, you've got to make more decisions. Some people don't like going on the record as much, but that's just the reality. And it's easier to kind of say that just let everything run on autopilot. And I think some of the fees, it's not all bad the way it's done. Sometimes it is within law, but other times it's simply government on autopilot, and that is not, I think, what the Constitution envisions, and I think it's up to us to start to claw this back.

So I yield back.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the gentleman from Georgia, Mr. Hice, for 5 minutes.

Mr. HICE. Thank you, Mr. Chairman.

Ms. Krause, I just want to make sure. You stated that the GAO does not know how much is collected through the fees and fines and all that sort of thing. Is that correct?

Ms. KRAUSE. There are data out there about individual ones. It has not been aggregated into a total. It's a very involved, complex process in terms of understanding the underlying specific legal authorities associated with those funds.

Mr. HICE. Well, in the first place, it seems like that would be information that not only you should have, but you would want to have. But secondly, this bill would correct that problem as well, if we're able to move forward on it.

And, Mr. Hollister, right along the same line, I want to just—for clarification, I want to make sure that you stated, you testified a while ago that the Treasury can provide an accurate number for the fees, fines, and settlements. Is that correct?

Mr. HOLLISTER. Mr. Hice, yes. My understanding is the Treasury can. The information that the Treasury receives from agencies is often in the form of summaries. So Treasury might give you amounts, but Treasury might not be able to walk that back all the way to the specific complexities of the legal authority under which each bunch was collected. Treasury, however, could give us, from the central accounting reporting system, could give us aggregations. And my testimony was that Congress could direct Treasury to include that in the overall spending structure.

Mr. HICE. Okay. Mr. Chairman, I think it'd be wise for us to request that number from the Treasury just to have an idea of what we're dealing with here.

Mr. Kosar, let me ask you, regarding the fines and fees, penalties, settlements, all this sort of stuff, do you have any idea how much that has increased over recent years?

Mr. KOSAR. No, I do not.

Mr. HICE. Who would have that information for us? Does anyone chart the increase of fees, fines, and settlements?

Mr. KOSAR. I would think OMB would have a number to use, and then presumably we could get some better data from Treasury.

Mr. HICE. I would also like for us to get that information, if we can.

And let's just, for the sake of being in here, is it fair, do you think, to make the assumption that fees and penalties, fines, have increased over the years? Is that a fair assumption?

Mr. KOSAR. I would say so. And I would say so probably as a proportion of the budget it has increased.

Mr. HICE. Right. I would say so as well, because we're now watching some agencies actually live off of those things. And so with the assumption that is more than likely accurate that the fines, penalties, fees have increased, how does that, number one, enable these agencies to operate independently? But also, how does that impact Congress's role?

Mr. HOLLISTER. Well, Mr. Hice, it reminds me of Thomas Jefferson's letter to the Treasury secretary complaining that the spending, even at that time in 1802, the Federal Government's operations had gone beyond the comprehension of Congress. The complexity at that point had already grown to the point where Congress couldn't comprehend it.

And in this case we see—because Congress has over the last 200 years delegated authority in very complex ways to agencies, we have a great deal of difficulty in getting that comprehension. I think we could help—we could start to regain it by consistently tracking that information and asking for that information to be put into the whole picture, integrated into the whole picture.

Mr. HICE. Well, I would absolutely agree. And it seems to me, with the complexity that you mention, the more complex this whole scenario is, the more difficult it is to have oversight over it. And it gets out of hand rapidly, it seems. And that—you know, this whole thing—and I'll just pick up on what Mr. DeSantis said. You know, this ultimately comes down to a constitutional issue. And fair enough, Congress over the decades has yielded some authority to these agencies, but we are on the verge of a genuine constitutional crisis now where those who are representatives are not having oversight and accountability, because those who are unelected in very powerful agencies are now able to operate independent from Congress and do multiple things, and they're not even elected by the people. And all of this creates a potential enormous constitutional crisis. Would you agree with that? Mr. Kosar?

Mr. KOSAR. I would say it creates basic questions of legitimacy and concerns along that line. And it also leads, I think, to the perspective that, you know, where does the real power lie, which branch? Eyes more and more turn to the executive branch. I mean, each time in an authorization, say, you allow an agency to collect fees for a particular purpose and spend it for a particular purpose, okay, you're directing the congressional spending, but because it's put into an authorization statute, if that agency misuses the money or has too much of it, well, you're going to have to pass another law to get that back. And as we know in this environment, passing legislation is very difficult. So the more that that is kind of toggled in one direction, the more toggles you've got to pull back if things don't work out right.

Mr. HICE. Well, I thank the panelists.

And I thank my colleague from Alabama for this bill, Mr. Chairman. I appreciate your indulgence. I yield back.

Mr. MEADOWS. The gentleman from Tennessee, Mr. DesJarlais, is recognized for 5 minutes.

Mr. DESJARLAIS. I thank you, Mr. Chairman. And thank you, Mr. Palmer, for bringing forth this legislation.

Ms. Krause, if you would, your 2015 report illustrates the DOJ sidestepping Congress and providing deposits from Federal fines and penalties to be immediately used to fund agency programs, correct?

Ms. KRAUSE. Yes. That's our report.

Mr. DESJARLAIS. Do you feel Mr. Palmer's legislation adequately addresses this issue?

Ms. KRAUSE. The recommendations that we made in that report dealt a lot with the obligated balances, so the balances the agency holds that—to manage the programs and the fees that come in. I'm not familiar—or I wouldn't know how that applies in the bill context.

Mr. DESJARLAIS. Okay. So we already know the DOJ has taken advantage of using their fines to fund initiatives within their agencies. Do you know what percent of their budget that represents?

Ms. KRAUSE. I believe in that report we talked about it being 15 percent of the budget in 2013.

Mr. DESJARLAIS. Do you have a list of other government agencies that have also circumvented Congress and used fines, fees, and penalties without congressional authorization?

Ms. KRAUSE. We have individual reports that we've—we have in terms of those that have authority where they've been granted authority to use funds without further appropriations. We don't have a comprehensive list. We have examples of that——

Mr. DESJARLAIS. Can you name a couple?

Ms. KRAUSE. What——

Mr. DESJARLAIS. Can you name a couple?

Ms. KRAUSE. Yeah. Sure. Some of those that include, I think we mentioned the National Park Service, the recreation fees, that the National Park Service is allowed to use those for repair and maintenance. You also have the USDA agriculture quarantine fees. Those are examples of fees that they do not require any further appropriation beyond their current authority.

Mr. DESJARLAIS. Is MHS one?

Ms. KRAUSE. MHS being?

Mr. DESJARLAIS. Mining.

Mr. MEADOWS. Mining Health and Safety.

Ms. KRAUSE. I believe that is, yes.

Mr. DESJARLAIS. Who determines the amount of the fine that's levied?

Ms. PEREZ. So that depends on the statutory authority. In some instances, Congress will set the percentage or the amount of the fee. In other situations, Congress has by statute designated that the agency will follow a particular process for determining a fee. And so agencies use a variety of factors for that.

Mr. DESJARLAIS. Okay. Mr. Jordan had mentioned the term “shakedown” in the process of these fines being levied and then sometimes negotiated. Who's authorized to negotiate, let's say, a fine that's levied of \$1 million and scares the heck out of businesses, and really there's never any intention of collecting \$1 million, but that gets their attention? Who negotiates the actual fee or fine that's paid?

Ms. PEREZ. That also will depend on the statutory authority of the agency that is either imposing a fine or following the process to assess a fine. So in those situations, you know, depending on that statute, the agency will be able to, you know, make decisions about how much of a fine they need to seek.

Mr. DESJARLAIS. Do you think that's fair and effective, to purposely mislead or levy a fine in instances to companies that obviously can't afford to pay that? I've seen it happen in nursing homes, I've seen it happen in mines, it happens in the Department of Justice. That's a problem America has with overregulation in the Federal Government, is they feel like they're simply at their mercy. And I think the process of coming in and determining a fine—the EPA does this all the time, that you have people that clearcut some timber and it happens to go beyond an acre, and they come in with a huge fine that they know they can't pay. And then when they negotiate it down to something still unreasonable, they are somehow expected to feel good about it. Do you think that's a fair process?

Ms. PEREZ. We actually haven't done the work to be able to determine of any specific case where that happens.

Mr. DESJARLAIS. Well, can you tell me if any of these fines and fees are used within the agency? We know they're used to fund some of their own initiatives. Do the employees that go out and

levy these fines that start the shakedown, if you will, do they ever get bonused by the very fines that they levy?

Ms. PEREZ. We're not aware of those situations.

Mr. DESJARLAIS. Can you say that there's not? Because this was a question I posed in a previous hearing and we didn't get an answer, even though there was evidence that this was occurring. So you've never heard of that?

Ms. PEREZ. We're not—I'm not aware of any particular situation, sir.

Mr. DESJARLAIS. Okay. So even though the DOJ has used this to fund their own initiatives, you don't have any evidence that the people who work for the DOJ benefit from these fines?

Ms. PEREZ. No. We don't—we don't have any particular cases in mind. We have received a request for a legal opinion from Chairman Chaffetz of the committee to look at some supplemental agreements that are made with respect to the EPA, and so that's a project we're working on.

Mr. DESJARLAIS. Okay. But, again, you can't tell me specifically who comes up with the amount of the fine and who's able to negotiate the actual settlement?

Ms. PEREZ. No, not in a general sense. Again, that would depend on the very specific statute and program and how that would be authorized.

Mr. DESJARLAIS. Do you feel that's something that needs to be addressed? Or Ms. Krause?

Ms. PEREZ. I mean, certainly GAO is always—you know, we're definitely in favor of, you know, looking into, you know, particular programs and the authorities and how agencies use them.

Mr. DESJARLAIS. Okay. I thank you for your time.

Yield back.

Mr. MEADOWS. I thank the gentleman.

Let me verify one thing. You said it's according to statute. A lot of these fines are not dictated by statute, I mean, in terms of what they are to fine. Is that correct?

Ms. PEREZ. Right. And that's why what we were saying is that depending on how the statute authorizes the agency to either impose a fine or assess a fine, then we would need to look at a specific situation to see what authority the agency had in that case.

Mr. MEADOWS. So it just depends on that agency's statute?

Ms. PEREZ. Yes, that's correct, sir.

Mr. MEADOWS. Do you not see that there would be a problem with lack of equality there?

Ms. PEREZ. You know, certainly that would be something to look into in terms of how an agency carries out those functions, carries out their statutory authorities. We just don't have any examples to be able to give you a specific example of one where there might be such a problem.

Mr. MEADOWS. I'm going to yield to the ranking member for just a—very brief, and then we'll come to Mr. Grothman.

Mr. CONNOLLY. Two quick observations. I come from local government. It is the practice of local government throughout the United States to levy fines, for example, on restaurants or food handling establishments when they find nonhygienic conditions: Rat droppings, cockroaches, or unsanitary conditions in the kitch-

en. Maybe some people want to call that a shakedown. I can tell you where I live, my public thinks that's a measure of public safety and protection to make sure that food is sanitary and healthy—

Mr. JORDAN. Mr. Chairman?

Mr. CONNOLLY. —not disease prone.

Mr. MEADOWS. The gentleman from Ohio. I can see where this is going.

Mr. JORDAN. We—

Mr. MEADOWS. Go ahead.

Mr. JORDAN. Yeah. If it's going to the—if the fine is going to the local government, but what—that's not what's happening at DOJ. There is a settlement and then DOJ tells the party who has supposedly done something wrong, you need to give the money to this nonprofit organization, which just so happens to have political leanings of—well, may have political leanings. That's the problem. And they call it a donation. When you're forced to do it, it's not really a donation. I think it's a shakedown, the term I used before.

Mr. MEADOWS. All right. We're going to go to the gentleman from Wisconsin, Mr. Grothman, for 5 minutes.

Mr. GROTHMAN. Okay. This is a question for any one of you. Next year's budget—obviously, it'd be nice if we had more detail here. It kind of surprises me the amount of funds that are going around that we don't even know the amount that's being spent. Can you make suggestions how—and I guess it would be Donald Trump's first budget—how in his submission to Congress, we can begin to see more clearly how funds are collected and spent or requirements we should put on that budget request?

Mr. HOLLISTER. Yes, sir. I'd recommend that Congress insist that the budget be expressed not just as a document, but also electronically, that it conform to the electronic structure that this committee has spent a great deal of time and effort mandating under the DATA Act of 2014 so that the budget can be electronically compared to the records from the previous year.

Mr. GROTHMAN. Okay. Mr. Kosar, in your testimony, you mentioned that the government collected \$516 billion from the public last year, right?

Mr. KOSAR. Correct.

Mr. GROTHMAN. To what degree do these—may be outside the normal collections is included in that amount?

Mr. KOSAR. I honestly don't know, because I find the categories that are used so confounding. And what we find in the President's budget is aggregate numbers in many cases. You'll have a line specifying a particular agency if it has a particularly large number, but then, you know, smaller amounts collected by agencies for other activities get rolled into one big ball. And so I would say it would be very nice if we had a better breakout and it was connected to the set of authorities.

Mr. GROTHMAN. Do you think we should do something statutorily to mandate a more clear delineation of where the funds are coming from?

Mr. KOSAR. I would favor that.

Mr. GROTHMAN. Okay. That's good.

Mr. HOLLISTER. Mr. Grothman, if I may, I would also add that there's a—the connection between the receipts and how they're ulti-

mately spent is crucial. That's one thing that we're missing today. We don't have any kind of system—even though Treasury has a system back behind there that does track what agencies are doing, we don't have a system that shows—that connects those receipts from nonappropriated sources to their ultimate expenditure. We know that that is technologically possible. We believe Congress should mandate that.

Mr. GROTHMAN. Well, I hope it's technologically possible. In other words, when they have money coming in, even though some of that money is dedicated to a given purpose, that's not necessarily apparent from their budget?

Mr. HOLLISTER. It won't be apparent from the system the way the system's structured today.

Mr. GROTHMAN. You know, it never ceases to amaze me how screwed up the Federal Government is. I tell everybody back home, I was a state legislator for 20 years, Washington is so much more screwed up than Madison, Wisconsin, you can't believe it, and one of them is how little information we get.

We'll ask all of you again, are there agencies with funding streams outside the appropriation process? And I guess this kind of goes to you. Which agencies in particular do you think could give us more transparent budgets?

Mr. HOLLISTER. Well, anecdotally, sir, we do know that some of the agencies that have independent research facilities, Defense Department in particular, but Energy Department certainly, there are often difficulties in comparing the budgets of those independent but federally funded research centers with wrapping them up and rolling them up to the overall budget of the agency.

Mr. GROTHMAN. Okay. Well, I'll see if we can do something.

One other comment. One of the Congressmen asked, I think maybe rhetorically, why they gave the power of the purse to Congress. And I guess I'll say the reason you want things in two different places is I think our forefathers were antithetical to the government growing at all. I mean, that's why, you know, the senators were supposed to be appointed by the—you know, why there were so many checks and balances. I think that's obviously why. It should be very, very difficult for the government to spend any money or hire any new people, and the more things are spread out, the more difficult that will be.

But we'll yield my remaining minute—

Mr. JORDAN. Will the gentleman yield?

Mr. GROTHMAN. —to Congressman Jordan.

Mr. JORDAN. I appreciate it.

I would just—I'm just struck because no one seems to be able to give us an amount. We had a colleague ask, has it been increasing, the fees, the fines, the penalties, the settlements? Has that number been going up? We don't—the answer is, from our panel, we don't know. When asked the total amount in fees, fines, penalties, and settlements, the answer is, we don't know.

Maybe the best way to get the information is to pass Mr. Palmer's legislation. Right? Because then we would know, because they got to all send it to the general fund, and we'll know what the amount—and with the appropriate amendments, Mr. Kohn, but we pass this bill, now we'll now. Right? Because now it'll be—that's

the whole—that makes the point why Mr. Palmer’s legislation is so darn good, because we’ll know and then we’ll know year to year if that number’s going up or down.

This is why this is such a common sense thing and so constitutional. And as Mr. Hollister said, States are doing this, they’re transparent. In Ohio, we know what’s happening with fees and fines and penalties and settlements. It’s just the Federal Government we don’t know. All the more reason to pass the legislation, then we’ll know.

I yield back.

Mr. MEADOWS. I thank the gentleman.

The gentleman’s time from Wisconsin has expired.

The gentleman from Alabama is recognized for 5 minutes.

Mr. PALMER. Thank you, Mr. Chairman. And I want to thank all my colleagues for attending this hearing, and for the witnesses.

And, Mr. Kohn, I want you to rest assured. I’ve read your testimony, and I actually called my chief of staff and told him that we needed to make sure that whistleblowers are compensated and that that’s protected. So you can rest assured that we’ll take care of that with a friendly amendment.

I would like to ask Ms. Krause this question: Article I, section 9, clause 7, says, “No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.”

Are fees collected by the Federal Government public money? That’s not a hard question.

Ms. KRAUSE. No. I was going to turn it to my counsel.

Mr. PALMER. Okay.

Ms. PEREZ. Yes, sir. The fees that are collected by agencies under the authority of Congress are considered to be appropriated funds.

Mr. PALMER. No. The question is are they public money?

Ms. PEREZ. Yes, sir. They’re considered to be public.

Mr. PALMER. Okay. They belong to the public, not to any individual, not to any agency director. They belong to the public. Is that correct?

Ms. PEREZ. Right. Appropriated funds—

Mr. PALMER. How about fines?

Ms. PEREZ. —is synonymous to public money, yes.

Mr. PALMER. Fines? That would—would you answer in the affirmative on fines, that’s public money?

Ms. PEREZ. Yes. Unless Congress—

Mr. PALMER. How about settlements?

Ms. PEREZ. Unless Congress has specifically designated that they not be considered public or appropriated, they would be considered appropriated, yes.

Mr. PALMER. Okay. And, I mean, settlements, revenues from the sale of government assets. That would be considered public money, wouldn’t it?

Ms. PEREZ. Any time Congress has designated sources of funding and said that—

Mr. PALMER. Okay.

Ms. PEREZ. —agencies can use them, those are considered—

Mr. PALMER. All right.

Ms. PEREZ. —public money, yes, sir.

Mr. PALMER. Thank you.

I just want to make the point that H.R. 5499 is not a radical proposal. It is consistent with the Constitution. It's a constitutional proposal. And as my colleagues on both sides of the aisle have acknowledged, it's the duty of Congress to direct spending and not the agencies. And H.R. 5499 is not only consistent with that principle and that constitutional requirement, it advances it. It advances that responsibility.

All my bill does is—all H.R. 5499 says is that all fines, fees, settlements, all unappropriated revenues shall go to the Treasury identified with the agency where they originated subject to being appropriated by Congress. It doesn't in any way diminish the fact that an agency might have access to those fees, but what it does is it puts the responsibility back where it belongs. It restores oversight to Congress over the agencies, but more fundamentally, it restores accountability of Congress back to the people. And that's one of the main things that we've avoided over the years by delegating spending to agencies, whether it's through spending fees, fines, settlements. But we also are required by the Constitution to give a statement and account of all receipts and expenditures of all public money.

And with all due respect to my—to the GAO and my colleagues, my friends there, and I have—I really like what the GAO does, you can't answer that question. You've been asked repeatedly and you can't give an answer to that.

So I'm just—what H.R. 5499 does is it would require Congress to review the unappropriated spending, it would give us the accurate number of how much we're actually collecting. And it may be that some agencies would be authorized or reauthorized on spending some of these fees. I don't dispute the use that some of these fees are necessary, but the use of the funds should also be proper. And if Congress is not appropriating and not exercising oversight, whether or not it's necessary, it's not proper.

So I just think on too many occasions, you know, agencies have circumvented the will of Congress and Congress has shielded itself from being held accountable by the public by allowing this to continue. And I think H.R. 5499 would hold the agencies accountable, but more fundamentally, it would make Congress accountable to the people.

And I just think that the fact that we fail to pass appropriations bills does not diminish the fact that Congress is not exercising the oversight and the appropriation authority required by the Constitution, and that's what we're trying to reestablish here. Congress needs to be held accountable for the way the agencies operate. We need to exercise due diligence in our oversight. And if Congress can give the authority, it can take it away. But I believe H.R. 5499 is a reasonable step toward restoring constitutional oversight of our agencies and Congress being held accountable by the people.

And I appreciate again your indulgence, Mr. Chairman, and for the committee holding this hearing, and I appreciate the witnesses' testimony. I yield back.

Mr. MEADOWS. I thank the gentleman, and thank the gentleman for his interest in this important topic.

The chair's going to recognize himself for a few questions, and then we'll be prepared to close with closing statements.

So, Mr. Hollister, let me come back to you, because I think in your testimony, you indicated that the Department of Treasury actually has monthly statements where the total fines, fees, and settlements, I guess, as it relates to—it may not be able to be tracked back to the genesis of where it started, but there is a total number. Is that correct?

Mr. HOLLISTER. That's correct, sir. There is a total number and there are detailed tables. The trouble is it's a static document.

Mr. MEADOWS. It's a what?

Mr. HOLLISTER. It's a static document. You can't—

Mr. MEADOWS. Okay. A static document. And we know that your fine group is not static, right? One of the reasons why I get so excited about what you're doing is it adds a level of transparency where we'll be able to drill down and really start to look at it in a real meaningful way. Would you agree with that?

Mr. HOLLISTER. It ought to be interactive, sir.

Mr. MEADOWS. So as we look at that, can you explain any reason why Treasury would not be able to give this committee, in response to a request that we made, the total amount of fines and penalties that they've collected? What would be a reasonable rationale for them not being able to give this to this committee?

Mr. HOLLISTER. My best suggestion, sir, would be that the Treasury Department tried to minimize the scope of the request, as leg affairs offices have been known to do—I've worked for the committee, I know how that works—and interpreted the request as a request for just the Treasury Department's own receipt of fines, fees, and settlements, which involves all sorts of—

Mr. MEADOWS. So what you're saying is we have a failure to communicate?

Mr. HOLLISTER. Yes, sir.

Mr. MEADOWS. So if we have a failure to communicate, I think it would be prudent for us to make sure that as a staff—and they've already indicated they're going to reach out to Treasury to get this number, because as my colleague, the gentleman from Ohio, Mr. Jordan, mentioned, we're talking—it's starting to add up to real money here. We're talking about \$600 billion. Is that correct? Based on the testimony from the White House budget and the \$83 billion that we got in a report, \$600 billion. Would you agree—

How about this, Ms. Krause. Would you agree that \$600 billion is a large sum?

Ms. KRAUSE. That is a large sum.

Mr. MEADOWS. All right. And being that the President-elect, Donald Trump, wants to spend \$1 trillion on infrastructure, that gets us half the way there with fees, fines, and settlement, doesn't it? You don't have to answer that. I'll just leave it at that.

But—and so as we go here, I guess I use the humorous example in one area that's not so humorous to me. So let me come back to GAO. MHS was mentioned earlier. And the reason why I drilled down on statute and what we can do with fines, fees, is because there is no guideline for MHS in terms of the fines that they may

give and the scope of that. It depends on the individual inspector on what he would give.

And what I was troubled with is—and I didn't know this because I was just a new Member of Congress going out to find out what was happening out there. And as I've recently found out, that actually there was an empty Coke can on a desk at a mining group, that they got a fine of well over \$500 for having a Coke can sitting on their worktable. That happens in my office probably on a regular basis. So if MHS had come in and fined me, I would have had this unbelievable fine. And then I went up on the——

Mr. CONNOLLY. Wait a minute. Can we get the address of your office?

Mr. MEADOWS. Yeah. Well, I'm sure it's in Rayburn, because you've got plenty of seniority.

And so as we look at this, here's my concern. If we leave it up to a nonspecified, arbitrary fine and fee schedule, it's one thing to say, okay, a fee covers the cost of this particular thing and this is where we collect it and it goes, that's one issue. But the other is, the gentleman from Ohio pointed out, on the settlement and the fines, that's a number that could go up or down based on no particular criteria. Would you agree with that? How many of the agencies have a defined, if you do X, it's going—the fine is Y?

Ms. PEREZ. I don't know the absolute number.

Mr. MEADOWS. Does the EPA have that?

Ms. PEREZ. I don't know specifically.

Mr. MEADOWS. I know the answer, but, I mean, do they have, if you violate a particular rule, that it always—the fine is always a set amount? In your experience, would you say that there is—that you could make an analysis that is linear in terms of their fee and fine structure?

Ms. PEREZ. I don't know that we could, sir.

Mr. MEADOWS. Okay. So here's what I would ask of each one of you. We would ask each of you to report to this committee, if you can, three recommendations on what you would like to see. And if you would get back to this committee. And that might even include looking at the particular piece of legislation and problems that you may have with that legislation that may not fulfill the intended consequence.

Mr. Kohn, I'm sure you can weigh in on that. There's a couple of others that the ranking member and I have talked about. But three recommendations that we have.

Here is the other question that I would ask for you, is to prepare at least two questions that we can ask OMB, the IRS, and Department of Treasury when we have the follow-up hearing for them to be able to hopefully illuminate on some of these unanswered questions. Because you would think if any group would have a proper accounting of what's coming in and what's going out and where it's coming from, it would be OMB, Treasury, and the IRS. Would you all agree with that?

Mr. HOLLISTER. Yes, sir.

Mr. MEADOWS. Most of you are nodding your head yes, and so let the record reflect that all witnesses answered in the affirmative.

And so as we go with that, I just want to thank you. I'm going to recognize the gentleman from Virginia for his closing statement.

Mr. CONNOLLY. I thank the chair. And it's an intriguing hearing. And I thank our colleague from Alabama for really bringing before us, I think, a very legitimate issue, worthy of much further examination.

I guess I'd make three points. One is, we talked about the Constitution and the role of Congress and the power of the purse. There has been no court ruling, that I'm aware of, in the history of the Republic that has challenged or questioned the constitutionality of Congress's right to delegate those authorities. So the fees and settlements and penalties in question so far apparently pass constitutional muster. So that's not the issue. The issue is, has it gone too far? Is it de facto creating a situation where we're not doing our job? And if so, what's the remedy?

What we have not examined here today, which you've heard me pursue, is, okay, what are the downsides? What are the consequences? If you cut off the TVA's ability to collect fees, what does it do to the mission of the TVA and the people it serves? And is that minor, is it trivial, is it easily correctable, or is it something much more serious and significant that we have to contemplate, we have to take responsibility for?

And, finally, I think we're putting a lot of faith in our own appropriations process. The fact of the matter is Congress is derelict in its duty, not so much by delegation of these fees and collections, but in our inability, frankly, to pass a normal appropriations process. And that's a bipartisan dereliction of duty. I worked in the Congress in the Reagan administration, and I can remember Ronald Reagan putting a big stack of papers, which was the omnibus funding bill that year, and talk about how shameful it was. That was over 30 years ago, and we do more of it and that stack of paper would be even bigger today.

To assume that we're going to take on more responsibility by proving every whistleblower payment or every settlement agreement or every fee to be charged, to me is maybe something that constitutes a noble goal, but it is not something that's practical in this Congress or any future Congress, given our past record of performance in that regard.

So I think there's a lot we have to think through before we act on this bill, but I do thank our colleague from Alabama for whetting our appetite and forcing us to deal with this subject, and I look forward to further investigation. And, Mr. Chairman, thank you for this hearing.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the gentleman from Ohio for his closing statement.

Mr. JORDAN. I thank the chairman.

I just wanted to respond briefly to the ranking member, our good friend from Virginia. He talked about no court case has said Congress cannot delegate, that's accurate, but there was a court case in 1976, *United States versus McCollum*, which said the Supreme Court has repeatedly affirmed, quote, "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."

So it's not a passive, it's an active role that Congress is supposed to play in this effort.

Never forget what happens here. We have three categories: Fees, fines and penalties, and settlements. No one could tell us what the total amount is. But we do know that the fees, according to the White House, just that alone is \$534 billion, roughly half of what we spent in discretionary spending last year. We know fines and penalties is \$83 billion over 5 years, and that excludes Treasury and the IRS. So we know that's a substantial number. And we know settlements just at DOJ is in the millions and millions of dollars, what they've required companies to pay, and not only pay to the DOJ but to pay to some favorite nonprofits that the DOJ recommends that they give a, quote, donation to.

So that's why what the chairman said just a few minutes ago is so important, that we get OMB in here, that we get Treasury in here, someone from the IRS, who can answer our questions. That's plain and simple.

And it, again, underscores, as I said earlier, why Mr. Palmer's legislation—maybe it needs some amendments, I haven't seen many bills that come in front of Congress that don't need some changing—but why it's so important and so valuable.

Maybe we also need the inspector general, Mr. Chairman, the inspector general from Justice Department to come in here and explain to us how this settlement game works when DOJ shakes down some companies. I'd like to know that too.

So this is an important subject. I want to commend the chairman for having this hearing, and I particularly want to commend the gentleman from Alabama for bringing this legislation. This is something we need to pursue. We need to make sure this bill gets done, gets passed, becomes law, because, like I said, if no one else will give us the number, when we pass the bill, we'll get the number, and that will help the taxpayers.

So with that, I yield back, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman.

I want to mention, the ranking member and I just had a conversation, and so we will be sending a bipartisan letter to request that information of Treasury. And so hopefully we'll get a little bit more specificity on that particular item.

And I want to close by saying this: One, thank you all for your interest in transparency, for your interest in this particular subject.

Mr. Kohn, thank you for your support of whistleblowers, specifically. It is a critical nature. Your graphs were very illuminating, and certainly we don't want to go backwards there. And I can tell you that I for one am committed to make sure we don't go backwards on that issue. I believe Mr. Palmer agrees with me on that particular item as well.

For my friends at GAO, the follow-up hearing that we will be having, I would ask that you just be prepared, because you're going to be part of that, because the fourth leg of that chair needs to be GAO and what we have and have not been able to acquire. And so as we look at that, I just want to thank all of you for your interest.

And if there is no further business before the subcommittees, they stand adjourned.

[Whereupon, at 3:46 p.m., the subcommittees were adjourned.]

