GOVERNMENT LITIGATION AND THE NEED FOR REFORM

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GOVERNMENT LITIGATION AND THE NEED FOR REFORM

Tuesday, June 6, 2023

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND LIMITED GOVERNMENT

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to notice, at 2:38 p.m., in Room 2141, Rayburn House Office Building, Hon. Mike Johnson of Louisiana [Chair of the Subcommittee] presiding.

Present: Representatives Johnson of Louisiana, McClintock, Kiley, Hageman, Fry, Scanlon, Escobar, Jackson Lee, and Johnson of Georgia.

Mr. JOHNSON of Louisiana. The Subcommittee will come to order. Without objection, the Chair is authorized to declare a recess at any time. I hope we don’t need it.

We welcome everyone to today’s hearing on Government Litigation and the Need for Reform. I will now recognize myself for an opening statement.

Today’s hearing will address various aspects of various government litigation that we believe merits reform. Our House Judiciary Committee is charged with safeguarding American’s most fundamental rights. Through that lens today’s hearing is going to primarily focus on three topics. Civil asset forfeiture, sue and settle tactics, and slush funds.

In recent times here’s the problem civil asset forfeit has become a device for unjustified governmental takings. Federal and State laws allow law enforcement agencies to take personal property through civil proceedings under certain circumstances. The standards for government taking a property vary from State to State and sometimes differ from Federal standards.

The problem today is that current Federal standards for civil forfeiture invite abuse. In part because State agencies can skirt State based forfeiture protections and rely on more relaxed Federal law to confiscate property and that results innocent citizens losing their property that the government simply pockets. The reform to Federal law is necessary to restore the original intent of the law because it’s an important one and better protect citizens’ property.

On a second issue another area of reform relates to the so-called sue and settle tactics. Sue and settle can occur where proregulatory
plaintiffs and willing government agencies circumvent Federal law, namely the Administrative Procedure Act while rewarding special interests that very favor. When a proregulatory plaintiff sues and then settles with an agency in ways that require certain types of rulemaking, the result is the plaintiff and agency is avoid public scrutiny and Congressional oversight of the agreed to policy.

So, the sue and settle tactics also can bind Federal agencies to rulemaking that extends from one administration to the next. With reforms, we can better guard against this tactic and return transparency, because that’s what the American people want and deserve and Congressional oversight to the agency rulemaking.

Finally, the third issue, in this hearing we’re going to provide the opportunity to examine the use of settlement slush funds. That’s a phrase that’s thrown around, but it refers to cases where defendants settle lawsuits with government agencies. Instead of government directing all settlement funds to the U.S. Treasury or to the injured parties, agencies have this habit now—agencies instead have required defendants to give them money to politically favored special interests that are disconnected entirely from the litigation in many cases.

These types of slush funds directed to support pet projects go to obviously the pet projects of an administration. They can amount to a form of Executive Branch spending that is not approved or even reviewed by Congress. This circumvents Congressional oversight and the resulting accountability of the Executive Branch. So here, of course, we believe that reform is desperately needed.

So, Congress is considering proposed legislation to address concerns with all these issues. These proposals include for example the FAIR Act, H.R. 1525, the Sunshine for Regulatory Decrees and Settlements Act of 2023, that H.R. 3446. The Stop Settlement Slush Funds Act of 2023, that’s H.R. 788.

Governments unwarranted taking of private property and administrative State’s litigation tactics to gain game the system on rulemaking or to direct funds to politically favored causes are highly problematic. Our deepest concern is that they are pretty clearly a violation of our Constitutional order. So, we are here today to gain a better understanding of these issues and how possible reforms will help restore confidence in our government.

We were talking just here a moment ago that the people’s faith in our institutions is at an all-time low. We have to fix this because it’s difficult to maintain a republic if people lose fate in those institutions.

So, with that, I thank all our witnesses who appeared to testify before us today. I look forward to a robust discussion on these really important issues.

I now recognize our Ranking Member, Ms. Scanlon, for her opening statement.

Ms. Scanlon. Thank you, Mr. Chair. Thank you to our witnesses for joining us today.

I am delighted to have the opportunity to hear from some these witnesses, because although I disagree strongly with the majority’s conclusions with respect to the need to impose additional burdens upon the settlement of certain Federal cases, I strongly agree that the abuse and injustices allowed by our Federal civil forfeiture sys-
tem stand in need of serious reform. I'm heartened by the broad bipartisan support for the FAIR Act which would do just that.

My interest in this bill stems from over a decade of work in Philadelphia before coming to Congress to reform Pennsylvania's civil forfeiture statute in many of the ways proposed by the FAIR Act. The legal services pro bono program that I led worked in conjunction with the Institute for Justice which is represented here by majority witness Kirby West today and under the guidance of the Professor of Lou Rulli at the University Pennsylvania Law School, along with an army ever volunteer law students and attorneys who were trained and donated their time to help dozens of low-income Philadelphians challenge the abuses of Philadelphia's civil forfeiture statute by local authorities who used it to seize the property of low-income residents, many of whom were innocent of any crime.

One of our typical clients whose case resulted in the Pennsylvania Appellate Courts changing the standard of proof needed to seize assets was Elizabeth Young, an elderly Black Philadelphia homeowner. Ms. Young was a widow with health problems living in a house she and her husband purchased over 40 years previously. After her adult son, I think he was in his fifties, moved in with two of his children, he was arrested for selling small amounts of marijuana. Despite Ms. Young never having committed any wrongdoing and with no proof that she was aware of the activity the government's seized Ms. Young's home and her car, throwing this elderly woman in poor health onto the street with no way to travel to her medical appointments. Her context, her car, and home were worth less than $60,000. Her son was arrested for selling a few bags of $20 worth of marijuana.

After pro bono counsel took years of appeals that went all the way to the Pennsylvania Supreme Court, Ms. Young prevailed in a groundbreaking decision on the proper application of the excessive funds clause of the United States and Pennsylvania Constitutions in civil forfeiture cases.

This case was far from the exception to the rule. Civil asset forfeiture was initially adopted as a tool to improve law enforcement by allowing the seizure of assets allegedly connected to criminal activity, but over time we've seen that:

1. Civil asset forfeiture laws have once shown no identifiable impact on the public safety,
2. have resulted in wrongful seizure of the personal property of the persons innocent of crime, and
3. created perverse financial incentives for law enforcement agencies to seize money and property to bolster their budgets.

While the proponents of civil forfeiture of projected seizure of drugs, expensive cars and other fruits of criminal enterprise far more frequently we saw seizures involving the cash, homes, or cars of persons of limited means who were often innocent relatives of someone suspected, but not necessarily even convicted of criminal activity.

Unlike criminal asset forfeiture, Federal civil asset laws do not require the government to prove that the individual whose property is seized has committed a crime beyond a reasonable doubt or even by a preponderance of the evidence. Federal agencies have been
empowered under an administrative process to decide these cases without any judicial oversight.

Furthermore, the Federal statute encourages State and local agencies to partner with Federal law enforcement to seize assets that more protected State laws would prevent. This perversion of the law has created persistent abuses of civil asset forfeiture that require urgent and meaningful reform.

Fundamental fairness requires that Congress ensure people are protected from wrongful seizure of their property. We should create guardrails against the persistent abuse of civil forfeiture laws that have raised Constitutional concerns for individuals due process rights protected under the Fifth Amendment.

Chief among the many issues raised by the civil forfeiture process is that it is so complex, and the standard of proof so overwhelmingly favors the government that low-income victims of this process are often unable to navigate it. They frequently lose their property, homes, and vehicles by default in the legal process. Either because they don’t understand the process at all, or they can’t afford a law.

In fact, the typical value of seized property is usually less than half the cost of retaining a lawyer. With minimal due process protections, without court supervision, without a right to counsel civil forfeitures can often leave people who have never even been charged with a crime financially devastated even homeless and with little recourse. Most frequently these perverse financial incentives and due process issues play out in low-income and minority communities.

Congress has direct authority to address much needed reforms here and we need to act. That’s why I’ve cosponsored H.R. 1525, the FAIR Act. This would address the due process concerns raised by our civil asset forfeiture laws, including eliminating administrative forfeitures so only Federal courts can order a forfeiture, providing access to counsel for indigent civil defendants seeking the return of their property, and requiring Federal forfeiture funds to be sent to the U.S. Treasury’s general fund rather than deposited into funds that can only be used for law enforcement purposes.

These sensible reforms have garnered bipartisan support. Unfortunately, today, this hearing is conflating this real issue that has bipartisan support with a partisan antiregulatory agenda. For decades Republicans have made spurious allegations that the Federal government is engaging in Executive overreach by abusing the court system to enact regulatory policies that violate Congress Legislative and spending authority to justify an antiregulatory agenda.

Democrats together with a broad coalition of environmental, public interest, labor and civil rights groups have consistently opposed these antiregulatory measures, both because they are unwarranted and because they undermine agency’s ability to protect public health and safety. We’ve heard our colleagues on the other side conjure up dubious allegations to justify taking action against a practice they refer to sue and settle, but there’s no credible evidence to support these allegations.

In fact, Republican Administrations have also argued that settlement agreements with corporate violators in cases brought by the Department of Justice that included donation requirements to a
A third-party group might help remedy the harm caused to the public. Both parties’ Presidential Administrations, including the Trump Administration, have settled what can be more accurately described as deadline lawsuits.

Congress authorizes these private lawsuits to enforce Federal law and require the agencies to abide by the rulemaking timelines set by Congress. Settlements and consent decrees are often the most efficient means of resolving these cases because the Federal government has no chance to prevail in court, not to mention they save taxpayer dollars by avoiding expensive and protracted litigation. These third-party donation requirements allow Federal agencies to hold wrongdoers accountable more effectively.

These funds are especially important in addressing systemic injustices that impact all of us but may not have easily identifiable victims like harms to public health, the environment or customers patronizing our Nation’s financial systems. These measures are designed to gum up the regulatory process created by Congress and if passed, would result in weakened protections for public health and safety.

Nonetheless, I thank the Chair for devoting time to Federal civil asset forfeiture reform and I hope to work with you both on the FAIR Act and other bipartisan measures in the future.

Thank you.

Mr. JOHNSON of Louisiana. Thank you, Ms. Scanlon.

Ms. SCANLON. Sorry. At the outset, I’d seek unanimous consent to introduce into the record the following, the 2021 report prepared by the Institute for Justice entitled, “Frustrating, Corrupt, Unfair: Civil Forfeiture in the Words of Its Victims.”

A written statement by Professor Lou Rulli of the University of Pennsylvania Law School, dated June 6, 2023, a letter from a broad coalition of civil rights organizations ranging from the ACLU to the Goldwater Institute expressing support for the reforms in the FAIR Act.

Two law review articles by Professor Rulli, one from 2021 entitled, “Prosecuting civil asset forfeiture on contingency fees,” and another from 2017 entitled, “Seizing family homes from the innocent.”

Mr. JOHNSON of Louisiana. Without objection.

Mr. JOHNSON of Louisiana. The gentlelady yields back. I recognize the Ranking Member of the Full Committee, Mr. Nadler, for his opening statement.

Mr. NADLER. Thank you, Mr. Chair.

Mr. Chair, the majority appears to have dusted off its old playbook from the Obama Administration for today’s hearing. Apparently whenever there is a Democratic Presidential Administration, the Republicans go-to move is to waste the Committee’s time accusing the Executive Branch of overreaching its legal and Constitutional authorities.

Conspiracy theory de jure for our hearing is that Federal agencies are, “colluding with liberal activist groups who abuse civil litigation in order to circumvent Congress’ legislative authority.” Despite many hearings over several Congresses, as well as a multiyear investigation, there is simply no credible evidence to support these allegations.
Instead, today’s hearing is simply a tired attempt by the majority to paint a Constitutional veneer upon unpopular antiregulatory agenda which includes enacting legislation credit that will undermine critical financial, environmental, health and safety protections for the American public.

Take for example H.R. 3446, the so-called sunshine bill. This legislation would create a gauntlet of burdensome and time-consuming procedures that would effectively stifle settlements and dissent decrees that resolve or can best be described as routine deadline lawsuits. The issue in these cases is a simple one: A Federal agency has failed to meet its statutory rulemaking deadline or other duty and a private party files a lawsuit demanding that they follow the law. That’s it.

The majority likes to spin tails of nefarious motives and collusion with liberal groups, a premise of the nonpartisan and independent Government Accountability Office debunked years ago. These deadline lawsuits do not result in a particular rule or policy outcome, nor do they circumvent the normal rulemaking process established by Congress under the Administrative Procedure Act. They simply require Federal agencies to do the job that Congress gave them.

Paradoxically then instead of protecting his Constitutional prerogatives, H.R. 3446 would thwart Congress’ will by further slowing down the rulemaking process that it has mandated. Of course, for my Republican colleagues, that’s not a bug in the legislation, rather than it’s primary feature.

Similarly, Committee Republicans have alleged that the Department of Justice is “Colluding” with liberal activists by including third-party donations and settlement agreements with corporate wrongdoers who actions have resulted in public harm. The public has accused DOJ of essentially creating a politically motivated slush fund. An outlandish argument based on the false premise that such settlements are illegitimate, a premise that both the GAO and the Congressional Research Service have debunked.

Nonetheless, the majority seeks to enact H.R. 788, the so-called slush-fund bill which would prevent DOJ settlements with corporate wrongdoers from including payments to third parties. Primarily nonprofits and educational community-based organizations that are best positioned to remedy societal harms caused by defendant. This legislation would curtail DOJ’s ability to enter settlements with third-party payments that would provide relief for systemic or diffuse harm caused to the public by illegal conduct.

For Congress to pass H.R. 788 it would be a gift to lawbreakers at the expense of families and communities suffering from injuries that cannot be addressed by direct restitution such as civil rights violations, environmental justice harms, or harms caused by fraudulent lending practices.

One bright spot in today’s hearing is the discussion of the need to reform Federal civil asset forfeiture laws. Here I do believe that there are legitimate policy concerns that current Federal civil asset forfeiture laws create incentive, perverse financial incentives for Federal agencies to pursue civil forfeiture in unmeritorious cases. Combined with the low standard of proof that the government must meet and the lack of due process protections, current Federal
civil asset forfeiture laws, very serious civil liberties and policy concerns.

My concerns are further heightened by the evidence that the burdens of civil forfeiture laws for disproportionately on working people. Particularly in communities of color already have few financial resources on which to draw.

Given the bipartisan interest this issue, I am deeply disappointed that Committee Republicans have chosen to shoehorn into this antiregulatory hearing, what is an otherwise worthy discussion of civil asset forfeiture reform. Unlike the case for civil asset forfeitures, these antiregulatory bills are solutions in search of a problem, designed to serve deep pocket and corporate wrongdoers and those seeking environmental consumer workplace and other protections.

To be clear, where there is a legitimate issue to address, we are prepared to work with our Republican colleagues. I hope the majority takes up the bipartisan FAIR Act of 2023 introduced by our colleagues Jamie Raskin and Tim Walberg to address the real problems presented by Federal civil asset forfeiture laws. The antiregulatory measures for the bulk of today’s discussion however do not address legitimate concerns, they are a distraction from the important work we could accomplish together.

I thank the Chair and I yield back.

Mr. JOHNSON of Louisiana. Without objection, all other opening statements will be included in the record.

We will now introduce today’s witnesses.

We’ll begin with Ms. Kirby West. Ms. West is an attorney for the Institute for Justice, she litigates cases involving the First Amendment, educational choice and property rights. She received her law degree with honors from Harvard Law School and clerked for Judge Dennis Shedd on the 4th Circuit Court of the Appeals.

Mr. Andrew Grossman is a partner at BakerHostetler, L.L.P. where he leads the firm’s appellate and major motions practice. He also serves as a Senior Legal Fellow at the Buckeye Institute and is an adjunct scholar at the Cato Institute. He received his law degree from George Mason University, law degree Antonin Scalia, and clerked for Judge Edith Jones of the 5th Circuit Court of Appeals.

Mr. Shu, John Shu, is an attorney who focuses on Constitutional law, Administrative law, antitrust law and securities and corporate law. He previously served in both the George H.W. Bush and George W. Bush Administrations and has written about the use of settlements in government litigation.

Finally, Mr. Todd today Phillips is the founder of Phillips Policy Consulting and is a fellow at the Roosevelt Institute and previously served as the Director of Financial Regulation in corporate governance at the Center for American Progress. As an attorney adviser to the Administrative Conference of the United States.

We welcome our witnesses and thank you for your patience and for appearing today. We’ll begin by swearing you in. So, if you’d all rise and raise your right-hand.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information and belief so help you God?
Thank you. Let the record reflect that the witnesses have answered in the affirmative. Please note as you all know, I don’t think this is your first rodeo for any of you, but your written testimonies will be entered into the record in their entirety and so accordingly we ask you to summarize your testimony in five minutes. You’ll see the clock there and the lights and I think you know the process.

Ms. West, we will begin with you.

STATEMENT OF KIRBY WEST

Ms. West. Thank you, Mr. Chair and Members of this Committee for the opportunity to testify today. My name is Kirby Thomas West. I’m an attorney at the Institute for Justice. The Institute for Justice is a national, nonprofit public interest law firm. For more than 30 years, we’ve litigated case on behalf of individuals and small businesses, defending their Constitutional rights, including cases challenging civil forfeiture.

When the government charges you with a crime, you can rely on the guarantees of the Bill of Rights to know that you have a fair opportunity to fully contest the charges against you and the protections of the Bill of Rights also ensure that you won’t be punished unless the government can prove its case beyond a reasonable doubt.

When the government alleges that your property, your car, your cash, or even your home has been involved in some kind of wrongdoing there is a trapdoor to the protection of the Bill of Rights. This trap door is civil forfeiture.

To describe civil forfeiture, you have to discredit it. The government can seize and forfeit property that it believes is connected with a crime regardless of whether it believes the property owner committed or was even involved in that crime. Throughout the forfeiture process the deck is stacked in the government’s favor.

The property owner has no right to counsel, the government need only make its case by a preponderance of the evidence. An innocent property owner bears the burden of proving their own innocence. To make matters worse most Federal civil forfeitures never make their way to a real court.

Instead, the entire process occurs within the agency that’s attempting to forfeit the property in what’s known as administrative forfeitures. By way of example, from 2000–2019, 93 percent of the DOJ civil forfeitures were administrative forfeitures. This process is extremely complicated to navigate as shown here in this graphic. Its full of stumbling blocks for property owners, any one of which cause you to permanently lose your property and that’s these red triangles here.

Civil forfeiture is not only unjust, it is ubiquitous. From 2000–2019, Federal law enforcement agencies deposited $45.7 billion into Federal forfeiture funds. The reason that civil forfeiture is so common is very simple, law enforcement gets to keep the money. Federal law enforcement retains 100 percent of the proceeds of civil forfeitures. State law enforcement can get back up to 80 percent of forfeiture proceeds, as long as they partner with Federal law enforcement in a process known as equitable sharing.
Civil forfeiture also just doesn’t work. Studies have shown that civil forfeiture has no meaningful impact on crime rates or drug use, and it may even reduce crime closure rates by diverting law enforcement time and resources. So, that’s the problem.

Now what can we do about it? There are three immediate reforms that would make a big difference.

(1) **End administrative forfeitures.** Part of the genius of the Constitutional system of separation of powers is that it’s design to ensure it takes an act of each of the three branches of government. Congress has to act to pass a law. The Executive Branch has to act to enforce that law. The Judiciary Acts to adjudicate each individual case. Administrative forfeitures cut the judiciary out of that process entirely. If someone’s going to permanently lose their property, they should get to appear in a real court, before a real Article III Judge.

(2) **End of the financial incentive for forfeiture.** Law enforcement priorities should be driven by how they can best solve and prevent crime, not by budgetary concerns. Directing all the proceeds of civil forfeiture to the general fund rather than to the seizing agencies would eliminate that incentive.

(3) **End equitable sharing.** In recent years many State governments have reformed their civil forfeiture laws, but their efforts are undermined by equitable sharing. Ending equitable sharing would close the loophole that allows State law enforcement to circumvent State laws. Each of these reforms would be accomplished if Congress passes the FAIR Act, a bill with a wide coalition of advocates outside of Congress and strong bipartisan support within Congress, including the current and the former Chair of this Full Committee.

I urge Congress to take advantage of this opportunity to work together to address this serious, long-standing injustice.

Thank you very much for the opportunity to testify.

[The prepared statement of Ms. West follows:]
Mr. JOHNSON of Louisiana. Thank you, Ms. West.
Mr. Shu, you may begin next if you’re ready.

STATEMENT OF JOHN SHU

Mr. SHU. Thank you, Mr. Chair, madam Ranking Member, thank you very much. The issue of third party, improper third-party settlement payments it is a nonpartisan issue. My goal here is to try and explain why it’s important for the Congress to protect its very own Article I powers and not just in the sense of the appropriations clause, but also in the sense of statutes that the Congress has passed, such as the Miscellaneous Receipts Act and the Antideficiency Act.

The fact of the matter is that H.R. 788 which would end this practice, it’s actually proenforcement, proregulation against any kind of corporate wrongdoing. The reason is because, for example, under the Obama Administration when the Obama DOJ settled case, mortgage fraud cases with the bulge bracket banks they gave credits a two-for-one dollar credit to organizations that provided these type of improper payments.

The fact of the matter is that the recovery and overall dollar amounts could have been higher, could have been sent to the victims or could have been sent to the community.

So, in this sense, certainly getting H.R. 788 is pro law enforcement against corporate wrongdoing and pro-enforcement of the regulatory State.

Second, I think it’s well-known that only this body, only Congress has the appropriations power and there have been Supreme Court cases that have ruled that unless Congress specifically authorizes an expenditure, it can’t happen. The earliest case that I can think of is the Resign Case from 1850. That’s a long time, that’s a heck of a precedent. It’s never been challenged, and I don’t think it will ever be overturned, quite frankly.

Another issue I think that would be important is the fact that there is a quo of whether H.R. 788 would take away an enforcement tool from not only the Justice Department, but any Executive Branch agency, including but not limited to HUD, EPA, and the Department of Interior.

Probably these four agencies are the ones that engage in improper third-party payments the most. The fact of the matter is that H.R. 788 and/or its predecessors would not take away the enforcement tool. The Justice Department can only enforce the law as it is written. The fact of the matter is that making sure that the victims receive restitution, making sure that, for example, any of our mental context—let’s say British Petroleum blows a Deepwater well in the Gulf, there is nothing preventing either the Justice Department or the Congress from requiring that British Petroleum compensate for that horrific incident.

So, the fact is that I think this Congress can do itself a lot of good by exercising and flexing its Article I authority. Your body is the body that is closest to the people, whether it’s in midtown Manhattan, El Paso, Atlanta, Delaware County Louisiana, Modesto, Roseville, Wyoming, or Read County, the fact of the matter is that this would apply equally to everybody.
We have in the news today that later on this evening former Governor Chris Christie is almost certainly going to announce he’s running for President of the United States in New Hampshire. As is indicated in my written remarks which is submitted for the record, Mr. Chair.

The fact of the matter is that Governor Christie when he was the U.S. Attorney in New Jersey as part of the settlement with Bristol Myers Squibb he forced an improper third-party payment. He forced Bristol Myers Squibb to pay $5 million U.S. dollars to Seton Hall to fund a professorship. Yes, it is just by coincidence that Seton Hall is Governor Christie’s alma mater. It is just by coincidence that this kind of work would be a boost to his local political career in New Jersey.

Governor Christie’s behavior there ought to be shocking and disappointing to everybody in this room, regardless of whether in the majority or in the minority. So, if you don’t like what Governor Christie did, if they don’t like what the Republican Administration’s have gone with respect to improper third-party payments, the solution is statutorily for the Congress to exercise its authority, get rid of it and bring us back to a Constitutional State for enforcement.

Thank you very much.

[The prepared statement of Mr. Shu follows:]
June 6, 2023

Hearing before the House Judiciary Committee’s Subcommittee on the Constitution and Limited Government, “Government Litigation and the Need for Reform.”

Written remarks from Mr. John Shu, Esq.

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

Imagine that a Democrat administration’s DOJ settles a securities fraud case with a pharmaceutical giant, and as part of that settlement the defendant pharmaceutical is required to fund
a $5 million professorship at the law school from where the local U.S. Attorney graduated, a move that will certainly boost his political future in local politics. Even worse, the local U.S. Attorney settles several other prosecutions and as part of those settlements he requires the defendant corporations to hire his friends and political allies as “independent monitors,” earning each of them an average of approximately $27 million per year.

The above examples actually happened, except it was the Obama DOJ which violated its own internal guidelines regarding third-party payments and engaged in over $1 billion in aggregate of improper third-party payments to hundreds of politically-allied organizations when settling mortgage fraud cases with banks such as Bank of America, Citi, and JPMorganChase. The DOJ, Congress, nor the banks know for sure on what or how the third-party organizations spent their spoils. Chris Christie was the Republican U.S. Attorney in New Jersey during the Bush (43) Administration who engaged in improper third-party payments and forced Bristol-Myers-Squibb to fund a professorship at Seton Hall Law School as part of its settlement. Christie not only became governor of New Jersey afterwards, but he also ran for the Republican presidential
nomination during the 2016 cycle and reportedly intends on doing so again for the 2024 cycle.

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

As Professor Nicholas Rosenkranz previously testified to the Judiciary Committee, in a monetary settlement, the executive branch agency is responsible for determining the value of the government’s claims against the charged party, but only the Congress is responsible for determining where and how those funds are to be used. Constitutionally, federal settlement proceeds first should be paid into the Treasury, and then Congress appropriates those funds. Whenever an
executive branch agency forces a defendant against whom the agency is litigating to pay politically-allied or “approved” third parties via settlements or mitigation plans, it unconstitutionally violates Congress’s exclusive power of the purse and basic separation of powers. This is even more so where Congress expressly declines to fund organizations or programs in a budget that the President signed into law, and the executive branch agency uses these third-party payments to re-fund them against Congress’ express will. As the Supreme Court stated in United States v. MacCollom, 426 U.S. 317 (1976), “the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”

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

Improper third-party payments are also blatantly partisan and political when financial restitution for victims is not, or at least should not be. Chris Christie was criticized, rightly, for his third-party payment choices when he was the U.S. Attorney in
New Jersey. As former House Judiciary Chairman Bob Goodlatte and the Judiciary Committee discovered, the Obama DOJ directed the banks to pay their third-party payments from the banks’ mortgage fraud settlements to the Obama Administration’s political allies and away from its political opponents. For example, a July 9, 2014 email from [redacted, but perhaps Deborah Leff or Karen A. Lash], DOJ’s Acting Senior Counselor for Access to Justice, to Maame Ewusi-Mensah Frimpong, Principal Deputy Associate Attorney General, stated that

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

In 2017, then-Attorney General Sessions prohibited improper third-party settlement payments, stating that “Department attorneys may not enter into any agreement on behalf of the United States … that directs or provides for a payment of loan to any non-governmental person or entity that is not a party to the dispute,” subject to three clear and limited exceptions. On May 5, 2022, however, Attorney General
Merrick Garland rescinded AG Sessions’ prohibition and ordered the DOJ to revise the Justice Manual accordingly. It is worth noting that from 1997 – 2018, the DOJ’s U.S. Attorneys’ Manual states in § 9-16.325 that, except for certain very limited circumstances:

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

Executive agencies violate Article I of the Constitution whenever they coerce and/or compel defendants to pay third parties without congressional approval. More investigation and research into the funds’ beneficiaries and use is needed. The Congress and the American public have a right to know about the existence, extent, use, and impacts of such improper third-party payments, regardless of whether they are labeled “donations,” “mandatory donations,” or some other euphemism.
Congress has the power to protect its constitutional and other interests against improper third-party payments. H.R. 788, the “Stop Settlement Slush Funds Act of 2023” is measured and constitutional. In fact, it would be well-within Congress’ power to ensure that it covers all improper third-party payments in the context of settlement agreements, e.g. not limited to “donations,” and Congress has the power to require that settlement monies go only to either the victims whom the defendants allegedly directly harmed and/or to the U.S. Treasury, and not to any third party who, by definition, is neither a victim nor a party to the government’s litigation.

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

Thank you very much.
Mr. JOHNSON of Louisiana. Thank you, Mr. Shu.
Mr. Phillips, you may begin. We're going in reverse alphabetical order, if anybody is confused. Sorry. Throw you off.

STATEMENT OF TODD PHILLIPS

Mr. PHILLIPS. Thank you, Johnson, Ranking Member Scanlon, Ranking Member Nadler, and Members of the Subcommittee, thank you for the opportunity to discuss the Federal government's civil litigation practices and authorities. I'm Todd Phillips, principal with Phillips Policy Consulting.

I previously served as an attorney adviser with the FDIC and Administrative Conference of the United States, and as counsel what was then known as the House Oversight and Government Reform Committee. My statements are my own.

My testimony today will focus on my concerns regarding two enforcement bills the Judiciary Committee is considering. I note at the outset that as the Supreme Court explained the case Heckler v. Chaney an agency enforcement decision, “Often involves a complicated balance of a number of factors which are peculiarly within its expertise.” If enacted, these bills would prevent the agency officials who know individual cases inside and out from using their expert judgment and discretion to ensure that the government operates efficiently.

In addition, my time as a Congressional staffer taught me to be concerned about waste, fraud, and abuse within the government. I'm concerned that enacting these bills could ultimately result in wasteful government spending. First, the Sunshine for Regulatory Decrees and Settlements Act would, if enacted, empower opponents of particular regulatory safeguards both inside and outside the government to perpetuate unlawful agency inaction.

Congress frequently enacts statutory deadlines for agencies to complete new regulations. Yet, agencies often fail to complete rulemakings pursuant to those mandates. Failing to enact mandated regulations can leave financial markets, the environment, and workers subject to abuse.

It also creates uncertainty for industry which must incorporate the potential effects of possible agency decisionmaking into future plans. Often these deadline lawsuits are our harmed parties only available recourse at agencies delay rulemakings by nine years, 12 years or longer. Importantly deadline lawsuit settlement agreements have no bearing on the substance of the rules agencies complete.

Several GAO studies have found that settlement terms nearly establish schedules for issuing statutorily required rules. No reviewed settlements included terms that finalize the substantive outcome of the ultimate rules. Rather than encouraging the Executive Branch to comply with its legal requirements, this bill would impose duplicative burdensome and time consuming hurdles slowing down the rulemaking process and preventing Federal law from being implemented. It would subject any regulatory settlement to a lengthy new notice and comment process, even though agencies are already required to engage in notice and comment.

It would permit interventions by individuals who declare themselves effected by the regulatory action and include them in court
supervised settlement talks even though individuals agree with by rules may challenge agency's rulemaking procedures in preenforcement litigation. Ironically, this bill would make the reason deadline litigation is brought in the first case, delayed agency action even worse.

Rather than endeavoring the slow down necessary Congressionally mandated rulemakings, Congress should determine why agencies violate this mandate in the first instance. Next, the Stop Settlement Slush Funds Act would place arbitrary limits on how Federal agencies may enter into settlements agreements that arise from enforcement actions brought against companies that have violated Federal laws. Its cumulative effect would be to deter agencies from the efficient resolution of civil complaints through settlement agreements.

When government agencies litigate, all parties may find that settlement agreements are the most effective and efficient way of resolving the issues and of improving the lives of affected nonparties. Importantly without the ability to enter into a settlement agreement that provides for mediation to impacted victims, there is no guarantee that defendants will agree to settle.

Agencies may be forced to trial, wasting time, resources and taxpayer dollars, and delaying timely provision of relief for victims, if victims received any relief at all. In sum, these bills are solutions in search of problems and if enacted could result in unnecessary government waste. They would prevent the agency officials who know individual cases inside and out from ensuring that the government operates as efficiently and effectively as possible. Congress should endeavor to conduct oversight rather than enact to apply to every agency settlement.

Thank you. I’m happy to answer any questions.

[The prepared statement of Mr. Phillips follows:]
Statement by
Todd Phillips, Principal, Phillips Policy Consulting
Before the United States House of Representatives Committee on the Judiciary
Subcommittee on the Constitution and Limited Government
“Government Litigation and the Need for Reform”
June 6, 2023

Chairman Johnson, Ranking Member Scanlon, and members of the Subcommittee, thank you for the opportunity to discuss the federal government’s civil litigation practices and authorities. I am Todd Phillips, Principal with Phillips Policy Consulting. I previously served as an attorney advisor with the Federal Deposit Insurance Corporation and the Administrative Conference of the United States, and as counsel with what was then known as the House Oversight and Government Reform Committee. My policy focus is at the intersection of administrative law and financial regulation.

My testimony today will focus on my concerns regarding two enforcement bills the Judiciary Committee is considering: H.R. 3446, the Sunshine for Regulatory Decrees and Settlements Act of 2023, and H.R. 788, the Stop Settlement Slush Funds Act of 2023. In my view, these bills are solutions in search of problems and could ultimately result in wasteful government spending.

I note at the outset that Article II of the U.S. Constitution places with the executive branch the responsibility to “take Care that the Laws be faithfully executed,” which includes the authority to initiate or end civil litigation under duly enacted statutes pursuant to its officers’ prosecutorial discretion. It makes sense for agency officials to have this authority: As the Supreme Court noted in Heckler v. Chaney, an agency enforcement decision “often involves a complicated balancing of a number of factors which are peculiarly within its expertise” such that agency officials are “far better equipped” than others “to deal with the many variables involved in the proper ordering of its priorities.”

If enacted, these bills would prevent the agency officials who know individual cases inside-and-out from using their expert judgment and prosecutorial discretion to ensure that the government operates efficiently. My time as a congressional staffer taught me to be concerned about waste, fraud, and abuse within the government, and I am concerned that enacting these bills could result in unnecessary waste.

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1 U.S. Const., Art. II, § 3.
2 See Heckler v. Chaney, 470 U.S. 821, 832 (1985) (“we recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict -- a decision which has long been regarded as the special province of the Executive Branch.”).
3 Id., at 831–32.
H.R. 3446, the Sunshine for Regulatory Decrees and Settlements Act of 2023

This bill would, if enacted, empower opponents of particular regulatory safeguards—both inside and outside the government—to perpetuate unlawful agency inaction.

Congress frequently enacts statutory deadlines for agencies to complete new regulations, yet agencies often fail to complete rulemakings pursuant to those statutory mandates. One example of delayed rulemakings relevant to my work is that which was required by Section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.\(^4\) Section 956 required several financial regulatory agencies to jointly enact a rule “prohibit[ing] any types of incentive-based payment arrangement, or any feature of any such arrangement, that the regulators determine encourages inappropriate risks by covered financial institutions…that could lead to material financial loss to the covered financial institution.”\(^5\) The agencies published a draft of this rule in 2016 that, if finalized, would have encouraged institutions to engage in prudent risk management practices such that bank executives do not take risky bets that put their firms at significant risk.\(^6\) Further, it would have allowed firms to recover incentive compensation provided for activities that ultimately produced losses.\(^7\)

Congress required that rule be enacted by spring 2011, yet 12 years later it has still not been completed.\(^8\) Earlier this year, the nation faced a banking crisis caused, in part, by insufficient risk management practices, which required two government agencies and the Treasury Secretary to declare the failures of Silicon Valley Bank and Signature Bank systemic risks to the financial system.\(^9\) While this rule, if finalized, may not have fully stopped the activities that led to these losses, it would have permitted the FDIC to recover incentive compensation from top executives from the two institutions, as the FDIC has stepped into the shoes of the institutions and used the rule to engage in clawbacks.\(^10\)

While the failure to enact congressionally mandated regulations left financial markets subject to abuse in this instance, unwritten rules similarly leave the environment and workers unprotected. It also, as the D.C. Circuit Court of Appeals has noted, “saps the public confidence in an agency’s ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans.”\(^11\) For those and other reasons, the Administrative Procedure Act requires courts “to compel agency action...

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\(^6\) See Incentive-Based Compensation Arrangements, 81 Fed. Reg. 37669, 37712 (June 10, 2016) (“Incentive-based compensation should support prudent risk-taking”).

\(^7\) See id., at 37679 (“The proposed rule would require a … covered institution to include clawback provisions in the incentive-based compensation arrangements for senior executive officers and significant risk-takers.”).

\(^8\) See 12 U.S.C. § 5641(b) (requiring the rule within nine months of the statute’s enactment, or April 2011).

\(^9\) See Joint Statement by the Department of the Treasury, Federal Reserve, and FDIC (Mar. 12, 2023).

\(^10\) When resolving a failing bank, the FDIC “‘steps into the shoes’ of the failed [bank], … obtaining the rights of the insured depository institution’ that existed prior to receivership.” O’Melveny & Myers v. FDIC, 512 U.S. 79, 86 (1994) (internal citation omitted). Accordingly, if a bank had authority to clawback compensation prior to its failure pursuant to a regulation, the FDIC, as receiver, would have that authority as well.

unlawfully withheld or unreasonably delayed.”\textsuperscript{12} The Supreme Court has held that this authority extends to instances in which an “agency is compelled by law to act within a certain time period.”\textsuperscript{13} Often, these “deadline lawsuits” are the harmed parties’ only available recourse as agencies delay rulemakings by nine years,\textsuperscript{14} twelve years,\textsuperscript{15} or longer.

Court-ordered and -approved settlement agreements and decrees stemming from these lawsuits have no bearing on the substance of the rules agencies complete. In a 2014 study of Environmental Protection Agency rules issued following settlements in deadline lawsuits, GAO found that “[t]he terms of the settlements in these deadline suits established a schedule to issue a statutorily required rule(s) or to issue a rule(s) … None of the seven settlements included terms that finalized the substantive outcome of a rule.”\textsuperscript{16} Similar results were found in a 2017 GAO study of Fish and Wildlife and National Marine Fisheries Services rules, which found that “the settlement agreements did not affect the substantive basis or procedural rulemaking requirements the Services were to follow.”\textsuperscript{17} That is, these settlements merely required agencies to finalize regulations by some future date because the agency had violated a congressional directive.

Instead of encouraging the executive branch to comply with statutory requirements, this bill would impose a barrage of duplicative, burdensome, and time-consuming hurdles that apply to settlements and decrees, slowing down the rulemaking process and preventing federal law from being implemented. It would subject any “regulatory” decree or settlement to a lengthy new notice-and-comment process, even though agencies are already required to engage in a notice-and-comment process.\textsuperscript{18} It would also permit intervention by any individual who declares they would be affected by the regulatory action in question and include that party in additional court-supervised settlement talks, even though individuals aggrieved by deadline lawsuits’ rules may already challenge agencies’ rulemaking procedures and rules’ substance in pre-enforcement litigation.\textsuperscript{19} And, ironically, because of the additional hurdles, this bill would make the reason deadline litigation is brought in the first case—delayed agency action—even worse.

\textsuperscript{12} 5 U.S.C. § 706(1).
\textsuperscript{14} See, e.g., In re Elwha Water Network and Ocean Advocates, 234 F.3d 1305, 1307 (D.C. Cir. 2000) (“ordering the Coast Guard to conduct prompt rulemaking” nine years after the statute required it be completed); Pub. Citizen Health Rch. Grp. v. Chao, 314 F.3d 143, 153 (3d Cir. 2002) (“We find extreme OSHA’s nine-year (and counting) delay since announcing its intention to begin the rulemaking process, even relative to delays other courts have condemned in comparable cases.”).
\textsuperscript{15} See, e.g., Prometheus Radio Project v. Federal Communications Commission, 824 F.3d 33, 48 (3d Cir. 2016) (“With 12 years having passed …, we conclude that the Commission has had more than enough time to reach a decision on the eligible entity definition.”).
\textsuperscript{17} U.S. Gov’t Accountability Office, GAO-17-304, Environmental Litigation: Information on Endangered Species Act Deadline Suits (2017).
\textsuperscript{18} See 5 U.S.C. § 553 (articulating the notice and comment process).
\textsuperscript{19} See Abbott Lab’ys v. Gardner, 387 U.S. 136, 141 (1967) (explaining that “only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict” pre-enforcement review of agency rules).
Rather than endeavoring to slow down necessary, congressionally mandated rulemakings, Congress should instead be conducting oversight to determine why agencies were violating its mandates in the first instance.

**H.R. 788, the Stop Settlement Slash Funds Act of 2023**

This bill would place arbitrary limits on how the federal agencies may enter into settlement agreements that arise from enforcement actions brought against companies that have violated federal laws. Its cumulative effect would be to deter agencies from the efficient resolution of civil complaints through settlement agreements.

When government agencies litigate, all parties may find that settlement agreements are the most effective and efficient way of resolving the issues and of improving the lives of affected non-parties. In the aftermath of the 2007-08 financial crisis, for example, the Department of Justice (DOJ) sued large financial institutions that had securitized, packaged, and sold mortgage-backed securities to investors. These institutions had little to no interactions with individual homeowners, but their demand for mortgages to securitize incentivized the origination of a large number of subprime loans. Clearly, homeowners were harmed by these behaviors, but the banks were not the proximate cause of the harm.

In settlement agreements with some of these banks, the DOJ secured “consumer relief” provisions that required remediation of the harms that resulted from the banks’ conduct. The settlement with Citigroup, for example, required $2.5 billion in various forms of consumer relief, including principal forgiveness, loan modifications, community reinvestment and stabilization initiatives, foreclosure prevention programs, and affordable housing resources. JPMorgan Chase’s settlement required $4 billion in consumer relief.

Importantly, without the ability to enter into settlement agreements that provided remediation to impacted victims, there would have been no guarantee that the banks would have settled. The DOJ could have been forced to trial, wasting time, resources, and taxpayer dollars, and delaying

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22 See FINANCIAL CRISIS INQUIRY COMMISSION, THE FINANCIAL CRISIS INQUIRY REPORT 380 (2011) ("[E]ach step in the mortgage securitization pipeline depended on the next step to keep demand going. From the speculators who flipped houses to the mortgage brokers who scooted the loans, to the lenders who issued the mortgages, to the final banks that created the mortgage-backed securities, collateralized debt obligations (CDOs), CDOs squared, and synthetic CDOs: no one in this pipeline of toxic mortgages had enough skin in the game.")
23 See, e.g., Id.
24 Id.
25 Id.
timely enforcement of the law and the provision of relief for victims—if they would have received any relief at all.

Financial regulation is not the only area in which such settlements are permitted and appropriate. As witnesses have previously testified before the House Judiciary Committee, the Environmental Protection Agency makes significant use of similar provisions in settlements under the Clean Water Act or the Clean Air Acts.23

H.R. 788 would prohibit settlement agreements like those the DOJ entered into with the financial institutions, as the harms to borrowers were not “directly and proximately caused by the party making the payment.”24 As the DOJ itself noted about a previous version of this bill, it would “impede the government’s ability to address the root causes of violations and establish effective remedies that are effective retrospectively (correcting noncompliance) and prospectively (addressing root causes of noncompliance to prevent recidivism).”25

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In sum, these bills are solutions in search of problems and, if enacted, could result in a more inefficient government. They would prevent the agency officers and staff who know individual cases inside-and-out from using their expert discretion to ensure that the government operates as efficiently and effectively as possible. These officials, as I noted before, are “far better equipped” than others “to deal with the many variables involved in the proper ordering of [agency] priorities.”26 Congress should endeavor to conduct oversight, rather than enacting dictates that apply to every agency lawsuit.

Thank you, and I am happy to answer any questions.

23 See H.R. 5063: Hearing before the H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law, 114 Cong. 43 (2016) (Testimony of David M. Uhlmann) (describing a prosecution under the Clean Water Act that resulted in $1 million in restitution and community service).
24 H.R. 788 § 2(c), 114th Cong.
Mr. JOHNSON of Louisiana. Thank you, Mr. Phillips.
Mr. Grossman, you may begin.

STATEMENT OF ANDREW GROSSMAN

Mr. GROSSMAN. Chair, Ranking Member Scanlon, and Members of the Subcommittee, thank you for holding this hearing today and inviting me to testify. My testimony will address a litigation based regulatory practice known as sue and settle. Sue and settle refers to collusion between agencies and outside groups to evade transparency and accountability mechanisms through friendly litigation and settlements.

In most cases, agencies vigorously defend against claims seeking to compel agency action. That’s not always the case. Agencies and activist groups have learned over the past decade or so that litigation and settlements can be used to expedite and even short circuit normal regulatory procedures.

The way it works is that an activist group files a case seeking to compel agency to take some action such as promulgating a new regulation or undertaking environmental review that will delay permitting that the group opposes. Rather than fight the case, the agency agrees to a settlement or consent decree that obligates to take the requested action off an on-a-set timetable.

The agency may even agree to bind itself to certain types of policy outcomes. For example, a consent decent might adopt a broader, more burdensome interpretation of a statute or regulation. The advantage to the agency is that a settlement or consent decree means that its hands are tied to carry out the policy that it favors.

Collusive settlements of course are not a new thing. The Reagan Administration entered office to find itself hemmed in by descent decrees that traded away policymaking discretion and purported lock in policies that the administration considered to be unlawful and unwise. What has changed since then is that the tactic has become routine. The use of sue and settle exploded during the Obama Administration.

Between 2008 and June 2013, 14 of the 17 major nondiscretionary rules issued by the EPA resulted from deadline lawsuits. Both environmental activists and regulators have learned that they can use settlements to push through controversial policies. The Trump Administration however stopped sue and settle exploded during the Obama Administration.

EPA administrator Scott Pruitt instituted a policy that restricted the use of settlements and made sure that no settlement could go forward without hearing from all the stakeholders, including States and including regulated parties. Now, that policy was revoked by the Biden Administration.

Over the past two years EPA has agreed to more than 20 litigation settlements, nearly all of them with environmentalist groups and it isn’t just EPA. The Bureau of Land Management has entered a series of settlements with environmentalists that have shutdown energy development on millions of acres of public lands. According to one of the environmentalists’ groups behind these lawsuits, the settlements and I quote, “Entirely recasts the Federal government’s obligation to consider the cumulative climate impacts of oil and gas leasing.” The results of this settlement is a de facto
moratorium, which is completely at odds with the proenergy policies enacted by Congress.

The problems with sue and settle are obvious. It allows agencies to evade accountability. In some cases, it cuts short ordinary rule-making timelines, limiting public participation, and leading to sloppy rulemaking. Worst of all, it can allow agencies to achieve policy outcomes that Congress had a rejected.

Congress does have the power to enact reforms. It should ensure that settlements are open to public scrutiny, that stakeholders have a seat at the table, that senior agency officials are accountable and that settlements do not compromise the rulemaking process. The Sunshine for Regulatory Decrees and Settlements Act does all these things.

Congress should also reconsider aspirational and unrealistic statutory deadlines in broad citizen suit provisions. Suing to compel an agency to act on a permit application is entirely different in kind from seeking to compel it to issue generally applicable regulations or to take action against third parties.

Citizen suit provisions give private litigants control over actions and decisions that are committed to the Executive Branch by Article II of the Constitution. We have seen that allowing private parties to force agency action through litigation leads to bad policy results.

I thank the Committee for its time and for inviting me today.

[The prepared statement of Mr. Grossman follows:]
Government Litigation and the Need for Reform

Testimony Before the Subcommittee on the Constitution and Limited Government, Committee on the Judiciary, United States House of Representatives

June 6, 2023

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

My testimony today focuses on the use and abuse of “sue and settle” tactics in litigation against the government. “Sue and settle” refers to collusion in litigation between government regulators and outside groups bringing suit against those regulators to compel them to take official actions that the regulators themselves support. It raises serious concerns about the conduct and resolution of litigation that seeks to compel agency action, set agency priorities, and (in some instances) influence the content of regulations or other agency actions. Since the House Judiciary Committee first directed its attention to the problem of collusive settlements in 2012, there have been a series of hearings and reports focusing on this problem, as well as the introduction of legislation. There are three questions for the Subcommittee today: Was the Trump Administration successful in avoiding the errors of the Obama Administration regarding collusive settlements? What is the Biden Administration doing today? And is there a role for legislation in this area? Let’s not hide the ball: the answers are, respectively, yes, the same old shenanigans, and emphatically yes.

I. Understanding the “Sue and Settle” Phenomenon

Usually, the federal government vigorously defends itself against lawsuits challenging its actions. But not always. Sometimes regulators are only too happy to face collusive lawsuits by friendly “foes” aimed at compelling government action that would otherwise be difficult or impossible to achieve.

In a number of cases brought by activist groups, the Obama Administration chose instead to enter into settlements that committed it to taking action, often promulgating new regulations, on a set schedule. While the “sue and settle” phenomenon was not new, dating back to the broad “public interest” legislation of the 1960s and 1970s, the Obama Administration accelerated the frequency with which agency actions and generally applicable regulations,

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particularly in the environmental sphere, were being promulgated according to judicially enforceable consent decrees struck in settlement. The EPA alone entered into more than sixty such settlements between 2009 and 2012, committing it to publish more than one hundred new regulations, at a cost to the economy of tens of billions of dollars. And that was only the first term of the Obama Administration. The second term witnessed a further “sue and settle” binge, including such regulations as the Clean Power Plan.

In the abstract, settlements serve a useful, beneficial purpose by allowing parties to settle claims without the expense and burden of litigation. But litigation seeking to compel the government to undertake future action is not the usual case, and the federal government is not the usual litigant. Consent decrees and settlements that bind the federal government present special challenges that do not arise in private litigation. They also raise what the authors of a Congressional Research Service report correctly described as “fundamental questions” about the separation of powers and exercise of policymaking direction, including:

To what extent can an administration bind itself and its successors to particular policies or actions that would otherwise remain discretionary? How can long-term judicial oversight of federal policy be consistent with the executive branch’s duty to faithfully execute the law? Do policymaking settlements unduly transfer federal power to private plaintiffs, who can “collude” with friendly administrations to enshrine favorable approaches to huge swaths of policy entrusted to the executive branch?

As Professor Michael McConnell observed in an unfortunately prescient article from the 1980s, litigation settlements involving the federal government have “created a new species of lawmaking,” one by which “one Administration can set policy today and bind their successors to comply with it tomorrow, by settling a law-suit on those terms.” Such settlement, he argues, “violate the structural provisions of the Constitution by denying future executive officials the policy-making authority vested in them by the Constitution and laws.”

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5 Id. at 298.
That is, however, only one part of the problem. In some cases, settlements may serve, within the context of a single presidential administration, to support departure from the priority schemes prescribed by Congress, to cut short ordinary rulemaking timelines, to limit public participation in rulemaking, to evade accountability, and to exclude interested parties from the policymaking process. As a result, sound administration of the law suffers. For example, agency settlements have “laid the foundation for rushed, sloppy rulemaking, resulting in further time and resources required to be spent on technical corrections, subsequent reconsiderations, or court-ordered remands to the agency.”

The “sue and settle” phenomenon is not confined to a particular policy area or agency. Settlements binding federal actors have been considered in cases concerning immigration law, civil rights, federal mortgage subsidies, national security, and many others. Basically, settlements may become an issue in any area of the law where federal policymaking is routinely driven by litigation. But they are especially prevalent in environmental law, due to the breadth of the governing statutes, their provisions authorizing citizen suits, and the great number of duties those statutes arguably impose on the relevant agencies.

II. The Trump Administration

There is a reason that public interest in the “sue and settle” phenomenon peaked during the Obama Administration and that relatively little ink has been spilled on it since until quite recently. That reason is that, right out of the gate, the Trump Administration resolved to put an end to the phenomenon through executive action. For example, the Administration’s first EPA Administrator, Scott Pruitt, quickly decided to bar collusive settlements involving the EPA. He explained the action in a radio interview:

In fact, one of the things we’ve done internally...is send a memo out to our regions and also to headquarters to say that the days of sue and settle, the days of consent decrees governing this agency where the EPA gets sued by an NGO, a third party, and that third party sets the agenda, sets the timelines on how we do rulemaking, and bypassing rulemaking entirely have ended. And we’ve sent that out across the agency....

When you use the courts, you know, when someone sues, a third party, and NGO, Sierra Club or otherwise, sues the EPA and then the EPA outside of the regulatory process enters into

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something called a judgment consent decree and then changes statute, changes timelines, changes obligations under a statute. That’s regulation through litigation. That’s an abuse of the process. And whether it’s for conservative causes or liberal causes, that’s still a breach of the process and should not be done.\footnote{EPA Administrator Scott Pruitt: The Days of “Sue And Settle” Have Ended, Hugh Hewitt Show (Mar. 29, 2017), available at http://www.hughhewitt.com/epa-administrator-scott-pruitt-days-sue-settle-ended/.


Administrator Pruitt could not have been more clear than when he told the \textit{Wall Street Journal}, “Regulation through litigation is simply wrong” and stated that agencies should not “use the judicial process to bypass accountability.”

Administrator Pruitt kept his word. In October 2017, he issued a memorandum entitled “Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements.” The memorandum provided that EPA “shall avoid inappropriately limiting the discretion that Congress authorized the Agency, abide by the procedural safeguards enumerated in the law, and resist the temptation to reduce the amount of time necessary for careful Agency action.” It also provided that, when considering a litigation settlement, EPA should “should welcome the participation of the affected states and tribes, regulated communities, and other interested stakeholders,” so that their rights and interests are given appropriate account.

Upon issuing this directive, Administrator Pruitt declared, “The days of regulation through litigation are over.” Administrator Pruitt, as well as his successor, Andrew Wheeler, followed through on that promise, adhering to the letter and spirit of the directive while in office.
III. The Biden Administration

President Biden’s appointee as EPA Administrator, Michael Regan, revoked the 2017 directive.\textsuperscript{10} His memorandum effectuating that decision explained that “settlement of environmental claims against the EPA preserves agency resources to focus on the vital work the agency carries out under the environmental statutes.”\textsuperscript{11} Of course, the Pruitt directive did not bar settlements of meritorious claims the litigation of which would only distract the agency and needlessly consume resources.

The Biden Administration’s most prominent settlements to date have focused on energy production. A series of litigation settlements entered in March 2022 binds the Bureau of Land Management to undertake extensive environmental review for oil and gas leases on thousands of parcels of public lands, covering nearly 4 million acres in Colorado, Montana, New Mexico, Utah, and Wyoming.\textsuperscript{12} In a press release, the plaintiffs—environmental-activist organizations that oppose energy production—crowed that the settlements “entirely recast the federal government’s obligation to consider the cumulative climate impacts of oil and gas leasing on public” and thereby provide an “opportunity for the Biden administration to chart a new path toward clean energy and independence from fossil fuels” by restricting energy production.\textsuperscript{13} The American Energy Alliance, however, warned that the settlements set a new “precedent [that] can now be cited to require future lease sales to include a more thorough study and further delay.”\textsuperscript{14}

In a separate settlement entered in September 2022, BLM agreed to halt drilling permits on 113 oil and gas leases across 58,617 acres of land in

\textsuperscript{10} Memorandum from Michael S. Regan, EPA Administrator, to EPA Deputy Administrator, et al., Re: Consent Decrees and Settlement Agreements to Resolve Environmental Claims Against the Agency (Mar. 18, 2022), available at https://www.epa.gov/system/files/documents/2022-03/oge-22-000-2698_0.pdf.

\textsuperscript{11} Id.


\textsuperscript{13} Id.

Montana, North Dakota, and South Dakota for the agency to undertake additional environmental review.\(^{15}\) One of the plaintiffs in the suit hailed the settlement as a repudiation of the Trump Administration’s pro-energy-development policies and an important step toward ending energy development on public lands: “Oil and gas leasing is completely at odds with climate action, we applaud the administration for agreeing to do the right thing.”\(^{16}\) One environmental law expert was more critical: “These settlements are an abuse of the system and are being used to advance the policy goals of the Biden administration at the expense of the law.”\(^{17}\)

As of June 3, 2023, the EPA’s website lists over twenty proposed consent decrees and draft settlement agreements that the agency has approved over the past year or so, nearly all of them in cases brought by environmental-activist organizations.\(^{18}\) The settlements address a wide variety of claims under such statutes as the Clean Water Act, Clean Air Act, and Endangered Species Act concerning such things as use of pesticides across the country for mosquito control and other flying insect pest control, weed and algae control, animal pest control, and forest canopy pest control; air regulations affecting industrial activity in numerous states; oil and gas production and transmission; and more. By all indications, “sue and settle” is back with a bang.

IV. Congress Should Enact Reform Legislation

Congress has the power and responsibility to ensure that the Executive Branch is not abusing its settlement power. After all, agency settlements concern the administration of statutory programs enacted by Congress, agencies may exercise only those powers delegated to them by Congress, and agencies have a duty to respect the limitations and priorities set by Congress. As we have seen, the use of collusive settlements is a recurring problem, one that has


\(^{17}\) Jack McEvoy, ‘Sue And Settle’: Biden Admin Agrees To Block Oil And Gas Drilling After Settling With Eco Activists, Sept. 13, 2022 (quoting Paul Seby).

persisted across administrations. Addressing it therefore requires reform that endure beyond the tenure of a single administration. That means legislation. Congress can and should adopt certain common-sense reforms that provide for transparency and accountability in settlements and consent decrees that compel or constrain future government action.

My previous written testimonies and articles on this issue have detailed at length the consequences and costs of collusive settlements, as well as principles for reform—specifically, transparency, public participation, accountability, and administrative regularity. Those principles are reflected in the Sun-
shine for Regulatory Decrees and Settlements Act, which was introduced in the previous Congress as H.R. 2708 and S. 1247. That bill represents a leap forward in transparency, requiring agencies to publish proposed settlements before they are filed with a court and to accept and respond to comments on proposed settlements. It also requires agencies to submit annual reports to Congress identifying any settlements that they have entered into. The bill loosens the standard for intervention, so that parties opposed to a “failure to act” lawsuit may intervene in the litigation and participate in any settlement negotiations. It targets collusion by requiring settlement negotiations to be conducted by mediation and to include any intervenors. To advance accountability, it requires the Attorney General or agency head (for agencies with independent litigating authority) to sign off on proposed settlements that affect an agency’s exercise of discretionary authority. Finally, it requires a court, before approving a proposed consent decree or settlement, to find that any deadlines contained in it allow for the agency to carry out standard rulemaking procedures and are consistent with the agency’s overall statutory priorities. In this way, the federal government could continue to benefit from the appropriate use of settlements and consent decrees to avoid unnecessary litigation, while ensuring that the public interest in transparency and sound rulemaking is not compromised.

V. The Department of Justice Should Readopt the Meese Policy

It is also appropriate for Congress to exercise oversight concerning the Executive Branch’s policies and internal procedures for agency settlements. While abuse of settlement power may have short-term benefits for agencies seeking to achieve their immediate policy priorities, “sue and settle” tactics undermine the federal government’s long-term interests in sound administration, effective rulemaking, and presidential control. In addition to the consequences described above, collusive settlements can be used to evade accountability within the Executive Branch. Experience has shown that they can be

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used to advance one agency’s agenda at the expense of another’s, to undermine centralized oversight of the regulatory system by the Office of Management and Budget and its Office of Information and Regulatory Affairs, and to undermine presidential control.

In these circumstances, the interests of Congress and the President overlap, and both should favor reintroduction of the “Meese Policy.”\(^{20}\) Attorney General Edwin Meese III, serving under President Ronald Reagan, saw that consent decrees have been abused to hinder the Executive Branch and circumvent the Legislative Branch. Turning to constitutional principles, he propounded policy guidelines prohibiting the Department of Justice, whether on its own behalf or on behalf of client agencies and departments, from entering into consent decrees that limited discretionary authority in any of three respects:

1. The department or agency should not enter into a consent decree that converts to a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations.

2. The department or agency should not enter into a consent decree that either commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question or commits a department or agency to seek a particular appropriation or budget authorization.

3. The department or agency should not enter into a consent decree that divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

With respect to settlement agreements unsupported by consent decree, the Meese Policy imposed similar limitations buttressed by the following requirement: that the sole remedy for the government’s failure to comply with the terms of an agreement requiring it to exercise its discretion in a particular manner would be revival of the suit against it. In all instances, the Attorney General retained the authority to authorize consent decrees and agreements that exceeded these limitations but did not “tend to undermine their force and

[were] consistent with the constitutional prerogatives of the executive or the legislative branches.”

The Meese Policy addresses the fundamental problem of sue and settle: It blocks agencies from relinquishing their discretionary authority to outside groups, thereby reinforcing traditional norms of administrative rulemaking. An administration that embraces the Meese Policy will benefit from greater flexibility, improved transparency, and, ultimately, better policy results.

My discussion of the Meese Policy reflects the fact that the exercise of settlement authority inevitably involves the exercise of discretion by the Executive Branch. That means, at the end of the day, that there will always be some room for mischief unless the Executive Branch commits to exercising its discretion wisely. As a practical matter, Congress can enact procedures and create incentives to promote that end and impose some measure of accountability on responsible officials. But a problem involving the exercise of discretion cannot be solved through legislation alone, short of eliminating discretion, which is not possible in this instance. After all, it is proper for the government to settle meritorious actions, and Congress has no means of spelling out, in every instance, when settlement may be warranted. What it does have is oversight authority, to ascertain the Executive Branch’s administration of the laws is sound and consistent with legislative policy and, if not, hold the responsible officials to account and press for reform.

Needless to say, the Biden Administration Department of Justice has not adopted the Meese Policy. As part of its oversight activities, Congress should undertake to understand why. While the Meese Policy would restrict settlement discretion somewhat, it does so in the service of values—accountability, the constitutional separation of powers, flexibility in administration of the laws, and sound policymaking—that the current Administration generally espouses. Ultimately, the lack of a persuasive explanation for an Administration’s refusal to adopt (and enforce) the Meese Policy or something like it may spell the need for closer oversight and for broader legislative reforms that limit agency power.

VI. Congress Should Consider More Comprehensive Reform To Bolster the Constitutional Separation of Powers

Along those lines, Congress may wish to consider a more comprehensive approach that limits the ability of third parties to compel Executive Branch action. Suing to compel an agency to act on a permit application or the like is different in kind from seeking to compel it to issue generally applicable regulations or take action against third parties. As Justice Anthony Kennedy observed, “Difficult and fundamental questions are raised” by citizen-suit provisions that give private litigants control over actions and deci-
sions (including the setting of agency priorities) “committed to the Executive by Article II of the Constitution of the United States.”

Constitutional concerns aside, at the very least, the ability to compel agency action through litigation and settlements gives rise to the policy concerns identified above, subordinating the public interest to special interests and sacrificing accountability.

The sue-and-settle phenomenon is facilitated by the combination of broad citizen-suit provisions with unrealistic statutory deadlines that private parties may seek enforced through citizen suits. According to a 2013 analysis by William Yeatman, “98 percent of EPA regulations (196 out of 200) pursuant to [Clean Air Act] programs were promulgated late, by an average of 2,072 days after their respective statutorily defined deadlines.”

Furthermore, “65 percent of the EPA’s statutorily defined responsibilities (212 of 322 possible) are past due by an average of 2,147 days.” With so many agency responsibilities past due, citizen-suit authority allows special-interest groups (whether or not in collusion or philosophical agreement with the agency) to use the courts to set agency priorities. Not everything can be a priority, and by assigning so many actions unrealistic and unachievable nondiscretionary deadlines, Congress has inserted the courts into the process of setting agency priorities, but without providing them any standard or guidance on how to do so. It should be little surprise, then, that the most active repeat players in the regulatory process—the agency and environmentalist groups—have learned how to manipulate this situation to advance their own agendas and to avoid, as much as possible, accountability for the consequences of so doing.

Two potential solutions suggest themselves. First, a deadline that Congress does not expect an agency to meet is one that ought not to be on the books. If Congress wants to set priorities, it should do so credibly and hold agencies to those duties through oversight, appropriations, and its other powers. In areas where Congress has no clear preference as to timing, it should leave the matter to the agencies and then hold them accountable for their decisions and performance. What Congress should not do is empower private parties and agencies to manipulate the litigation process to set priorities that


23 Id.
may not reflect the public interest while avoiding the political consequences of those actions. To that end, Congress should seriously consider abolishing all mandatory deadlines that are obsolete and all recurring rulemaking deadlines that agencies regularly fail to observe.\textsuperscript{24}

Second, Congress should consider narrowing citizen-suit provisions to exclude “failure to act” claims that seek to compel the agency to consider generally applicable regulations or to take actions against third parties. As a matter of principle, these kinds of decisions regarding agency priorities should be set by government actors who are accountable for their actions, not by litigants and not through collusive litigation.

\textbf{VII. Conclusion}

Collusive settlements that govern the federal government’s future actions raise serious constitutional and policy questions and are too easily abused to circumvent normal political process and evade democratic accountability. Congress can and should address these problems to ensure that settlements are employed only in circumstances where they advance the public interest, as determined by our public institutions, under the requirements of the Constitution.

I thank the Subcommittee for the opportunity to testify on these important issues.

Mr. JOHNSON of Louisiana. Thank you, Mr. Grossman. We will now proceed under the five-minute rule with questions. I will recognize myself for five minutes.

I want to thank you all again for being here today and for your patience. As I mentioned in my opening statement, we’re here to discuss the government’s use of litigation and the ways that we, the Congress can reclaim our Article I powers and fight back against the abuses of power by the Executive Branch.

Mr. Shu, I love what you said about our opportunity here to I think you say flex our Article I authority. Hear us roar, my friend. I love it. I wanted to amen you when you said it. So, I am going to start with you on the topic of settlement slush fund. So, Article I of the Constitution gives Congress the power of the purse, not the Executive Branch. As you said, this should be well understood by everybody.

My understanding is that the typical policy for settlement agreements with the Federal government is to deposit those funds into the Treasury or distribute them to victims of the alleged action by a defendant. However, as has been noted here, under the Obama Administration the Federal government began the practice of diverting the settlement funds to politically favored third-party entities or programs that the administration supported, all while avoiding Congressional oversight.

The Trump Administration rightfully did away with that practice. Within his firsthand full of months on the job, Attorney General Merrick Garland revived the use of settlement slush funds presumably to reward politically expedient groups. So, Mr. Shu, with that context in mind, can you provide us any specific example of the Federal government using the settlement slush fund in contravention of Article I authorities?

Mr. SHU. Thank you, Mr. Chair. Yes. Probably the most egregious was the mortgage fraud settlements with the bulge bracket banks. JPMorgan Chase, Bank of America, Citi, et cetera. Mr. Chair, I would respectfully disagree with you on the issue that began with the Obama Administration.

As a matter of fact, under President Carter the—his Justice Department had written a memo stating that these third-party payments were not proper. As I mentioned before, even under a Republican Administration, the Bush Administration 43, when Chris Christie was a U.S. Attorney he engaged in this reprehensible behavior.

So, in fact, you mentioned General Garland rescinding General Session’s order. That’s especially interesting because if it wasn’t a big deal as some people say, then why would he have to rescind it? He rescinded it because it was an important function for them, an important funder of their allied groups. Make no mistake, they go to allied groups. Whether it is Chris Christie or whether it was Tony West it is going to allied groups.

I would add that in General Garland’s rescission memo he, actually, in my view, misstatements the law. He had cited an OLC memo from 2020 and which in turn cited an OLC memo regarding the settlement in the Canadian software lumber case. The reason that’s important is because No. 1, the 2020 memo to General Barr, it was merely a form in the Gowdy memo about the CFR. It was
not analyzing whether the Miscellaneous Receipts Act actually requires prohibiting the third-party settlement. So, that was sort of the misuse of that particular memo.

The Canadian lumber settlement. Again, I believe General Garland misapplied that case and the reason is case in the United States was the defendant. The United States was not the plaintiff in this case. Canada our allies to the North they sued the United States because they were unhappy with timber imports.

So, in that situation the United States as defendant agreed to fund certain escrow accounts not as the plaintiff. Also, there was plenty of disclosure in that case because the USTR negotiated that. Unlike the mortgage cases or other cases where there was no disclosure at all, as a matter of fact if it hadn’t been for former Chair Goodlatte and his hard work and his team’s hard work, and of course working together with at that time Congressman Nadler and his excellent staff, the fact of the matter is that information would not have come to light.

I would say, when people lobby before Congress, that has to be reported, that has to be disclosed, but if it hadn’t been for Chair Goodlatte and the work of the entire Committee, the lobbying that was done to the DOJ, the fighting for the money and the distributions, that would have never come to light. It would have remained in the shadows and Congress would not have been able to exercise either its oversight or its statement in account power.

So, that’s why I’m here to help Congress flex its power.

Mr. JOHNSON of Louisiana. You know too much, and I only got one question so I approach yes that. I’m out of time. We will yield back. I recognize the Ranking Member of the Full Committee, Mr. Nadler for his questions.

Mr. NADLER. Thank you, Mr. Chair.

Mr. Phillips, under H.R. 3446 the Sunshine for Regulatory Decree Settlement Act it appears that any private third party could weigh in on a proposed consent decree or settlement agreement pertaining to regulatory action that affects the rights of private parties.

What is the scope of entities that could intervene in a suit to enforce statutory rulemaking deadlines under this provision? What impact would it have on the efficacy of the rulemaking process.

Mr. Phillips. Thank you, Congressman. This provision provides that any person who believes that its in their interest, who would “not be represented adequately by the existing parties to the action” should be permitted to intervene in the litigation where a settlement is being considered.

This provision is written unbelievably broad with little limitation. It is much broader than what is currently required under the Constitution for Constitutional standing requirements, which requires parties to show that they were or will definitely be injured by the agency’s action, the agency’s delay will cause injury and that the harm will be redressed by favorable outcome.

The end result of this is that it will end up delaying the rulemaking process. Agencies are already required to go through a— in my mind very laborious notice and comment process to ensure that the public has the opportunity to comment by allowing any party under the sun to engage in these presettlement arbitration
discussions to try to add additional provisions, it's just going to slow everything down in an already slow process.

Mr. NADLER. Thank you.

Mr. Phillips, why is H.R. 788 the so-called slush funds bill a solution in search of a problem?

Mr. PHILLIPS. Yes, thank you again, Congressman. This settlements bill times aims to address—the settlements this bill aims to address are just not problematic. No one is forcing firms to enter into settlement agreements, no one is forcing them into settlements with third-party payments. They do so voluntarily because they think that settling is a better value for them than the alternative. They could certainly proceed to trial if they wanted to, but enacting this bill would create more problems by preventing parties from voluntarily settling. If you look at the settlements entered into after the 2007–2008 financial crisis, banks entered into these settlement agreements largely because of some of these third-party payments.

So, JPMorgan Chase settled for $13 billion, $4 billion of which was going to go toward consumer relieve. A good chunk of that money Chase was going to have to pay regardless because they were going to have to do mortgage modifications and things like that.

So, reducing its actual settlement expenditures to roughly $10 billion, if this bill had been in place and JPMorgan Chase had been asked to settle with a $13 billion fine directly to Treasury.

I'm really doubtful that they would have settled and would have gone to trial. That would have forced the Department of Justice litigators to spend a lot of time and a lot of money preparing and defending their action. It would have just been wasteful government spending as opposed to moving on to pursuing different other wrongdoers.

Mr. NADLER. Thank you.

Ms. West, you stood for Justice's 2020 report titled, "Policing for Profit," it states that the Department of Justice's equitable sharing program, "creates a giant loophole." What is this loophole? Can you explain how it allows State and local law enforcement agencies to circumvent civil forfeiture laws passed by the State legislatures?

Ms. WEST. Sorry. Thank you.

So, with equitable sharing even with States that have passed reforms to their own civil forfeiture laws, State law enforcement if they work with the Federal agencies, they can still get back the proceeds of civil forfeiture.

One great example for that is in Missouri the Missouri Constitution actually has an amendment that says all the proceeds of forfeiture should be going to schools. Because Missouri State law enforcement can still take forfeitures and hand them over to the Federal government through equitable sharing and then get kickbacks up to 80 percent of the forfeitures, a 2019 investigation showed that only less than two percent of the forfeiture proceeds in Missouri were actually going to Missouri schools as was mandated by the Missouri Constitution.

Mr. NADLER. Thank you, Ms. West.

My time has expired. I yield back.
Mr. JOHNSON of Louisiana. Thank you. The gentleman the gentleman yields back.

The Chair recognizes Mr. Kiley five minutes.

Mr. KILEY. I yield my time to the Chair.

Mr. JOHNSON of Louisiana. Thank you for yielding.

I have got to go back to Mr. Shu because I have some more questions.

So, I mentioned a moment ago that I started tracking this during the Obama Administration, but as you noted it goes back to at least to the Carter Administration, so that was a little before my time. What is your best guess? Let me say this, one study that I looked at said only 1.4 percent of all settlement slush fund payments can be tracked.

So, that means 98.6 percent of the 668 million that was this calculation was directed in ways that were undisclosed, so we have to oversight ability at all over that. What's your best guess for how much money has been diverted through the settlement slush funds and I guess this could be back to the seventies, right.

Mr. SHU. We're talking in the tens of billions, Congressman.

Mr. JOHNSON of Louisiana. With a B?

Mr. SHU. B.

Mr. JOHNSON of Louisiana. Wow. I had a list of the some of the Obama Administration examples of this, where settlements were directed funds to the groups like National Fish and Wildlife Foundation, National Community Reinvestment Coalition, National Urban League, and National Council of La Raza. In your mind what are some of the more egregious examples? Can you name some of the beneficiaries of these funds over the years?

Mr. SHU. Yes. Certainly, the ones that you mentioned were beneficiaries. They were also even local to Washington, DC, there was the Voice Group and the Metro IAF in Virginia. They actually not only did they lobby the DOJ, they also lobbied Mark Warner to help them get these settlement funds. It's not an accident that every single entity who received the largest of improper third-party payments was a liberal group.

Now, you could say well, it's because the Obama Administration is Democrat. Yes, I understand that, but there is also an email that former Chair Goodlatte had uncovered where you have the Acting Senior Counsel for access to justice programs at DOJ writing to the Principal Deputy Associate Attorney General and she said, concerns include.

Not allowing city to pick a statewide intermediary like the Pacific Legal Foundation because it does conservative property rights free legal services. I mean, come on. I'm not saying it's bad or good. As I mentioned, Chris Christie was awfully partisan himself. So, I'm saying that either way from either point of view it's not right. Its offensive to Congress' power and authorities.

Mr. JOHNSON of Louisiana. We agree.

Ms. West, I want to go to you. I love the picture is worth a 1,000 words. I think there are actually a 1,000 words on this chart here. For those who might not have seen your opening testimony, this is in the record, this is entitled, “The convoluted process property owners face when their property is seized for Federal forfeiture.”
There is no way that—I'm a lawyer and this is hard for me to follow. So, it is difficult for citizens to do that. It is difficult for us to track and oversight and all the things we are talking about.

To summarize your testimony, you say this is a trapdoor for the protections of Bill of Rights and you gave three recommendations, end administrative forfeitures, end financial incentive for forfeiture which is send all this to the general fund instead of other things, and inequitable sharing.

So, really quick, with a minute and 90 seconds, the FAIR Act has all this in it, we were able to pass legislation to check each of those boxes, what would this chart look like after that? Would it simplify it dramatically.

Ms. WEST. Not only would it simplify it, but it would takeaway this whole half of the chart.

Mr. JOHNSON of Louisiana. Oh, wow. OK.

Ms. WEST. So, anything under administrative forfeiture. If we end administrative forfeiture, all forfeitures will happen where they should happen, which is in a real court, a real Article III Court.

Mr. JOHNSON of Louisiana. Excellent.

Mr. Grossman, you said that the sue and settle issue really exploded under the Obama Administration. Do you have a theory as to why it began? Why is this such a recent advent in the law or a recent practice.

Mr. GROSSMAN. I think the political dynamics really do explain it. Many of the groups bringing these suits are proregulatory groups. They had discovered that they could use the leverage of litigation to lead to favorable settlements at the tail end of the Carter Administration.

There was a little bit of activity along these lines during the Clinton Administration as well, but it was really during the Obama Administration that it exploded across the board not merely in the environmental space, but really effecting any number of different Federal programs and agencies.

Mr. JOHNSON of Louisiana. It started a custom and practice and the only way to reel that back in and change it in our view, is if Congress acts and has to do this, and so that's why we appreciate your testimony so much.

I remember from law school the term in-law school vexatious litigation, it feels that way, it feels like that.

The Chair is out of time.

I recognize next Ms. Escobar.

Ms. ESCOBAR. Thank you, Mr. Chair. Thanks to our witnesses today.

Mr. Phillips, I want to piggyback off something that—off Mr. Nadler's question, so under H.R. 3446 if the regulatory action involved the Clean Air Act, for example, could a private third party include someone who breathes air?

Mr. PHILLIPS. Absolutely, Congresswoman. The provisions in that bill are just so broad, as I said to be practically meaningless.

Ms. ESCOBAR. Thank you.

Also, can you share with us what are some reasons why DOJ or another agency might want to enter into a settlement agreement
that would provide for consumer relief provisions, such as, payment to the a local community nonprofit organization.

Mr. PHILLIPS. Sure. So, going back to the large bank settlements, these institutions were bundling mortgage-backed securities in such a high rate that they needed as many mortgages as they could get and that incentivized the creation of low quality mortgages. They had no interaction with the mortgage holders. They were not the ones who were making loans themselves.

So, they would where not the direct and proximate cause of those consumers harms. The reason that DOJ or other agencies would want to include some of these third-party agreements is so that the consumers who were hurt by the defendant’s actions, even if they were not the direct and approximate cause could still get some relief. It's complicated and it's difficult.

It is a not a good use of corporate resources to search for each and every harmed individual. What does make sense is doing some mortgage relief or to give a donation to a group that is able to do homeowner relief themselves and things like that, even if they aren't a part of the company.

Ms. ESCOBAR. Thank you very much.

Can you also explain how consent decree practices have resulted in beneficial settlements for all parties, including corporations and produced good proconsumer outcomes.

Mr. PHILLIPS. Absolutely, Congresswoman. The laws that Congress has enacted frequently require agencies to write rules by a certain deadline, ensuring that consumers financial markets, and the environment workers are protected.

The consent decrees that these agencies entered into really just ensure that the rules Congress has mandated get put on the books. It is just the agency's effectuating Congress' law. It's nothing more.

It ensures that corporations are benefited by corporations can plan for the future. When Congress says to an agency to write a law by X date, but the agency doesn’t do it, it leaves corporations in the lurch. They want to be able to plan for the future and know what the law is. When an agency waits nine years, 10 years—I do financial regulation, there is right now a rule we've been waiting on for 12 years, it means that corporations can’t plan, they can’t invest as they would like to because of the uncertainty.

Ms. ESCOBAR. Thank you so much.

Mr. Chair, I yield back.

Mr. JOHNSON of Louisiana. Thank you. The gentlelady yields back.

The Chair recognizes Mr. McClintock for five minutes.

Mr. MCCLINTOCK. Thank you, Mr. Chair. When we speak of threats to democracy, it seems to me the ultimate threat is a government that’s detached from the will of the electorate. When we speak of independent bureaucracies, I think we have to ask of question well, independent of whom. Well, obviously, independent of the elected officials who in turn elected by and answerable to the people.

So, we’re talking about the separation of our democracy, the rule of the people. From the government that’s now in effect running itself.
It’s also been operating not only outside the rule of democracy, the people, it’s also operating outside the bounds of the Constitution, which gives all legislative powers to the Congress of the United States. Under the separation of powers at the center of our Constitutional architecture, Congress makes law but cannot enforce it. The President enforces law, but cannot make it. The Executive authority to—pardon me. The Exclusive authority to adjudicate disputes that are arising under our laws belong to the Judiciary.

Now, Mr. Phillips, just told us, well, there’s no problem here, nobody’s forcing these settlements, but that’s not the point. The point is these settlements are making laws quite independent from the elected representatives. It may even be in diametrical opposition to the policies of the elected President. That means our government’s become a law to itself.

Mr. Grossman, am I correct that a bureaucracy needs only to collude with likeminded pressure groups to establish a new rule, an enforceable law, even if it’s at odds with the elected representatives of the people?

Mr. Grossman. In some instances, agencies have, in fact, done that to adopt legal interpretations that have very serious consequences to regulated parties as well as the broader economy, yes.

Mr. McClintock. Isn’t this a quintessential threat to democracy when laws are imposed not by the elected Representatives of the people, but entirely contrary to their wishes as they express them through the vote?

Mr. Grossman. Yes, yes. I think that is exactly right. You see that, in particularly, as you pointed out, in what’s called—known as the slush-fund settlement context. Because in that instance, the programs that are being created by the settlements, they may be well and good. Some people may look at them and say they’re laudable, and they lead to good public policy results. The problem is they were never enacted by Congress.

Mr. McClintock. Therefore, you’re getting a runaway bureaucracy completely attached and controlled by the electorate.

Mr. Grossman. Exactly. Not only standing up its own programs with its own policy objectives, but then funding those programs independently of Congress. So, there is no check and no oversight.

Mr. McClintock. By the way, it accuses you of violating the law it is now made by itself. You’re held to account in an administrative law court, are you not, run by that very same agency?

Mr. Grossman. In settlements, yes. The money can be directed to third parties. So, when Congress typically enacts a fine, the money goes into the Treasury, and then it’s subject to appropriations. Under these sorts of agreements, there isn’t that type of democratic oversight.

Mr. McClintock. Mr. Shu, we had a California insurance commissioner many years ago who was forced to resign when he was
found to be directing a settlement with insurance companies to contribute to an ad campaign that featured himself as he prepared to run for Governor. Is that the kind of abuse we’re talking about?

Mr. SHU. It certainly could be and in any other context.

Mr. MCCLINTOCK. He was a Republican. As you pointed out, Chris Christie directed funds from a settlement to his alma mater, a Republican. So, isn’t this something Democrats should be just as concerned about as Republicans?

Mr. SHU. Yes, Congressman, that is why I mentioned that whether somebody’s from Atlanta or media or a Thousand Oaks, the fact of the matter is that this is a nonpartisan issue. Democrats should be concerned. There’s also the funding issue in the sense that in 2011, Congress had cut certain grantees from the budget. President Obama signed it into law. These settlements didn’t end right around the appropriations—

Mr. MCCLINTOCK. This frightens me, because it is a brave new world if it’s replacing the Constitutional republic that our Founders envisioned. Our chance to set things right is quickly passing from our hand. So, I think the proceedings today are extremely important. I know the authoritarian left applauds these developments because they believe the policy outcomes favors their goals. They should beware of such powers because those power once summoned are not easily contained and could one day be turned against them.

Mr. SHU. Yes, sir.

Mr. MCCLINTOCK. I yield back.

Mr. SHU. Yes, sir.

Mr. JOHNSON of Louisiana. The gentleman yields back. The Chair recognizes the gentleman from Georgia, Mr. Johnson, for five minutes.

Mr. JOHNSON of Georgia. Thank you, Mr. Chair. H.R. 788 and H.R. 346, which we’re discussing today, should not be joined with the civil asset forfeiture measure that we’re also considering today because H.R. 788 and 3446 are MAGA Republican antiregulatory bills in search of a problem. So, I don’t think we’re well-served by looping in this for forfeiture bill with those two corporate loving bills. H.R. 3446, the so-called Sunshine Bill, would throw a monkey wrench into the rulemaking process by creating a gauntlet of burdensome and time-consuming procedures before allowing an agency to settle cases.

It opens the door wide to dilatory tactics by corporate opponents of statutes like the Clear Air Act, and it would force expensive time-consuming litigation at taxpayers’ expense. H.R. 3446 also subverts the Federal Rules of Civil Procedure and the longstanding practice of judicial discretion. Under the Federal Rules, the courts are empowered to manage litigation and to consider equities in their decisionmaking. Yet, this bill would strip judges of that authority.

H.R. 788 would be a gift to lawbreakers at the expense of families and communities suffering from injuries that cannot be addressed by direct restitution, such as civil rights violations, environmental justice harms, or harms caused by fraudulent lending practices. That bill would hamstring DOJ’s ability to address remedy and deter systemic harm caused by unlawful conduct.
Democrats are prepared to work with our Republican colleagues where there are legitimate issues to address, but the antiregulatory measures that form the bulk of today’s discussion are not based on legitimate concerns; instead, they are a reaction to MAGA conspiracy theories and would cause immense harm to the public health and welfare if they were enacted.

Now, Ms. West, according to your organization’s October 21, 2021—excuse me, October 2021 report, which compared to Philadelphians’ overall respondents—well, let me rephrase this. According to your organization’s October 2021 report, quote:

Compared to Philadelphians overall respondents in civil asset forfeiture cases where more often minority and low-income, and that, in fact, two-thirds of the respondents were Black.

Do you agree that civil asset forfeiture impacts low-income people and people of color disproportionately?

Ms. WEST. Yes, Representative Johnson. The report you’re talking about is the report that Ranking Member Scanlon mentioned earlier, and it did find that civil forfeiture disproportionately impacts low-income and minority communities. We have dozens of examples showing that’s the case.

One example from, Mr. Chair, from your home State of Louisiana, we have a client named Kermit Warren who had lost his job, unfortunately, in the COVID–19 pandemic, and he was going to use his life savings of $30,000 to buy a tow truck to start a new business. As he traveled to Ohio to look at a truck, it turned out the truck didn’t work for him, so he took his money, and he was flying back to his home State of Louisiana.

Mr. JOHNSON of Georgia. With cash money?

Ms. WEST. Cash money, that’s right. His money was seized at the airport just because it was a large sum of money. Federal law enforcement agencies can do that when they see large sums of money.

Mr. JOHNSON of Georgia. A Black man?

Ms. WEST. Yes, sir.

Mr. JOHNSON of Georgia. Mm-hm. Thank you.

Mr. Phillips, why would H.R. 788’s limitation on settlement agreements be harmful?

Mr. PHILLIPS. Absolutely. It would require companies and the government to potentially enter into protracted legal—protracted court cases. It would prohibit them from settling and using their resources to make—to enact new policies, to bring about new enforcement actions. It would just hamstring the Federal government from using their independent and expert judgment to figure out how to litigate the cases that they are tasked by the Constitution with litigating.

Mr. JOHNSON of Georgia. Thank you. I’m reaching the end of my time, so I’ll yield what I have remaining back. Thank you, Mr. Chair.

Mr. JOHNSON of Louisiana. Thank you. The gentleman yields back. The Chair yields to—or recognizes Ms. Hageman for five minutes.

Ms. HAGEMAN. Thank you. Mr. Grossman, when Congress passes a law instructing the agency to act in settlement cases, special interest groups sue those agencies, and then obtain consent decrees that override Congress by requiring agency rulemaking favorable to
the special interest. Doing so can bind the agency in ways not intended by Congress, and even in ways that then bind subsequent administrations. There's also another problem associated with this particular paradigm known as the Equal Access to Justice Act. Have you ever heard of the EAJA?

Mr. GROSSMAN. Yes.

Ms. HAGEMAN. Can you briefly explain what the EAJA does?

Mr. GROSSMAN. Well, in general, a plaintiff's group that obtains such a result in a case would be a prevailing party and so would be able to recruit large amounts of its litigation costs, attorney's fees.

Ms. HAGEMAN. Well, and that's if there's litigation. They also, the agencies and the environmental groups can actually enter into a consent decree where the agency will agree to pay EAJA funds to particular environmental organizations. Is that right?

Mr. GROSSMAN. Yes.

Ms. HAGEMAN. So, I'm going to read a bit of information to give the folks here a bit more background about how the EAJA has been abused over the years.

Environmental litigation has become an expensive national policy issue that causes harmful gridlock for the Federal agencies managing wildlife and public lands. At the center of their problem is the Equal Access to Justice Act, which permits the recovery of attorney’s fees and lawsuits against the Federal government.

EAJA was enacted in 1980 to protect ordinary citizens and small business from government overreach and wrongdoing by giving them the means to pursue otherwise prohibitively expensive litigation. Over the years, EAJA shifted from being a well-intentioned corrective measure to a powerful weapon for large, well-funded special interest nonprofit groups to continuously sue the government on environmental issues. Litigation against government agencies is virtually nonstop, because these groups can recover substantial legal fees under EAJA, even if they win only a small part of the case or settle out of court. Most of these lawsuits are settled out of court.

Recently, I filed a bill to delist the Grizzly bear. One of the things that happened was that the Fish and Wildlife Service agreed in 2007 and again in 2017 that the Grizzly bear had been fully recovered. Environmental groups sued, and eventually the Fish and Wildlife Service reached an agreement. When the environmental groups came back seeking funds, they sought almost $500 an hour in their legal fees, and ultimately $1.4 million under the Equal Access to Justice Act.

Wouldn't you agree that this is another incentive or perverse incentive that has been created that needs to be fixed that encourages these kinds of sue and settle tactics that you're describing?

Mr. GROSSMAN. It is a very unfortunate structure in that effectively it's a self-perpetuating proreregulatory, almost lobbying treadmill, because groups sue agencies to compel agency action. In many instances, the agency will be favorable to what it is the group is asking for. So, they then get priority for their policy preferences, and at the same time they obtain additional funds that then can use to promote further regulatory initiatives. It is a very unusual structure that you would have the government funding effectively
a proregulatory to force the government to undertake additional regulatory actions. It’s not protecting people's rights against the government; it’s expanding the government to exert more force in general.

Ms. HAGEMAN. Interestingly enough, I've had numerous opportunities to deal with EAJA as a trial attorney. I have worked with a variety of organizations, private landowners, farmers, ranchers, irrigation districts, interest groups such as Pharm Bureau, stock growers, and those kind of things.

What I have found is when I prevail against the Federal government, it’s very difficult for me to receive EAJA funds. Yet, when environmental groups again may prevail on a technical matter, and the agencies will actually enter into consent decrees so that they can get the EAJA funds. Have you noticed a similar pattern in what you have reviewed?

Mr. GROSSMAN. It's simply another aspect of the collusion that is unfortunately prevalent in the space and certainly something that demands Congress' attention.

Ms. HAGEMAN. Thank you, and I yield back.

Mr. JOHNSON of Louisiana. Thank you. The gentlelady yields back. The Chair recognizes the Ranking Member, Ms. Scanlon, for five minutes.

Ms. SCANLON. Thank you. At the outset at the hearing, I spoke about the work that the Institute for Justice did with Professor Julia Penn and many of my colleagues to study and challenge abuses in Philadelphia’s Civil Forfeiture Program. I would urge my colleague to review the report that we’ve already entered into the record because it’s really thorough and really paints a pretty damning portrait of what could happen with civil forfeiture programs.

In that report, it described the courtroom where civil forfeiture cases were heard as a kangaroo court; where someone failed to show up, they could get listed for default judgment. If they did show up, the prosecutors would relist the case, again and again and again, forcing people to come back to court, which is a problem if you’re in minimum wage or other restrictive jobs.

Your report also talked about the fact that pit disproportionately entangled members of disadvantaged communities who would have difficulty fighting back. It took an average of nine months to get property back, as long as three years, sometimes three, four, five, or more court appearances.

Then the median value of items seized by law enforcement in any incident was only $1,300. The median cost of hiring an attorney to fight forfeiture was $3,500. Given this disproportionate impact and the cost, is it fair to conclude that the absence of counsel or a right to counsel significantly impacts the ability of people to fight civil forfeiture?

Ms. WEST. Yes, Ranking Member Scanlon, it’s absolutely true. That’s another—I mentioned three reforms that will be accomplished by the Fair Act. Of course, the Fair Act also includes a right to counsel. That’s so crucial when you look again at how complicated this process is. You were talking how the process disproportionately impacts low-income and minority communities. The report you mentioned from Philadelphia also showed that people have lower levels of education have a much harder time getting
their property back. It’s easy to see why that’s the case because it disproportionately impacts the low-income communities at both ends of the forfeiture process. So, on the front end, we’ll have law enforcement who will frequently say, these are high-crime areas. We think that there was a crime involved in this property because this is a high area. Well, people live in high-crime areas, and often those people are low-income.

Then on the back end, once you’re already into the forfeiture process, it’s not hard to understand why if you can’t afford a lawyer you are going to be much less likely to be able to get your property back.

Ms. SCANLON. Thanks. The report also talks about more than half of the people who ultimately lost their property were never charged with a crime. Can you talk a little bit about the impact that civil asset forfeiture has on individuals who are arrested or charged and the innocent owners’ issues?

Ms. WEST. Sure. So, as I mentioned earlier, they’re—under current Federal law, it’s up to an innocent owner to prove affirmatively their own innocence, which is a huge problem. In this report that you mentioned from Philadelphia, it actually showed only one in four were found guilty or pleaded guilty to a crime. There are all kinds of circumstances in which innocent people find themselves caught up in this forfeiture process.

We have one client, for example, from Rochester, New York. Her apartment was raided because her boyfriend was accused of selling drugs. During that raid, the local police department seized $8,000 from our client. Ultimately, which is often not the case in forfeiture, but ultimately there was a criminal charge against her ex-boyfriend, but he was acquitted of the crime. Nevertheless, the local police department turned over her $8,000 to the DEA for forfeiture. This was money that she was planning to use to upgrade her business which is a mobile food cart to a full food truck to support her grandnephew and herself. We don’t have time to get through even half of the stories of innocent people who find themselves in a similar situation.

Ms. SCANLON. Certainly, one of the egregious cases that I know our Philadelphia colleagues dealt with was a kid whose piggybank with his $91 in birthday money was seized. It took months to get this back. Yes, the financial incentives for law enforcement to sweep up everything they could and keep it, essentially, really adds a perverse incentive here. Can you talk about that a little bit?

Ms. WEST. Sure. Law enforcement will sometimes be honest, and they’ll say, oh, the reason we need civil forfeiture is because we need the money. Of course, I don’t know what exactly is the right level of funding for the various Federal law enforcement agencies. What I am 100 percent sure about is whose responsibility that is, and that’s yours. The Constitution unequivocally grants to Congress only the power to raise revenues. So, it’s not only a corruption of this Constitutional power for the Executive Branch law enforcement agencies to be raising revenue, but it’s also distracting them from what they should be doing, which is solving crime and preventing crime.

Ms. SCANLON. Thank you. I yield back.
Mr. JOHNSON of Louisiana. Thank you. The gentlelady yields back. The Chair recognizes the gentleman from South Carolina, Mr. Fry, for five minutes.

Mr. FRY. Thank you, Mr. Chair. Thank you for having this hearing today. I actually did a lot of work on civil assets forfeiture when I was in the State house in South Carolina. It’s amazing to me as divided as this is as divided as Columbia can be at times, the bill that we filed was sponsored by 80 percent of the entire House of Representatives. You have conservatives lined up with Liberals that really understood that this was a problem and that we needed to fix it.

Civil asset forfeiture has really become a device for unjustified government takings. It’s violative oftentimes, my view, of the 4th, 5th, 8th, and 14th Amendments. The problem that I have is that it doesn’t have to accompany a charge. It’s a totally separate mechanism. There’s no due process, or very little. There’s no judicial review or very little. Whether or not it’s excessive or not, there’s no real protection for the individual.

As you pointed out, you have to go through this entire labyrinth here a layperson, as a litigant yourself to establish your innocence and to get your item back. It’s never within a timely manner.

Many people are unaware of how the government or legal system really works until they find themselves in this exact spot. As Ms. Scanlon pointed out, it’s actually really interesting because a lot of these crimes or a lot of these seizures are less than a thousand dollars.

In South Carolina, 55 percent are less than a thousand dollars. Nobody is going to hire an attorney for that amount of money to go get their stuff back. They’re just not going to do it.

In instances within the districts, since we were doing this, Ms. Eller Vermel was a 72-year-old senior living in Conway, South Carolina. She owns a thousand square foot home. She’s had it for decades. She’s not in the best neighborhood. She did everything she could to get people off of her property when she was sleeping or at nighttime or when she was at work because they would sell drugs at the corner by her house. She put up “no trespassing” signs. She talked to other people in the neighborhood. She talked to parents. She talked to kids. She talked to the police. She even trimmed her bushes so that police could have a better vantage point of what was going on in the city of Conway. The city of Conway seized her home. She had fight to get that back. It’s very similar to what Ms. Scanlon was talking earlier.

Randi Cook dropped off a friend at a Myrtle Beach sports bar as a favor. Drug enforcement agents swarmed the car in the parking lot. Because she was a waitress and didn’t have a bank account, she had roughly $5,000 in her possession. Because her friend was wanted, and she was unaware, they seized her money, too. It took really a very long time to get that back. This isn’t a debate in my mind about pro or antipolice, really. It’s really about process, right? Civil forfeiture is kind of based on the in rem jurisdiction that you can go seize the item. That the item committed the crime, it’s not in personam, of course, which could be against the owner itself.

You look at these—Mr. Chair, briefly, I want to introduce into the record with unanimous consent an investigatory series in 2019
from the Greenville News in the Anderson Independent-Mail called, “TAKEN: How Police Departments Make Millions,” which talks about civil asset forfeiture in South Carolina.

Mr. JOHNSON of Louisiana. Without objection.

Mr. FRY. Another one, too, an opinion article by Andrew Yates on “Why South Carolina Must End Its Civil Asset Forfeitures.”

Mr. JOHNSON of Louisiana. Without objection.

Mr. FRY. In this series, which is a massive investigatory series by the news, in three years, law enforcement seized $17 million. Twenty percent of people who lost their property were never charged with an actual crime. Another 20 percent were charged, but not convicted. The average time between seizure and when the prosecutor filed an action was 304 days, and 55 percent of cash seizures were less than a thousand dollars.

The problems, as you highlighted, really are everywhere. It's a separation of powers issue. It's a burden of proof issue. It removes the impartiality agencies now have a financial incentive to go do this and continue to do it. It doesn't protect innocent owners. It's not worth the fight to go against the government on small sums, as has been outlined. Of course, it's violative possibly of the 4th, 5th, 8th, and 14th Amendments, and, of course, the preponderance of the evidence standard. These are all problems.

Ms. West, have you encountered similar instances representing people who have lost either property or cash through civil forfeiture?

Ms. WEST. Yes, thank you. More again, we could possibly cover, even if we had—this hearing was three hours longer. One that comes to mind just because you were talking about how long this can take, and how long people can be deprived of their property in the civil forfeiture process, is we had a client who was traveling near the border to visit family near Mexico. He was driving his Ford F–250 pickup truck, and CBP stopped him. He didn't have any weapons in the car, but what he did have, he has a licensed firearm back home. What he did have were five lone bullets in a console in his car. CBP took his car because he was transporting munitions of war across the border.

After his property was taken and put into the forfeiture process, he went two years without ever having an opportunity to even have a hearing to contest the forfeiture and try to get his truck back. It's obviously a huge problem because we see all the time we have clients who if you don't live in a place that has reliable public transportation, for example, if your car is taken away, that means you can't get your kid to school; you can't get to the grocery store; and you can't get to your job.

So, this is a really serious problem. These procedural defects really impact real people's lives.

Mr. FRY. Thank you, Mr. Chair. With that, I yield back.

Mr. JOHNSON of Louisiana. Thank you. The gentleman yields back. The Chair recognizes the gentlelady from Texas, Ms. Jackson Lee, for five minutes.

Ms. JACKSON LEE. Let me thank the Chair and the Ranking Member for a very important and constructive hearing. It is noteworthy again. I guess I'm often to say this that we have gone through these civil forfeiture legislation initiatives in the more
than two decades that I’ve been here. I am reminded of Chair Hyde—one of the issues that he was focused on—the late Chair Hyde.

It seems that we have a space where we can find some enormous bipartisan issues. To listen to an example of a senior citizen’s house being taken because they can’t stop drug activity on the corner of the front yard is egregious. There are similar stories that you have spoken to, Ms. West. So, I’m going to pose my questions to you and Mr. Phillips on a different line of questioning.

First, I’d like to say that we recognize that penalties, civil penalties are part of the justice system in some way in that the taking of things are clearly an aspect of that. We just had the Department of Justice in Houston on a settlement of dumping; egregious dumping in somebody else’s neighborhood. It happens to be in the neighborhoods of minorities. So, clearly a tool could be used.

If you travel miles in a truck to dump, there may be a basis that punishment is your truck is gone. You may have rights to get it back, but you have been notified there are signs it’s not a dumping place, you’re dumping. So, I would offer to say that it is a tool. It is a tool that must be contained, and there must be reasons.

So, let me just raise this point and I think you have—or this report and just this October, just this October 2021 report on civil forfeiture says that: “Frustrating, corrupt, unfair, so forfeiture in the words of its victim.” Can you speak to where that is, also asset forfeiture is frustrating, corrupt, and unfair? Let me pose my question to Mr. Phillips before you answer, and that is that we are also lumping together a number of legislative initiatives that are shocking to me, H.R. 3446, saying that there’s collusion among agencies around regulations. H.R. 788 prevents the DOD settlements of corporate wrongdoers from including payments to nonprofits. Then H.R. 788 will be a gift within essence via the expense of families and communities suffering from injuries that cannot be addressed directly. So, things that would help the American public.

Let me go to Ms. West on the frustrating and corrupt and unfair of civil asset forfeiture programs.

Ms. WEST. Sure. Thank you, Representative Jackson Lee. I would say to your point about forfeiture being a tool, no one contests that if the government charges someone with a crime and convicts that person of a crime with all the protections that the criminal justice system that grants to that person when they are charged with a crime, the government can then take the proceeds of that crime or property that’s the fruits of that crime through criminal forfeiture. No change to—

Ms. JACKSON LEE. I should have clarified and thank you for doing that for me.

Ms. WEST. Yes, yes.

Ms. JACKSON LEE. That’s what happened to a dumping case, but go ahead it would be a criminal.

Ms. WEST. That’s exactly right. So, criminal forfeiture is what allows the government to address property that’s actually involved with their crime. When you look at civil forfeiture, you’re sweeping in all kinds of other property.

A great example out of California recently our clients Linda Martin and Reggie Wild were saving money to buy a home, and they
had $40,000 in cash in a safe deposit box. So, you can’t get safer than that. You’ve got your money in a safe deposit box at a private safe deposit box company. The FBI raided that business and took all the property from all the safe deposit boxes, including Linda and Reggie’s money that they are saving to purchase a home. When they got a notice about the FBI’s intent to forfeit everybody’s property in the safe deposit boxes, they couldn’t even tell what crime it was alleged that their property had been involved in because there was a laundry list of possible crimes.

So, you’re looking at situation where you’re facing this Byzantine process get your property back, and you don’t even know what it is that you’re contesting. So, I would just say that criminal forfeiture is where we should look when we’re looking to take property that’s actually been involved with a crime.

Ms. JACKSON LEE. I thank you. I would ask the Chair to indulge for Mr. Phillips to be able to respond to that question that I impose.

Mr. JOHNSON of Louisiana. I always indulge Ms. Jackson Lee. Go ahead.

Ms. JACKSON LEE. I thank you. I think is an important hearing on the aspects of dealing with the civil asset forfeiture. Thank you very much, Mr. Phillips.

Mr. PHILLIPS. Thank you, Congresswoman. Thank you, Ranking Chair. Really quickly, you asked what could improve these settlements? I would say don’t throw the third-party agreements, baby out with the bathwater. I think they can be very useful. As I said before, I think oversight is really important.

One Representative brought up earlier the Equal Access to Justice Act. One of the things that Congress did recently was it required all agencies that engage in that payout EAJA fees, EAJA awards have to submit that to a data base that’s accessible to the public so the public can understand where this money is going. Through this data base, we have learned that the vast majority of EAJA fees go to social security awardees who have been wrongly denied. They had to hire a lawyer to appeal, and their lawyers got EAJA fees helping them get Social Security benefits.

I imagine that Congress could do something similar with regards to these third-party settlements just to ensure that there is disclosure and oversight. Sunshine is the best disinfectant. I imagine this is something that could potentially get bipartisan agreement.

Ms. JACKSON LEE. Thank you. I yield back.

Mr. JOHNSON of Louisiana. Thank you. The gentlelady yields back. That concludes today’s hearing. I do sincerely want to thank the witnesses again for appearing today and giving us your insights on, obviously, a very important series of issues that we might actually find bipartisan agreement on. So, we’ll see. Wonders never cease.

Without objection, all Members will have five legislative days to submit additional written questions for the witnesses or additional materials for the record. Without objection, the hearing is adjourned.

[Whereupon, at 4:10 p.m., the Subcommittee was adjourned.]
All materials submitted for the record by Members of the Subcommittee on the Constitution and Limited Government can be found at: https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=116049.