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Agency Finance in the Age of Executive Government

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Abstract

The rise of "executive government" has prompted a great deal of public debate and scholarly theorizing. This article examines one aspect of that very large subject: agency budgets or, more precisely, revenues. To an unprecedented extent, regulatory agencies have come to rely on non-appropriated funds for their ordinary operations. Many have become self-financing; some have become profit centers for wider executive exertions—and for Congress. We trace this development in two areas: agencies' delegated authority of tax, and agency finance through settlement with private parties in criminal or civil enforcement proceedings. Due to a paucity of reliable data, our presentation is necessarily sketchy and tentative. That said, agency self-finance bears on many of the central themes of administrative and constitutional law: delegation and the separation of powers; congressional oversight; agency independence; the choice between rulemaking and enforcement or adjudication; and judicial review. In many of these domains, the debate over "the administrative state" has become excessively abstract and formalistic. Approaching the administrative state from its most pedestrian front opens a window both into its actual operation and constitutional rule-of-law questions.

Introduction

The rise of "executive government" has prompted a great deal of public debate and scholarly theorizing. This article examines one aspect of that very large subject: agency *budgets* or, more precisely, *revenues*. The inquiry, we believe, merits attention beyond a narrow circle of public finance scholars. Approaching the administrative state from its most pedestrian front opens a window both into its actual operation and constitutional rule-of-law questions.

The notion that tangible incentives (including monetary incentives) shape the contours of public administration is in many ways foundational to the American experiment. Our system of "checks and balances" is foremost a system of incentives. The written Constitution is unequivocal, indeed emphatic, in committing fiscal powers to Congress and in withholding them from the executive;[1] and in several clauses, it specifies with precision who can and must be paid what and by whom.[2]

The idea that "money matters" for administration is equally foundational to the modern public choice and public finance literature. The late William Niskanen, by way of prominent example, proposed an elegant model of bureaucratic agencies as budget maximizers.[3] Few contemporary scholars defend the Niskanen model in its simple, original form. Still, it embodies three assumptions that are shared among the great majority of scholars: (1) consistent with Madisonian intuitions, administrative agencies are empire-builders. (2) Budgets (fiscal resources) are *among* the things agencies seek to maximize—even if their utility functions are a great deal more complicated than the highly stylized Niskanen model would suggest.[4] (3) The budgetary maximand for regulatory agencies is *legislative appropriations*. Conversely, appropriations are one of the principal means through which Congress controls and directs agencies (ex ante, through budgetary appropriations; ex post, through "riders" and earmarks; or by signaling).[5]

That third assumption fits our intuitions about the ordinary operation of government, as well as the constitutional text: the power of the purse belongs to Congress. Public expenditures must be appropriated by Congress.[6] And with some exceptions, government agencies may not raise or

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[1] *See* U.S. CONST. art. I §§ 1, 2 (providing Congress with power to "lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and welfare of the United States" and "to borrow money on the credit of the United States"); U.S. CONST. art. I § 9, cl. 7 ("No money shall be drawn from the treasury, but in consequence of appropriations made by law").

[2] U.S. CONST. art. I § 6, cl. 1 ("The Senators and Representatives shall receive compensation for their services … paid out of the treasury of the United States"); U.S. CONST. art. II §1, cl. 7 (the President shall receive compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them"); U.S. CONST. art. III § 1, (judges' compensation "shall not be diminished during their continuance in office").

[3] William A. Niskanen, *Nonmarket Decision Making: The Peculiar Economics of Bureaucracy*, 58 AM. ECON. REV. 293, 293-97 (1968).

[4] Niskanen, *supra* note 3 at 293.

[5] Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 443 (1989).

[6] U.S. CONST. art. I, § 9, cl. 7.

spend funds that have not been appropriated.[7] Two ancient organic statutes, the Miscellaneous Receipts Act and the Deficiency Act, enshrine this general regime.[8] Increasingly, however, the picture is at war with reality. To an unprecedented extent, regulatory agencies rely on non-appropriated funds for their ordinary operations. Many have become self-financing; some have become profit centers for wider executive exertions—and for Congress. Correspondingly, the general assumption that Congress will jealously guard its powers of the purse as its ultimate means of checking and balancing the executive has become open to serious doubt: in many respects, those powers have fallen into disuse.[9]

This paper sketches the parameters of agency self-finance and offers several suggestive examples. It is sketchy, suggestive, and initial because of the paucity of publically available data. Neither the Office of Management and Budget, the Department of the Treasury, the enforcement agencies, nor Congress publishes (or, as far as we know, even compiles) systematic accounts of agency revenue raising and the uses made of the funds. Thus, one of our purposes is simply to identify the phenomenon and call for greater official documentation and transparency. But we think we know enough, even now, to begin serious speculation on questions of cause and consequence.

What drives the trend toward agency self-financing? The most tempting answer is public indebtedness. The federal budget consists mostly of transfer payments, interest payments on the debt, and payments for a minimum level of national defense—expenditures that are effectively untouchable. Whatever budget discipline can be had must fall on "discretionary" spending, including payments for the ordinary operations of government. So Congress may find the benefits of agency contributions worth the costs of giving up a degree of appropriations control.

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[7] The exceptions are "revolving fund" or "non-appropriated fund institutions" ("NAFI's"). These institutions are beyond our purview. For very brief discussion see *infra* nn. 27-28 and accompanying text.

[8] The Miscellaneous Receipt Act of 1849, Pub. L. 97-258, 9 Stat. 398 (codified as amended at 31 U.S.C. § 3302(b) (2012)), provides that an agent of the U.S. "receiving money for the Government from any source" must deposit the funds into the general treasury. 31 U.S.C. § 3302(b) (2012). The Anti-Deficiency Statute of 1905, Pub. L. 97-258, 33 Stat. 1214 (codified as amended at 31 U.S.C. § 1341-1351 (2012)) makes it unlawful for a federal agency to "make or authorize an expenditure or obligation exceeding an amount available in an appropriation." 31 U.S.C. § 1341(a)(1)(A) (2012). For discussion *see* Kate Stith, *Congress' Power of the Purse*, 97 YALE L. J. 1343, 1363-77 (1988).

[9] Christopher DeMuth Sr., "A Constitutional Congress?", *The Weekly Standard*, Oct. 27, 2014, and "Congress Incongruous," *Liberty Law Forum*, August 2015 (http://www.libertylawsite.org/liberty-forum/congress-incongruous/).

There is something to this. But the explanation is a bit unsatisfactory. Foremost, tendencies toward off-budget agency finance date back some four decades, and they show no obvious correspondence to economic conditions or budget cycles. We suggest that the growth of off-budget finance reflects a pervasive, secular trend to *executive* government.

About the existence of that trend, there is not the slightest doubt. A large body of scholarship has described it, discussed its causes and effects, and traced its implications for administrative law and doctrine.[10] By approaching the subject through the lens of agency finance—more specifically, the agencies' growing ability to combine regulatory mandates and enforcement with powers of outright taxing and spending—we hope to enrich our understanding in three respects.

First, the inquiry can yield useful empirics. Dollars can be counted for purposes of comparing agencies and programs and (with inflation adjustments) charting trends over time. To be sure, scholars have also counted the cost of regulation, the numbers of pages and rulemaking notices in the Federal Register, the ratio of agency regulations to statutory law, and even sub-regulatory devices such as "interpretive guidelines," "Dear Colleague" letters to regulated parties, or "Frequently Asked Questions" bulletins and online postings.[11] But all those are proxies, and while compiled with increasing sophistication[12] they involve intractable problems of measurement and interpretation. Dollars, too, are a proxy—an agency such as the EPA with a relatively small budget can command vastly greater private resources through rulemaking—but the unit of measurement is relatively unproblematic. And dollars are a pretty good proxy. A longstanding program of analyzing agency budgets by form of regulation (economic, social, financial, etc.) has yielded many useful insights.[13]

[10] *See, e.g.*, Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. ___ (2016) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687205&download=yes); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014); Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501 (2015); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

[11] *See, e.g.*, Clyde Wayne Crews Jr., "Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State", *Competitive Enterprise Institute* (2015) (estimating the annual cost of regulatory compliance and economic costs at $1.88 trillion annually).

[12] The latest and most ambitious effort is the RegData program of the Mercatus Center at George Mason University, which analyzes regulatory text and counts numbers of binding constraints or restrictions. *See* http://regdata.org.

[13] *See* the annual "Regulators Budget," now in its thirty-seventh year, published jointly by the Weidenbaum Center on the Economy, Government, and Public Policy at Washington University in St. Lewis and the Regulatory Studies Center at George Washington University. See https://wc.wustl.edu/regulatory_reports.

Second, our inquiry opens a perspective on the administrative state *in actual operation*, as distinct from its appearance in agency pronouncements, court decisions, and law reviews and textbooks with their heavy emphasis on doctrine. Scholars have lamented the increased disconnect between administrative law and practice.[14] Examples include the once-rare, now-common practice of multi-agency rulemakings;[15] the emergence of special status agencies (such as the IRS and the Federal Reserve Board) as regulatory agencies and federalism architects;[16] the proliferation of novel forms of administrative practice in the financial regulatory sector;[17] "regulation by threat";[18] the implementation of public law through second-order private agreements;[19] and "cooperative" federal-state regulation through comprehensive settlements in the shadow of the law and, sometimes, in a virtually law-free zone.[20] We urge that agency self-finance be added to the growing list of practices for which the existing *corpus juris* lacks any meaningful account.

Third, and relatedly, agency self-finance bears on many of the central themes of administrative and constitutional law: delegation and the separation of powers; congressional oversight; agency independence; the choice between rulemaking and enforcement or adjudication; and judicial review. In many of these domains, the debate over "the administrative state" has become excessively abstract and formalistic. By way of prominent, highly pertinent example, the perennial controversy over "independent" administrative agencies continues to revolve around the President's removal powers[21]--an important aspect of agency design and

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[14] *See e.g.*, Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014); Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501 (2015); and Abbe Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2699993&download=yes).

[15] Farber & O'Connell, *supra* note 14 at 1155-57.

[16] Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack Of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2006).

[17] Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689 (2013); Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship between Administrative Law and Financial Regulation*, 78 LAW & CONTEMP. PROBS. 129 (2015).

[18] *See* James W. Coleman, *Regulation by Threat* (forthcoming on this site).

[19] Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029 (2005).

[20] *See, e.g.*, U.S. Chamber of Commerce, A Report on Sue and Settle: Regulating Behind Closed Doors (2013) (https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREPORT-Final.pdf); and infra nn. 72-83 and accompanying text.

[21] *See*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 16-17 (2010) (criticizing the "obsessive focus on removal as the touchstone of independence"). For a rare plea to integrate budgetary arrangements into a separation-of-powers analysis see Note, *Independence, Congressional*

operation, to be sure; but not the only feature of administrative governance that commands attention. While money may not change *everything*,[22] following its trail is generally a sound practice in private affairs and, in public affairs, a matter of considerable and indeed constitutional concern.[23] A focus on agency budgets, we believe, may pay dividends in understanding not only the actual operation of the administrative state but also its constitutional contours.

Part I of this paper describes an increasingly common form of agency fiscal independence: delegated tax powers. Part II discusses the rapidly growing practice of government finance through agency policing, enforcement, and "settlements." Part III offers some tentative thoughts on the origins and consequences of off-budget agency finance.

I. **Executive Taxing and Spending**[24]

The federal government collects most of its revenue through explicit statutory taxes—individual and corporate income taxes, payroll taxes for Social Security and Medicare, estate and gift taxes, customs duties, and an array of excise taxes.[25] But executive agencies also raise revenue from license fees, royalties, proceeds from public lands, the sale of ordinary goods and services, and legal fines and settlements. Some of the money comes from government activities that might as well be left to private commerce, such as military PX stores ("post exchanges") and the U.S.

Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy With Removal Protection, 125 HARV. L. REV. 1822 (2012) [hereinafter *Congressional Weakness*].

The case law reflects an even starker disconnect between questions of agency finance and formal analysis. The law on "non-appropriated" agency finance is almost exclusively the law of the Federal Circuit. Conversely, standard separation-of-powers analysis ignores agencies' budget authority and focuses single-mindedly on removal powers. *See* especially Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010). The disconnect reflects the dynamics of litigation. Litigants have no reason to bring unpromising claims; courts will not address claims that have not been brought. Here and in other dimensions of the administrative state, improvement must come from scholars rather than practitioners. *See* Robert R. Gasaway & Ashley C. Parrish, *Reflections on the Administrative State* (forthcoming on this site).

[22] *But see* CINDY LAUPER, *Money Changes Everything*, *on* SHE'S SO UNUSUAL (Portrait Records 1983).

[23] *Cf.* U.S. CONST. art. I § 9, cl. 7 ("[A] regular statement and account of receipts and expenditures of all public money shall be published from time to time.").

[24] Portions of this section draw on Christopher DeMuth Sr., Agency Taxation, *Engage* 16:2 (Sept. 4, 2015), http://www.fed-soc.org/publications/detail/agency-taxation.

[25] Over the past ten years, explicit statutory taxes comprised between 64% (2010) and 79% (2005) of the federal government's annual revenues. In addition to funding sources mentioned in the text, the Treasury also receives funds from interest on federal accounts, gifts and donations, civil forfeitures, realization on "loans and investments," and intra-budgetary receipts. *See* U.S. Dep't of the Treasury, Bureau of the Fiscal Serv., 2015 COMBINED STATEMENT OF RECEIPTS, OUTLAYS, AND BALANCES, TABLE A–RECEIPTS BY SOURCE CATEGORIES, https://www.fiscal.treasury.gov/fsreports/rpt/combStmt/cs2015/rta.pdf. (last accessed Feb. 7, 2016).

Mint; other comes from a wide range of user fees—for using national parks and applying for licenses, permits, visas, patents, and regulatory approvals.

On the spending side of the ledger, the constitutional rule that moneys may not be spent except through congressional appropriations admits of many exceptions, most of them linked to these non-tax revenues.[26] "Nonappropriated Fund Instrumentalities" ("NAFIs") are money-making, self-financing enterprises that are managed by federal employees and treated as government entities for most legal purposes (procurement, contracting, liability). NAFIs include numerous organizations devoted to meeting the needs of those in military service and their families (PXs, gyms, clubs, sports leagues). Outside the military, NAFIs range from the Federal Reserve System and the Federal Deposit Insurance Corporation to the Graduate School of the U.S. Department of Agriculture. User fees charged by regular federal agencies are sometimes remitted to the Treasury and sometimes held by the agencies; when held by the agencies their expenditure may or may not be subject to appropriations. The device of the "revolving fund" permits agencies to continuously collect user fees and spend them on specified purposes, thereby establishing "permanent indefinite appropriations." Revolving funds are increasingly used to permit regulatory and enforcement agencies to use fines and settlements to operate their own spending programs, as we shall see.

These forms of executive self-financing are only roughly defined and accounted for. No one knows how many NAFIs exist.[27] Similarly, Congress' policy of making non-NAFI regulatory agencies self-financing through user fees and other devices—an effort that began in earnest under the Reagan administration[28]--appears to have outstripped the legislature's monitoring capacity. Consider the Customs and Immigration Service (CIS), which processes and adjudicates

[26] *See,* U.S. Government Accountability Office, Office of the General Counsel, *Principles of Federal Appropriations Law*, 3d ed., Sept. 2008, Vol. III, pp. 12-85–12-140 (revolving funds), 12-140–12-196 (user fees), and 15-226–15-277 (NAFIs), http://www.gao.gov/assets/210/203470.pdf. About 70 percent of federal spending is now "entitlements" such as Social Security, Medicare, and food stamps, where spending is a function of statutory formulas rather than annual appropriations. Our concern here is with that portion of the remaining "discretionary" expenditures that have also escaped the need for appropriations.

[27] *See,* U.S Government Accountability Office, "Federally Created Entities: An Overview of Key Attributes," Oct. 2009, pp. 16–17, http://www.gao.gov/assets/300/297944.pdf.

[28] *See, e.g.,* Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. 99–272, 100 Stat. 82, § 7005 codified at 49 U.S.C. § 60301 (2012) (establishing "user fee" finance for pipeline safety programs administered by U.S. Department of Transportation); Omnibus Budget Reconciliation Act of 1986, Pub. L. 99-591, 100 Stat. 1890, § 3401 codified at 42 U.S.C. § 7178 (2012) (entire regulatory budget of the Federal Energy Regulatory Commission (FERC)).

immigrant applications for green cards (lawful permanent resident status), workers permits, naturalization, and dozens of subsidiary classifications. Through a series of incremental steps culminating in the 2002 "homeland security" legislation following the 9/11 terrorist attacks, Congress directed that CIS cover essentially its entire budget through application fees. This means, for example, that the $985 filing fee for a green card covers not only CIS's review and processing costs but also a share of its activities that do not generate revenue, such as adjudication and asylum applications. CIS does not have a formal revolving fund (it has requested one), but retains its fee revenues in its own account and maintains the account over time to cover its entire budget (with minor exceptions) without congressional appropriations.[29] The agency's special status came to light in November 2014, in the wake of President Obama's executive revision of statutory immigration policies that many in Congress opposed on constitutional or policy grounds or both. Shortly after the president announced his actions, opponents announced that they would countermand them with a rider to CIS's appropriations for the coming year. A few days later came the embarrassed retraction: staffers had discovered that USCIS is self-funded and financially independent of Congress.[30]

That many in Congress were unaware that an agency as important as CIS was not dependent on its appropriations is a striking example of the increasing informality of federal taxing and spending, and of Congress's loss of interest in using its power of the purse over the evolution of policy. Even more striking, Congress has in recent decades begun to empower agencies to calculate and impose outright taxes—charges unrelated to any service provided[31]—and to

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[29] *See*, Congressional Research Service, "USCIS Funding and Accountability to Congress," Feb. 19, 2015, https://www.fas.org/sgp/crs/homesec/IN10233.pdf; U.S. Dep't of Homeland Security, FY 2016 Budget-in-Brief (undated), pp. 95–97, http://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf.

[30] *See* 8 U.S.C. § 1356 (2012); Rebecca Shabad, *House GOP Panel: Defunding Immigration Order 'Impossible'*, The Hill (Nov. 20, 2015), http://thehill.com/policy/finance/224837-appropriations-panel-defunding-immigration-order-impossible (last visited Jan. 15, 2016).

[31] The distinction is not always entirely clear. The Independent Offices Appropriation Act (IOAA), 1952, 65 Stat. 290, (codified at 31 U.S.C. § 9701 (2012)), allows agencies to collect fees based on "(A) the costs to the Government; (B) the value of the service or thing to the recipient; (C) public policy or interest served; and (D) other relevant facts." 31 U.S.C. § 9701(b)(2). In two decisions, the U.S. Supreme Court construed the statute narrowly so as to avoid constitutional questions that might arise over a delegation of tax authority: Nat'l Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 342 (1974); Fed. Power Comm'n v. New England Power Co., 415 U.S. 345, 351 (1974) (invalidating fees calculated to inure to the benefit of the public at large). However, the IOAA is a default statute: it governs unless an agency's organic statute provides otherwise. Congress may call something a "fee" when it is plainly a tax on non-regulated parties, *see infra* note 41-42 and accompanying text (discussing PCAOB's "accounting support fee"), and it may (within uncertain limits) delegate its authority to tax. Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 222-23 (1989).

exercise wide discretion in how the revenues are spent. Examples of such delegated taxing power include the Federal Communication Commission's "universal service" fees and the Public Company Accounting Oversight Board's annual assessments on audited companies. A more peculiar case is the financing of the Consumer Financial Protection Bureau through transfers from Federal Reserve revenues.

The FCC's Universal Service Program. The Telecommunications Act of 1996 authorizes the FCC to set and collect taxes for promoting "universal service" and gives the Commission wide discretion to determine whom to tax and at what rate and how to spend the revenues.[32] The FCC's annual operating budget of about $500 million is covered entirely by the Commission's licensing and other fees and a share of the net proceeds from its spectrum auction programs—but the expenditures are nonetheless subject to annual appropriations by Congress in response to FCC budget requests. The universal service program, in contrast, is administered for the FCC by a subsidiary not-for-profit corporation, the Universal Service Administrative Company, whose revenues and expenditures are independent of annual budget requests and congressional appropriations.

Prior to the 1996 Telecommunications Act, Congress had sought to ensure "universal service" through a complex system of cross-subsidies among service providers. (In substance, the FCC permitted AT&T to maintain a long-distance monopoly in exchange for supporting local carriers, and local carriers in turn charged rates that favored residential over business customers and rural over urban customers.) Recognizing that telecommunications markets had become naturally competitive, Congress replaced regulatory cross-subsidies with direct subsidies for certain groups financed through the universal service "contribution."[33] The contribution is a tax in all but name. It has no relation to any benefit conferred by the FCC; instead, it is based on the agency's self-determined fiscal needs to sustain its subsidy schemes.[34] The FCC collects the tax on the interstate and international revenues of landline and wireless telecommunications

[32] Phil Weiser, *Paradigm Changes in Telecommunications Regulation*, 71 U. COLO. L. REV. 819, 824 (2000) (noting that Congress "did not provide much guidance as to exactly how it should be implemented" and instead "handed the ball to the FCC, mandating that the FCC work with a Joint Federal-State Board . . . to figure it out").

[33] 47 U.S.C. § 254 (2012).

[34] Krotoszynski, Ronald J. Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 273 (2005)

companies, cable companies that provide voice service, and paging service companies.[35] (The providers, in turn, pass the assessments on to their customers.)[36] The tax is much higher than the 3-percent statutory federal excise tax on telephone service, and the Commission adjusts it each quarter to keep pace with its program spending. Recently the tax rate has ranged from 15.7 percent (3Q-2014) to 17.4 percent (2Q-2015).[37] The revenues come to about $8.8 billion per year.[38]

The FCC spends those revenues on grant programs for landline, wireless, broadband, and Wi-Fi equipment and services for schools, libraries, and rural health care facilities, and on rate-subsidies for low-income and rural customers. For example, the Commission's "Lifeline" program currently provides a free basic wireless phone or landline installation and free basic telephone service (250 minutes per month) to about 12 million low-income customers, at a cost of $1.6 billion annually.[39] The programs have been widely criticized as ineffective and scandal prone, with very high administrative costs to boot.[40]

The Public Company Accounting Oversight Board. The Sarbanes-Oxley Act of 2002 established the PCAOB to regulate accounting firms that audit "public companies" (those that issue publicly-traded stock) and broker/dealers in public stocks. The PCAOB's annual budget of about $250 million is funded almost entirely by its own tax (which it calls an "accounting support fee") on the equity capital or net asset value of public companies and broker/dealers. The

[35] Proposed regulations on § 254 are ambiguous on extending the fee to ISPs. *See* Federal Communications Commission, *Second Further Notice of Proposed Rulemaking*, FCC 15-71, at 27-28 (June 22, 2015) (seeking comment on whether to amend FCC regulations to include "broadband" as a supported "telecommunications service")

[36] *See, e.g.*, In re Federal-State Joint Board on Universal Service, 17 F.C.C.R. 24,952, 24,974-83 (2002) (report and order of second further notice of proposed rulemaking) (acknowledging that carriers simply pass along universal service fees to their customers).

[37] Federal Communications Commission (FCC), *Proposed Third Quarter 2014 Universal Service Contribution Factor*, (Public Notice DA 14-812) (June 12, 2014); Federal Communications Commission (FCC), *Proposed Second Quarter 2015 Universal Service Contribution Factor*, (Public Notice DA 15-326) (Mar. 13, 2015).

[38] Universal Service Administrative Company (USAC), *2014 Annual Report* at 15, available at http://www.usac.org/_res/documents/about/pdf/annual-reports/usac-annual-report-2014.pdf. (last accessed Feb. 7, 2016).

[39] In May 2015, FCC Chairman Tom Wheeler announced plans to expand the Lifeline program to cover Internet broadband as well as telephone service. *See* Statement of FCC Chairman Tom Wheeler, "*Re: Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, *Telecommunications Carriers Eligible for Universal Service Support*, WC Docket No. 09-197, *Connect America Fund*, WC Docket No. 10-90" (May 28, 2015), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-71A2.pdf (accessed Feb. 7, 2016); Rebecca R. Ruiz, *F.C.C. Chief Seeks Broadband Plan to Aid the Poor*, N.Y. TIMES, May 28, 2015 at A1.

[40] *See, e.g.*, Krotozynski, *supra* note 34 at 297 (describing segments of the program as dismal failures and the costs of administering the system as "staggering").

Board establishes its operating budget for the year, subtracts a small sum from annual fees it collects from the accounting firms it regulates (about $1.6 million), and allocates the remainder among public companies and broker/dealers according to their size as measured by equity capital or net asset value. (The Board exempts smaller public companies from its tax, and it typically funds part of each year's budget from carryover tax and fee revenues from prior years.) The total accounting support fee for 2015 is $226.6 million, with approximately $199.1 million allocated to public companies and $27.5 million to broker-dealers.[41]

The PCAOB, like the FCC's Universal Service Administrative Company, is a 501(c)(3) subsidiary of a regulatory agency. Its parent is the SEC. Its annual budget must be approved by the SEC, but is entirely independent of congressional appropriations. The Sarbanes-Oxley Act contains several provisions emphasizing that the PCAOB is independent of Congress and that its revenues are not "monies of the United States."[42] Even so the Board's taxes (and, of course, its accounting regulations) are federally enforced legal obligations.

The Consumer Financial Protection Bureau. The CFPB, established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, enjoys a different form of agency self-financing. The Bureau is funded by a draw (up to a statutory cap) from the revenues of the Federal Reserve System.[43] The Fed's revenues come from fees on private banks and earnings from open market operations; it covers its own operating budget (along with other expected expenses) from the bank fees and remits the remainder to the Treasury.[44] The Bureau's budget, like that of the Federal Reserve, is entirely independent of congressional appropriations, but is capped at 13 percent of the Fed's operating budget.[45] Currently the Fed's expenses total almost $5.5 billion while the CFPB's budget is about $500 million.[46]

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[41] *PCAOB Approves 2015 Budget and 2014-2018 Strategic Plan*, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, http://pcaobus.org/News/Releases/Pages/11252014_Budget_Meeting.aspx (last visited Jan. 15, 2016).

[42] *See, e.g.*, 15 U.S.C. § 7219(c)(1) (2012) ("Accounting support fees and other receipts of the Board . . . shall not be considered public monies of the United States.").

[43] 12 U.S.C. § 5497(a) (2012).

[44] A recent statutory amendment, contained in the 2015 highway act, limits the Federal Reserve's retained revenues to $10 billion. Highway and Transportation Funding Act of 2015, Pub. L. No. 114-21, 129 Stat. 218 (2015).

[45] 12 U.S.C. § 5497(a)(2) (2012).

[46] *See* Board of Governors of the Federal Reserve, *101st Annual Report, 2014*, (June, 2015) 402-03, http://www.federalreserve.gov/publications/annual-report/files/2014-annual-report.pdf (accessed Feb. 8, 2016); Consumer Finance Protection Bureau, *The CFPB Strategic Plan, Budget, and Performance Plan Report*, (Feb.

II. For-Profit Law Enforcement

1. Overview and Examples

For-profit law enforcement, meaning an enforcement system that permits enforcers to keep all or part of the proceeds of the action, has a long and storied history in the United States. The obvious argument in favor of for-profit enforcement is the creation of private incentives: to the extent that enforcers may "eat what they kill," they will be more aggressive. The argument *against* it is the fiendish difficulty of creating the right set of economic incentives to generate an optimal level of enforcement and deterrence.[47] Since the turn of the nineteenth century, the general (though not unbroken) practice in the United States has been to permit *private* enforcers (including so-called *qui tam* plaintiffs) to sue for profit, while prohibiting *public* enforcers from doing so. Among the most common arrangements is to provide that all monies collected in the process of public enforcement must be deposited in the general treasury.[48]

Over the past decades, this general understanding has eroded. One observes a pronounced trend toward a merging of private and public enforcement agencies and their functions.[49] Private individuals and organizations have been motivated to act as "private attorneys general."[50] At the same time, public enforcers at all levels of government have come to behave more and more like private profit-maximizers. While individual *officers* are still prohibited from benefitting directly from their enforcement activities, numerous public *agencies* have gained a stake in maximizing

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2015) at 13, available at: http://files.consumerfinance.gov/f/201502_cfpb_report_strategic-plan-budget-and-performance-plan_FY2014-2016.pdf (accessed Feb. 7, 2016).

[47] The canonical article is Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) (private incentives may easily generate under- or over-enforcement).

[48] Miscellaneous Receipts Act, 31 U.S.C. § 3302(b) (2006) (subject to a few enumerated exceptions, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.") Most state codes contain similar provisions.

[49] *See, e.g.*, David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689, 1753 (2013) ("[A]lthough much of the existing theoretical literature treats public and private enforcement as pure substitutes and a binary choice . . . [,] 'many of our most consequential regulatory regimes have evolved . . . into hybrids of public and private enforcement in which multiple enforcers . . . operate and interact within complex ecologies of enforcement.'"); Margaret H. Lemos & Max Minzner, *For Profit Public Enforcement*, 127 HARV L REV 853, 862-863 (2014) and sources cited *id* notes 39-41; Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012).

[50] SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TULANE L. REV. 339 (1990).

the financial proceeds of their enforcement activities.[51] Somewhat perplexingly, these tendencies have been accompanied by a proliferation of criminal provisions of an open-ended nature, especially in the area of "economic" crimes: fraud, misappropriation, misrepresentation, violations of fiduciary duties, failure to provide "honest services," "corruption," mail fraud.[52] Many of these violations are loosely defined and carry draconian penalties. On the traditional understanding, the fact that statutes of this nature are easily over-enforced was a potent argument for public enforcement discretion that would be (a) bounded by the enforcers' need to obtain legislative appropriations and (b) guided by public-regarding considerations, including a concern for possible miscarriages of justice.[53] Just the opposite has happened.

The tendencies just described appear robust to partisan politics, political fluctuations, and economic and fiscal circumstances. They are observable at all levels of government—local, state, and federal.

Ferguson 2015. After the shooting of a black man by a white police officer, race riots broke out in the predominantly black neighborhood of Ferguson, Missouri. One official report found the shooting to be an act of self-defense and cleared the officer of any misconduct.[54] Another report found that the local police department had for many years issued citations and collected fines for traffic violations and other petty (and often non-existent) offenses, in an obvious effort to bolster

[51] A comprehensive theory of agencies' enforcement choices would have to address the incentives of *individual* enforcers as well as institutional incentives. That inquiry, though, is beyond the scope of this essay.

[52] *See, e.g.*, Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 PENN. ST. L. REV. 625 (2007) (documenting the trend toward overlap of criminal and civil suits brought by private parties). The U.S. Supreme Court has repeatedly voiced concerns over the aggressive enforcement of open-ended and excessively broad criminal provisions. On some occasions it has sought to provide a check through limiting constructions or (as dissenting and concurring justices argued) artful re-writes of the statutory language. *See, e.g.*, Skilling v. U.S., 561 U.S. 358 (2010) (18 U.S.C. § 1346) ("honest services"); Yates v. U.S., 135 S.Ct. 1074, 1090-91 (2014) (Kagan, J. dissenting) (disputing the majority's interpretation that 18 U.S.C. §1519's prohibition on tampering with "any record, document, or tangible object" can be interpreted to mean anything other than "an object that's tangible.").

[53] James Landes & Richard Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 36-37 (1975).

[54] DEPARTMENT OF JUSTICE, MEMORANDUM: DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARRIN WILSON, 4-5 (2015) available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf (last accessed Jan. 16, 2016).

its budget. The department's oppressive campaign, the report concluded, was a principal cause of high levels of distrust and mutual hostility between the police force and the local population.[55]

Speed Traps for the Twenty-First Century. The deployment of automated cameras for policing traffic violations (stop lights and speed) in major cities has clearly been motivated by revenue-raising as well as safety considerations, with revenue-raising predominating in at least some cases. Among the allegations are that cameras are positioned at tempting rather than dangerous intersections, that they are combined with lowered speed limits on routes traveled by suburban commuters, and that the duration of yellow light periods have been clipped. The Chicago photo-enforcement scandal has been particularly nasty and therefore well documented.[56]

State Attorneys General. Beginning in the 1980s, state attorneys general have played a pioneering role in the practice of for-profit law enforcement. Most of them are specifically exempt from state miscellaneous receipts laws. They may "eat what [they] kill" and have acted accordingly.[57] Their offices have become significant profit centers for state legislators.[58]

The single most consequential enforcement action to date is the 1998 Multistate Settlement Agreement ("MSA") between the attorneys general, major tobacco manufacturers, and private plaintiffs' attorneys. In a settlement of class actions brought by all states in cooperation with private attorneys, the manufacturers agreed to pay over $250 billion over a period of 25 years. (Thereafter, the MSA is to run in perpetuity.) While the agreement supposedly settled claims against the manufacturers for past misconduct (specifically, the costs that their products allegedly inflicted on the states' Medicaid programs), the payments are calculated on the basis of *future* tobacco sales; and the agreement is cleverly structured so that virtually the entire cost of

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[55] DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, 1-2 (2015) available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (last accessed Jan. 16, 2016).

[56] See *How the Red-Light Scandal Unfolded*, CHI. TRIB., http://graphics.chicagotribune.com/news/local/red-light-timeline (accessed Jan. 16, 2016); David Kidwell, *How Chicago's Red Light Ticketing Turned Yellow Lights Into Cash*, CHI. TRIB., Oct. 12, 2014, http://www.chicagotribune.com/news/ct-red-light-camera-yellow-light-1012-20141012-story.html (accessed Jan. 16, 2016).

[57] Lemos & Minzner, *supra* note 49 at 866.

[58] *See id.* at 855.

the settlement falls on consumers. In effect, the MSA imposed a national excise tax on tobacco products. No legislator at any level of government ever voted for it.[59]

The MSA has since served as a model for multi-state enforcement campaigns against pharmaceutical manufacturers, financial companies, and other corporate targets.[60] Increasingly, moreover, state attorneys general sue not on the state's behalf but, in so-called "mass actions," on behalf of citizens alleged to have been victimized by corporate misconduct.[61] Very often, those victims cannot be identified, or their individual damages cannot be assessed, without incurring inordinate administrative costs. In such scenarios, the law permits so-called cy-près distributions, meaning a disposition that approximates the intended beneficiaries' interests as closely as possible. In practice, that circle has proven quite wide. Cy-près beneficiaries have included advocacy groups, shell entities created by the defendant corporation for its own benefit, and the prosecuting attorneys' associates.[62]

Asset Forfeiture. Beginning in the 1970s, Congress (as well as state legislatures) incentivized public agencies to conduct the "war on drugs" by means of asset forfeiture, meaning the pre-trial and pre-conviction seizure of assets from suspected violators.[63] Initially limited to drugs and drug paraphernalia, the statutes soon came to cover the instruments and the proceeds of suspected drug trade, from cars to cash. In 1984, Congress authorized the Department of Justice to keep the proceeds of asset forfeiture for its own use.[64] Subsequently, the legislature enacted a "fair share" statute authorizing the Department to share the proceeds of assets forfeiture for federal crimes with the local authorities that made the seizure.[65] Empirical and econometric studies have shown that the "war on drugs" has been driven by executive as well as legislative

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[59] For a full account of the MSA's origins, structure, and implications see MARTHA A. DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS (2d ed. 2011).

[60] PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA (2015) (providing data and comprehensive analysis).

[61] Lemos, note 49 at 489-90. Attorney General-led mass actions have gained particular importance because unlike private mass actions, they are not subject to the limitations and removal provisions of the Class Action Fairness Act. Mississippi ex rel. Hood v. AU Optronics Corp., 134 S.Ct. 736 (2014).

[62] *Oversight of the Justice Department's Mortgage Lending Settlements: Hearing before the House Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Law*, Testimony of Theodore H. Frank, Serial 114-16 at 69-84 (Feb. 12, 2015) (http://judiciary.house.gov/_cache/files/d5be7358-cc2e-4c0f-94c1-e677994b856a/114-16-93280.pdf).

[63] Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79 (1996).

[64] Lemos & Minzner, *supra* note 49 at 868.

[65] 21 U.S.C. § 881(e)(1)(E) (2012).

budgetary considerations.[66] The “fair share program” proved sufficiently lucrative to spawn a cottage industry of consulting firms. Operating under black-ops names (“Black Asphalt”), they instruct law enforcement agencies in the interception of “suspicious” vehicles and drivers and in the circumvention of constitutional rules against warrantless searches and seizures.[67]

Corporate Crime. The single largest venue of for-profit law enforcement is corporate crime and misconduct. Unlike many other legal systems (such as Germany’s), U.S. law permits enforcers to prosecute corporations rather than—or in addition to—their individual officers or employees. Over the past decade or so, such prosecutions have become increasingly common. Professor Brandon L. Garrett’s widely cited study, *Too Big to Jail* (2014), counts 2,262 prosecutions over the 2001–2012 period, with a pronounced upward trend.[68] Fines and other payments recovered in these actions have risen even more dramatically. Average payments have risen largely due to an explosion of very high-end settlements, often exceeding $1 billion.[69]

A common, highly controversial practice in this area is the settlement of criminal investigations through “Deferred Prosecution Agreements” (“DPA’s”) or “Non-Prosecution Agreements” (“NPA’s”). The first such agreement was reported in 1994; since then, the practice has spread. Appendix 1 provides an annual count of such settlements and their aggregate amounts for the years 2001-2014, based on Professor Garrett’s data and a partially overlapping count and analysis by the law firm of Gibson, Dunn & Crutcher LLP. We caution that the data are somewhat impressionistic. While DPA’s must be approved by a court,[70] NPA’s require no

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[66] *See* Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2135 (2007) (showing that budget authorities cut appropriations in response to law enforcement seizures and that law enforcement increases forfeiture activity as a result); Eric D. Blumenson & Eva S. Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 CHI. L. REV. 35 (1998); John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171 (2001). Courts have also noted the phenomenon. *See, e.g.*, United States v. James Daniel Good Real Prop., 510 U.S. 43, 56 n.2 (1993) (“The extent of the Government’s financial stake in drug forfeiture is apparent from a 1990 memo, in which the Attorney General urged the United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice’s annual budget target: . . . ‘Failure to achieve the $470 million projection would expose the Department’s forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.’” (alteration in original) (quoting U.S. Dep’t of Justice, Administrative Issues, 38 U.S. ATT’Y BULL. 163, 180 (1990))).

[67] Michael Sallah et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014) (http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/)

[68] BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 301 (2014).

[69] *Id*., at 292-295.

[70] Without such approval DPA’s would violate the Speedy Trial Act, 18 U.S.C. § 3161 (2012). “Approval” means a rubberstamp, usually on the day of submission to the court. There appear to be only two reported decisions and

such approval; and no official count appears available from any government source. The settlement volume is likewise a matter of conjecture, as is the distribution of the funds. Many settlements are wholly undisclosed (and confidential); others disclose aggregate figures in the form of self-serving press releases. All that acknowledged and despite a large year-to-year variance, there is no mistaking the over-all tendency: beginning in 2004 or thereabouts, both the number and the settlement amounts of DPA's and NPA's increased very substantially.

2. Corporate Prosecutions: Some (Cautious) Empirics and Interpretation

The forgoing examples provide a sense of movement toward for-profit law enforcement at all levels of government and in a wide range of venues and institutional settings. The remainder of this section dives deeper into federally-led criminal and civil actions against large corporations. We present some empirics and then turn to salient features that bear on our central theme of agency finance: (1) the rising tide of such prosecution and monetized settlements; (2) their apparent focus on economic sectors with intense financial and regulatory relationships with the government; (3) the pattern of consistent legislative support for expanding the practice; (4) a pronounced tendency toward "presidentialism"; and (5) a startling lack of public accountability at all stages of the proceedings, including the disposition of funds.

Monetized Law Enforcement. Professor Garrett's study of corporate criminal prosecutions over the 2001–2012 time frame marshals impressive evidence of the sharp increase in such prosecutions, aggregate fines collected, and settlement volume. However, as the author explains, the study does not provide a full picture of the landscape.[71] It does not include state prosecutions. Nor does it include civil proceedings brought by federal agencies (such as the Securities Exchange Commission), government tort actions for natural resource damages that are well-nigh indistinguishable from fines,[72] or *qui tam* actions.[73] Finally, the author's data cannot provide a full picture of the financial transfers. As already noted, settlements are frequently confidential.

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opinions scrutinizing a DPA: United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160 (D.C.D. 2015) (*appeal pending*); United States v. HSBC Bank USA, N.A., 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

[71] Garrett, *supra* note 68 at 7-8, 291-292.

[72] *See* Karen Bradshaw Schulz, *Natural Resource Damages*, 40 HARV. ENVTL. L. REV. ___ at ___ (forthcoming 2016). While most damages settlements and awards are fairly small, they include settlements over the Exxon Valdez ($680 million) and the BP Deepwater Horizon ($8.1 billion).

[73] For empirics *see* Engstrom, *supra* note 49.

Publicly advertised settlement values often differ wildly from actual and actually paid amounts,[74] and the payment streams to different federal agencies, states, private parties, and *qui tam* plaintiffs are difficult to trace.

For a somewhat closer observation we have endeavored to create a database for one subset of settlements: civil and criminal settlements for $100,000,000 or more with commercial and investment banks, involving one or more federal agency (often in league with state attorneys general), from 2000 through late 2015 (the date of this paper). A summary, based on agency press releases and news reports as well as Professor Garrett's posted data on criminal settlements, is presented at Appendix 2. As one would expect, our sample is dominated by the legal sequela of the financial meltdown of 2008. There were few big-money bank settlements of any kind before 2009. Thereafter several cases involved municipal bond underwriting ("Muni Bid-Rigging"), violations of U.S. trade embargos ("IEEP Laundering"), and tax and securities fraud. From 2010 onward the number and size of settlements increased dramatically, and the picture is dominated by allegations of conduct said to have contributed to the 2008 financial collapse—inadequate disclosure of the risks of banks' residential mortgages and mortgage-back securities (MBSs) to private purchasers, government agencies, and the government-sponsored enterprises Fannie Mae and Freddie Mac (in federal conservatorship at the time of the settlements); inadequate internal procedures and documentation for processing mortgage originations and foreclosures; and LIBOR rate-fixing.[75] Government press releases announcing these settlements often said they were punishment for conduct that had contributed to the 2008 "mortgage meltdown."

Where did the money go? The lion's share of settlement proceeds were remitted directly or indirectly to the U.S. Treasury. However, substantial sums were paid to Fannie and Freddie, the

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[74] Several reasons account for this phenomenon. Fines and settlement payments may never be collected, see infra n. 103. In many instances, both the prosecutors and the settling firm have reputational incentives to exaggerate the settlement amounts. Settlements often contain figures that are based on outer-bounds estimates of parties entitled to restitution, and they may contain terms that permit the settling corporation to minimize the actual value of the settlement. *See, e.g.*, Sean Higgins, *Obama's Big Bank Slush Fund*, WASHINGTON EXAMINER Jan. 18, 2016 http://www.washingtonexaminer.com/obamas-big-bank-slush-fund/article/2580431

[75] Our sample omits several settlements related to the 2008 collapse with independent securities broker/dealers (i.e., unaffiliated with a commercial or investment bank) and other entities, including a February 2015 settlement with Standard & Poor's for allegedly misrepresenting the risks of MBSs and related securities in its securities ratings. Of that $1.375 billion settlement, $687.5 million went to the federal government and $687.5 million was divided among 19 states and the District of Columbia.

Federal Housing Administration, and (our "Other Fed" category), the Federal Reserve, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation; and nearly $7.8 billion was divided among various groups of state attorneys generals. Our single largest settlement category, "Restitution" ($44.75 billion), is a hodge-podge but a highly intriguing one. It includes sums paid directly by settling banks to designated parties in restitution for harms resulting from the conduct in question; sums paid to the Justice Department, SEC, or state attorneys general for distribution (as through the SEC's "Fair Fund"[76]) to groups described with more or less specificity in press releases and court documents; and funding of non-profit groups for causes related to the conduct in question.

The most thoroughly documented agreement appears to be the February 2012, $25 billion "National Mortgage Settlement" with five leading banks over allegedly questionable mortgage loan servicing and foreclosure practices. A summary of the settlement, prepared by the National Council of State Legislatures, appears at Appendix 3. The $23.75 billion in our "Restitution" category (Appendix 2) includes $13 billion of bank refinancings of the mortgages of borrowers who were delinquent in their payments or whose homes had fallen in value to less that the principal due; another $7 billion in bank "consumer relief" for certain mortgage borrowers who were unemployed or in military service plus additional, somewhat mysterious categories such as "anti-blight activities"; a government-administered $1.5 billion "payment fund" for borrowers whose mortgages had been foreclosed upon; and approximately $2.25 billion distributed by state attorneys general to hundreds of state and local agencies and non-profit organizations. The settlement documents and press coverage were much less precise about the sums collected by government agencies for their own account. It appears that $912 million was retained by federal agencies, most of it deposited in the FHA's capital fund, and another (approximately) $350 million was divided among state attorneys general and associations of state regulatory agencies.

A comparison between the post-2008 pattern and responses to earlier financial crises suggests a substitution of corporate prosecutions-for-money in lieu of prosecution of individuals. One of the principal public responses to the S&L crisis of the 1980s was a raft of prosecutions of

[76] *See* Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331 (2015).

individual wrongdoers.[77] The response to the 2001 market crash brought high-profile prosecutions of corporate executives (such as Enron's) and the federal prosecution of Arthur Anderson, which destroyed the firm itself (although the conviction was later unanimously overturned by the Supreme Court).[78] However, the crisis also produced high-value settlements—foremost, an April 2003 settlement with ten leading banks and securities dealers over conflicts-of-interest between their securities research advisories and securities underwriting. It included $387.5 million to be "put into a fund to benefit consumers of the firms," $432.5 million to be spent by the firms on securities research by independent firms, and $80 million to "fund and promote investor education." Another $487.5 million was divided among state attorneys general.[79] That settlement seems to have been the template for the post-2008 settlements. Still, the 2008 response differs in two respects: it was led by federal rather than state agencies, and it appears to have been entirely money-driven, to the virtual exclusion of individual prosecutions.[80]

The progression from criminal law enforcement to monetized settlements may have a legal explanation (such as the difficulty of obtaining individual convictions, or differential evidence of actual wrongdoing). It may have a political explanation, such as partisan control of federal agencies and state AG offices or the financial institutions' lobbying clout and personal connections. However, the progression is also consistent with an agency-centered theory of non-appropriated budget maximization. We cannot defend that theory against its rivals with any great confidence, but we would keep it among the plausible candidates.

Government Relations. Our sample of corporate prosecutions is hardly representative. It is dominated by a crisis that had cost the federal government hundreds of billions of dollars, that many political leaders and legislators had attributed to "greed on Wall Street," and that had led to insistent demands for criminal punishment of the evildoers. Moreover, the government's

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[77] *See* Bruce A. Green, *After the Fall: The Criminal Law Enforcement Response to the S&L Crisis*, 59 FORDHAM L. REV. S155, S156 (1991) (describing congressional adoption of laws "designed to facilitate the investigation and prosecution of individuals who committed crimes against financial institutions").

[78] Arthur Andersen, LLP v. United States, 544 U.S. 696, 708 (2005).

[79] *See* Appendix 3.

[80] So far: Deputy Attorney General Sally Q. Yates recently announced new guidelines for prosecuting individual executives in addition to extracting settlements from their firms. Although she emphasized the importance of prosecuting executives to "protect our financial system," the guidelines apply to all cases involving corporate criminal allegations. *See* MEMORANDUM OF THE DEPUTY ATTORNEY GENERAL, INDIVIDUAL ACCOUNTABILITY FOR CORPORATE WRONGDOING, Sept. 9, 2015, available at http://www.justice.gov/dag/file/769036/download (accessed Jan. 16, 2016). Jailing executives and collecting revenues will be competing rather than complementary pursuits. It remains to be seen how the Department of Justice and its agency clients strike the balance.

relationship with the financial sector is uniquely intense, intimate, and co-dependent. The federal government regulates, subsidizes, supervises, and insures the banks. It operates a national bank that collaborates continuously with private banks in the conduct of monetary policy and other matters, and the U.S. Treasury and other agencies collaborate continuously with the banks in borrowing and repaying vast sums for financing the government's own operations as well as a range of private activities (especially residential mortgages, student loans, and sales of American products to foreign purchasers). State and municipal governments do many of these things as well. Billions of dollars move back and forth between the government and private commercial and investment banks every week, and their top executives move back and forth regularly. Moreover, in the years preceding the 2008 financial collapse federal agencies (including regulatory agencies) had been avid promoters of highly leveraged, loosely secured mortgage lending and of the explosive growth of MBS markets. So it is easy to imagine that the huge bank settlements of the past five years, whatever the legal merits of the individual cases, were to some degree transactional—a squaring-up of accounts in one line of a financial partnership that had gone terribly awry.

That said, available data suggest that a comprehensive tabulation of the past two decades' large legal settlements would reveal that they are *not* targeted on a single industry, are *not* a "crisis response" phenomenon, and are *not* a response to a sudden outbreak of corporate greed and criminality. Professor Garrett's much larger set of criminal prosecutions is dominated by pharmaceutical companies and violators of antitrust statutes and the Foreign Corrupt Practices Act.[81] Available data for prosecutions under the False Claims Act show the same pattern, as does a (partially overlapping) data series on settlements with pharmaceutical companies.[82] Similarly, data on joint state prosecutions fail to demonstrate any "crisis response" pattern or a preoccupation with the financial sector. Pharmaceutical firms rank ahead of all other targets (20.5 percent), followed by banks and insurers (10.9 percent combined).[83]

We venture that large civil and criminal settlements are dominated by cases against firms with substantial long-term relationships with federal and state governments. Banking and finance are

[81] Garrett, *supra* note 68 at 295 and Table A.3.

[82] Sammy Almashat & Sidney Wolfe, *Pharmaceutical Industry: Criminal and Civil Penalties: An Update*, PUBLIC CITIZEN, Sept. 27, 2012, https://www.citizen.org/documents/2073.pdf (accessed Jan. 16, 2016).

[83] Nolette, *supra* note 20 at 25.

but the most extreme example of a model of regulation and a pattern of government-corporate relations that also applies to pharmaceuticals, defense and aerospace, health care and medical insurance, automobiles, telecommunications, and energy.[84] If we are right, then our speculation that the recent bank settlements have been to some degree financial transactions as well as law enforcement actions deserves serious consideration. The complaints of several judges in approving DPAs and other settlements—that monetary penalties and disgorgements seem paltry in light of the magnitude of the misconduct complained of[85]—might lend support to the transactional explanation.

Congressional Support. Public prosecutors appear to have been quite creative in devising novel instruments to monetize criminal enforcement; the prolonged boom market in DPAs and NPAs is an example. For the most part, though, it is difficult to portray the phenomenon as a prosecutorial rampage: it has occurred with the full support of Congress (and for that matter of state legislators). For example, statutes enacted in hasty response to crisis events or newspaper headlines routinely expand definitions of corporate misconduct, increase penalties, and facilitate prosecutions.[86] Congressional hearings routinely urge greater prosecutorial zeal; occasionally, they serve to generate information and even predicate acts for prosecutions.[87]

Among the robust indicators of congressional support is the creation of "revolving funds." Such funds permit agencies to keep the proceeds of their enforcement activities (in whole or in part) instead of depositing them, as ordinarily required, in the U.S. Treasury. One already-mentioned fund supports the Department of Justice's asset forfeiture program[88]; another, the

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[84] Of course these sectors amount to a large share of the economy as a whole. Our prediction is that their share of settlements will be even larger (and that the also large retail grocery sector will appear only in an occasional antitrust proceeding, if at all).

[85] *E.g*., United States SEC v. Citigroup Global Mkts., Inc., 827 F. Supp. 2d 328, 333 (S.D.N.Y. 2011). ("[A] consent judgment that does not involve any admissions and that results in only very modest penalties is just as frequently viewed, particularly in the business community, as a cost of doing business imposed by having to maintain a working relationship with a regulatory agency, rather than as any indication of where the real truth lies. This, indeed, is Citigroup's position in this very case."); *id*. at 333-34 ("[I]n terms of deterrence, the $95 million civil penalty that the Consent Judgment proposes is pocket change to any entity as large as Citigroup.") (footnote omitted); United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160, 167 (D.C.D. 2015) ("I cannot help but conclude that the DPA presented here is grossly disproportionate to the gravity of Fokker Services' conduct").

[86] See sources cited *supra* n.

[87] Garrett, Too Big to Jail at 45-46.

[88] The Department's Asset Forfeiture Fund consists of "all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice." 28 U.S.C. § 524(c)(4)(A) (2006 & Supp. V 2011).

Department's enforcement of the False Claims Act.[89] Another fund, created in 1996, is the Health Care Fraud and Abuse Control Program, jointly administered by the Department of Justice and the Department of Health and Human Services.[90] Yet another is the CFPB's Civil Penalty Fund: under Title X of the Dodd-Frank Act, the Bureau may keep the proceeds of its enforcement activities for its own use or the benefit of certain third parties.[91] The SEC's "Fair Fund," mentioned above, was established by the Sarbanes-Oxley Act of 2002 to permit the agency to distribute civil penalties to defrauded investors at its discretion.[92] As those varied examples suggest, congressional support for monetized law enforcement has enjoyed bipartisan support for a considerable period of time.

Presidential Enforcement. Legal scholars as well as political scientists have consistently found a tendency toward executive government, and, within the executive, a shift of authority from routinized administration to political decision-making; from line administrators to heads of departments and the White House.[93] Corporate crime enforcement reflects the same tendency. In the "big" cases, the sums are simply too large, the targets are too prominent and well connected, and the economic and political ramifications are too significant to be left to line prosecutors. JP Morgan's settlement was agreed upon in a meeting between the bank's chief executive, Jamie Dimon, and the Attorney General of the United States.[94] BP's first "settlement" of the Deepwater Horizon oil spill, in the amount of $20 *billion*, was memorialized in a wholly novel legal form—a joint press release with the White House.[95]

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[89] 31 U.S.C. § 3730(d) (2012).

[90] 42 U.S.C. § 1320a-7c (2012). Data are reported at http://oig.hhs.gov/reports-and-publications/hcfac/. Most years have seen deposits of over $1 billion. The annual reports highlight the numbers, and — more recently — calculate and emphasize the "Return-on-Investment (ROI)" of the Health Care Fraud and Abuse Control Program, which created the fund. … In 2012, the agencies reported that "for every dollar spent on health care-related fraud and abuse investigations in the last three years, the government recovered $7.90." Lemos & Minzner, *supra* note 49 at 864-65.

[91] 12 U.S.C. § 5497(d) (2012).

[92] Velinkonja, *supra* note 76 at 333-34.

[93] *E.g.*, Elena Kagan, *supra* note 10; Thomas Gais & James Fossett, *Federalism and the Executive Branch*, *in* THE EXECUTIVE BRANCH 486 (Joel D. Aberbach & Mark A. Peterson eds., 2005)

[94] David Henry & David Ingram, *JPMorgan's Dimon Meets with U.S. Attorney General Holder*, REUTERS, Sept. 26, 2013, (available at http://www.reuters.com/article/us-jpmorgan-probes-holder-idUSBRE98P0NW20130926) (accessed Feb. 7, 2016).

[95] President Barack Obama, Press Release: *Statement by the President After Meeting with BP Executives*, The White House, June 16, 2010, (available at https://www.whitehouse.gov/the-press-office/statement-president-after-meeting-with-bp-executives) (accessed Feb. 7, 2016).

Perhaps, the trend toward "presidential" government is better described as a trend to *political* administration. It does not signal greater centralization. Rather, as noted, agencies at all levels of government seem emboldened to press their enforcement authority. In a very real sense, they compete in the enforcement market for targets and revenues. (This phenomenon has necessitated many multi-agency settlements.) *Within* each agency, however, decision-making authority has migrated upward to elected and other political officials.

Oversight. Corporate prosecutions are very poorly monitored by outside actors at all stages: investigation, indictment, settlement, remedies.[96] Congressional oversight has been sporadic at best, and one may reasonably doubt whether Congress can in fact police settlement authority—once it has been conferred—in an effective fashion.[97] Judicial oversight is equally haphazard. Some settlements receive judicial sanction; others do not. Even where judicial approval is obtained, review is highly perfunctory even when potent criminal charges are settled for a relative pittance and the defendants obtain immunity form prosecution. (In a highly noted case, a district judge who insisted that the parties show some evidence to the effect that the settlement was not mere collusion was slapped down by an appellate court.)[98]

Outside monitoring is yet more perfunctory at the remedies stage. In major cases, settlements often contain provisions for what, in an adjudicatory setting, would be called conduct remedies—foremost, corporate compliance programs. Other settlements contain elaborate (and very expensive) programs for restitution or compensation for the supposed victim of the alleged misconduct, such as mortgage debtors or student borrowers. Studies have consistently found such arrangements to be very poorly monitored.[99] Neither party to the agreement has an actual

[96] Garrett, Too Big to Jail at 7 ("there is not much information out there about how or when corporations are prosecuted") et pass.
[97] Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327 (2009).
[98] United States SEC v. Citigroup Global Mkts., Inc., 673 F.3d. 158 (2d Cir. 2012), *rev'g* 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011) (rejecting a proposed Consent Order that imposed "substantial injunctive relief" because it is neither "reasonable, nor fair, nor adequate, nor in the public interest.").
[99] Garrett *supra* note 68 at 172-195.

stake in its success.[100] Courts have better things to do with their time. Legislators, to date, have made do with requesting the occasional GAO Report.[101]

A bit more surprisingly, while the urge to maximize enforcement revenues seems simply irresistible, there's no telling where the money went[102]—or, indeed, whether it is paid in the first place. The collection rate for payments to the U.S. Treasury is in the single digits.[103] Revolving fund collections are probably more substantial;[104] however, in the absence of any robust evidence, it is difficult to be confident about the magnitude. Congress, for its part, has legislated regular reporting requirements for revolving funds. However, the agencies do not report collection ratios. For enforcement proceeds collected outside revolving funds, data are available only partially, from private watchdog groups or agency press releases.

III. Concluding Discussion and Questions

The first, blazing conclusion from this overview is that we need better data—for reasons of good government, and for purposes of legal and policy analysis. Obtaining such data for the federal government (let alone states) would exceed the capacity of individual scholars or research teams. Most likely, it would require a *congressional* mandate compelling the executive to collect systematic revenue and expenditure data from and across a multitude of agencies. Treasury and OMB, and GAO, CBO, and CRS need to get on the case. The dearth of information, we believe,

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[100] To our minds, it is not entirely clear what "success" might mean in this context. The overarching goal of compliance programs is to change the "corporate culture." *See, e.g.*, FREDERICK D. LIPMAN & L. KEITH LIPMAN, CORPORATE GOVERNANCE BEST PRACTICES: STRATEGIES FOR PUBLIC, PRIVATE, AND NOT-FOR-PROFIT ORGANIZATIONS, 54-55 (2006); Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 689-95 (2008) (discussing corporate compliance programs and their emphasis on corporate culture). However, it is exceedingly difficult to operationalize such an objective, and harder yet to translate it into practice. A financial firm's agreement to hire 1,000 additional compliance officers—all of whom are a raw net cost—may in fact enhance the organizational stature and dominance of the traders and dealmakers: profits and rents must be earned before they can be dissipated. Thus, compliance and monitoring are bound to turn into bureaucratic bean-counting exercises: monitors hired, meetings conducted, reports produced. We know of no systematic study of the issue; however, the basic intuitions are straightforward.

[101] *See, e.g.*, Government Accountability Office, *DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness*, Jan. 8, 2010, available at http://www.gao.gov/assets/300/299781.pdf (accessed Jan. 18, 2016).

[102] *Cf.* ROBERT PALMER, *Simply Irresistible*, *on*, HEAVY NOVA (EMI, Manhattan 1988).

[103] Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453, 468 (2011). Under-collection on that scale is difficult to square with a deterrence theory of public prosecution: Lemos & Minzer, *supra* note 49 at 883-85.

[104] Lemos & Minzner, *supra* note 49 at 872-73. The obvious reason for this surmise is that those proceeds—unlike funds remitted to the Treasury—redound to the enforcing agency's own benefit.

is itself revealing. No one set about to create a system of independent agency finance, yet here we are, moving impressively in that direction. We need to know the particulars and patters of what has transpired in order to understand why it is happening and what might be done about it.

A second conclusion is that some doctrines of administrative law may need revisiting. For instance, the constitutional rule of congressional delegation of *regulatory* authority is that Congress must provide an "intelligible principle," a requirement that has never been found wanting in any Supreme Court case since 1935.[105] Among the proffered reasons for that permissive approach is the alleged impossibility of identifying judicially manageable standards to distinguish permissible from excessive delegations. Do the Constitution's clear textual assignments of taxing and appropriation powers counsel a different, more stringent and formalistic judicial approach with respect to Congress's powers of the purse? The Supreme Court's general answer has been "no"; here as with regulatory delegations, the constraints on Congress are vanishingly weak.[106] What, though, of an agency that is vouchsafed expansive rulemaking authority *combined with* its own taxing and spending authorities (and perhaps also, as with the CFPB, protections against presidential removal of the principal officers)?[107] Even if each device is constitutional on its own, might combining all of them produce such comprehensive executive autonomy as to counsel a different answer, and suggest a judicially manageable one?[108]

Our third and grandest conclusion is that agency taxation and for-profit enforcement does indeed, as we hazarded at the outset, belong in the larger discussions of the emergence of executive government. We think the appearance of *self-financing* executive government challenges earlier explanations of the phenomenon and might lead to a fuller explanation.

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[105] *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989); Yakus v. United States, 321 U.S. 414 (1944) (distinguishing, and arguably overruling *sub silentio*, the non-delegation principle articulated in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-38 (1935)).

[106] Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989); Tex Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 426-28 (5th Cir. 1999), cert. denied, 530 U.S. 1210, 1223 (2000), and cert. dismissed, 531 U.S. 975 (2000).

[107] See *Congressional Weakness*, *supra* note 22 at 1843 ("[T]he appropriateness of combining self-funding with removal protection for various types of agency deserves more analysis and should be a topic for future scholarly debate.").

[108] For a suggestion that the answer may be "yes" see Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010); Association of American Railroads v. U.S. Dep't of Transp., 721 F.3d 666, 673 (D.C. Cir. 2013) ("[J]ust because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute.") *vacated and remanded on other grounds*, 135 S. Ct. 1225 (2015). *But see* Consumer Fin. Prot. Bureau v. ITT Educ. Servs., 2015 U.S. Dist. LEXIS 28254, *29-30 (S.D. Ind. Mar. 6, 2015) (mocking the defendant's "mosaic theory" of the Constitution).

Theorizing has tended to focus either on the incentives and behavior of the Congress and its members, or the incentives and behavior of agencies and their officials. But Congress's handing agencies taxing and spending along with lawmaking power demands that the two be considered together. As it happens, each of the authors of this paper has written separately on the two subjects, in ways that could lead to an integrated approach.

One of us (DeMuth) has linked the rise of executive government, and the corresponding decline of Congress, to growing affluence and education and advances in information and communication technologies.[109] He argues that these developments, by greatly increasing political participation and reducing political transactions costs, have transformed both sides of the market for government policy. On the demand side, an enormous array of discrete interest groups can now organize effectively to lobby for government interventions. On the supply side, politics has become entrepreneurial and specialized: candidates, legislators, and officials can now work directly with interest and ideological support groups, bypassing the party and congressional hierarchies that previously controlled and limited the political agenda. But Congress itself—with its ungainly decision-making procedures and innumerable conflicts among representatives of diverse localities, interests, and values—is institutionally incapable of managing the resulting profusion of policy demands. Its solution is to delegate lawmaking to administrative agencies that possess the advantages of hierarchy and specialization that Congress lacks; agencies can deploy modern technology much more efficiently in managing the "stakeholder communities" engaged in each policy field, and can be multiplied essentially without limit. In this view, Congress has evolved from lawmaker into enabler of executive government. Its institutional function is to establish semi-autonomous special-purpose governments, while its individual members pursue their electoral careers as official lobbyists of those governments on behalf of narrow interest groups and broad ideological or partisan causes.

This construct is, at least on the surface, highly pertinent to the emergence of agency taxation and for-profit enforcement. It suggests that, contrary to the longstanding view of many political scientists, legislators might not distinguish sharply between delegating lawmaking and delegating taxing and spending. The established analysis is that legislators (a) vote for broadly popular causes such as clean air, safe products, and honest finance; (b) leave the real, contentious

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[109] *See* Christopher DeMuth, *Can the Administrative State be Tamed?*, 7 J. L. ANAL. ____ (forthcoming 2016), and articles cited *supra* at note 9.

policy choices to the agencies—while "stacking the deck" in favor of certain interest groups through administrative procedures and standards of judicial review; and (c) maintain at least a modicum of control over agency choices through the "power of the purse"—budgeting, appropriations, and appropriations riders.[110] In this view, legislators have simply discovered a new means of muddling political accountability. But if legislators are instead pioneering a new form of specialized, atomized government to accommodate the demands of specialized, atomized modern politics, then they might find it equally advantageous to distribute financial power as lawmaking power. After all, taxing and spending can be as contentious, and as problematic for collective congressional choice, as fashioning rules for private conduct. And agency regulation, from setting telephone and electricity prices to setting pollution and energy standards, has always involved implicit taxing of some groups for the benefit of others—so why not give the agencies explicit taxing and spending power as well?

The other of us (Greve) has proffered, though with no great confidence, a public choice explanation for the ascent of for-profit government.[111] As suggested earlier, for-profit government appears particularly prevalent in industry sectors that are highly concentrated and only nominally private—and, moreover or perhaps therefore, are characterized by very high rates of return: pharmaceutical and health care companies, "systemically important" banks and other financial firms, and defense contractors. Returns in these industries probably include substantial rents from government regulation and private-public partnerships. At the same time, relatedly or not, those same industries are viewed with considerable suspicion on the Right as well as the Left, as exemplars of "crony capitalism" or "government for Wall Street." Congress could respond by adopting more efficient rules to govern the industries, or by appropriating the rents through taxation. Unable to do either, Congress resorts to the second-best means of empowering the executive to confiscate the rents and to distribute them, haphazardly and more or less, to the kinds of constituencies Congress might service if it still had the capacity. The system converges on an "adversarial corporatism": an unholy matrimony between the state and industry, made no better by a bilateral show of enmity. That view makes a lot of empirical evidence "fit"—but only

[110] A good discussion of this literature by three of its leading authors is in McNollgast (Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast), The Political Economy of Law, in A. MITCHELL POLINSKY & STEVEN SHAVELL (EDS.), HANDBOOK OF LAW AND ECONOMICS (2007), ch. 22, pp. 1702–1716. *See also* the articles of Ting and Yandle, *infra* n. 116.

[111] Michael S. Greve, *The Rise of Adversarial Corporatism*, LIBRARY OF LAW AND LIBERTY (July 1, 2014), http://www.libertylawsite.org/liberty-forum/the-rise-of-adversarial-corporatism/.

at the federal and perhaps the state level. (For-profit government at a local level appears mostly a matter of exploiting local citizens with inadequate tax capacity or political resources, especially minorities.) Moreover, it threatens to collapses into the "explanation" that Congress is impotent and the executive runs the show.

Conceivably, these two conceptions could be combined into a single account that links the electoral incentives of legislators to the organizational incentives of capaciously endowed special-purpose agencies. We cannot move from speculation to hypothesis without knowing more about the provenance, dynamics, and residual congressional oversight of agency taxation, for-profit enforcement, and expenditure of the proceeds. We can, however, suggest several paths of analysis.

To begin with legislative incentives and behavior: why would Congress delegate taxing and spending authority along with regulatory authority? The examples we have offered counsel caution with respect to any global answer. The FCC universal service program looks like a path dependency story: instead of yanking established but increasingly infeasible telecom cross-subsidies into the appropriations process (as it did with small-community airline service when it abolished airline regulation in the late 1970s), Congress authorized the FCC to continue them on its own by direct and explicit means. The PCAOB was part of a hastily enacted statute that packaged previously rejected proposals, sight unseen, into a single "reform" initiative.[112] Neither of these innovations appears to have been subject to any serious congressional debate.[113] The CFPB and its financing structure was the product of a Congress and administration under the control of a single party, determined to insulate the newly created agency against interference by a president *or a future Congress* under the control of the other party.[114] *That* has the makings of a public choice story: a momentary partisan majority is "stacking the deck" in favor of its interest-group coalition, more thoroughly than the mere jiggering of administrative procedures could do, at the cost (perhaps trivial, or even negative) of weakening future Congress's power of the purse over its handiwork. But it seems not to extend to our other examples, and the creation of revolving enforcement funds in decades has been a similarly haphazard affair. It is difficult to

[112] Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2004).

[113] Diligent research failed to uncover any evidence of serious congressional consideration of the point at issue. Non-results are available from the authors.

[114] *Congressional Weakness*, *supra* note 22 at 1840-41.

identify any common theme across all of our cases beyond Congress's disregard for its long-term institutional interests.

As noted earlier, standard explanations of that pattern turn on asymmetric incentives between Congress as an institution and individual legislators. Congress as an "it," the theory goes, cheerfully delegates lawmaking power because individual lawmakers (or committees) stand to gain by first voting for aspirational statutes and, down the road, complaining over agency abuse and overreach or, alternatively, about sloth and capture on the other; and by performing services for favored constituencies *ex post*.[115] On that theory, though, broad delegations of lawmaking or waiver authority should go hand-in-hand with increased congressional vigilance with respect to the means of backstopping agencies—foremost, *budgetary* means.[116] Delegations of tax authority and self-funding mechanisms that disconnect agencies from the appropriations process seem to cut in the opposite direction. They suggest that a Congress that surrenders its lawmaking authority will eventually also surrender less formal means of agency control. Then again, it may be the case that Congress delegates revenue-generating authority to agencies for its own purposes—with an expectation that the agencies will in fact heed those purposes, and with a full intent of ensuring compliance: how much have you collected for us, lately? What looks at first sight like another delegation may in fact be an affirmative command to generate revenue—with Congress rewarding agencies with greater regulatory and spending autonomy as compensation for undertaking the politically unpleasant task of revenue raising (through explicit tax programs or targeted fines-and-settlements).

Turning now to where this paper began, the incentives and behavior of agencies: how would they be affected by the possession of independent sources of revenue and freedom from annual appropriations? Unlike tax collectors in the early days of the republic,[117] the officers of modern agencies are salaried employees and may not work on commission. And unlike true profit-maximizing private attorneys, public prosecutors may not reap direct, overt financial gains from

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[115] Neomi Rao, Administrative Collusion: How Delegation Diminishes the Collective Congress, 90 N.Y.U. L. Rev. 1463, 1477-84 (2015) .

[116] *Cf., e.g.*, Michael M. Ting, *The 'Power of the Purse' and Its Implications For Bureaucratic Policy-Making*, 106 PUB. CHOICE 243 (2001); Bruce Yandle, *Regulators, Legislators and Budget Manipulation*, 56 PUB. CHOICE 167, 178 (1988) (describing the budget as "the most effective sanction" for influencing agencies).

[117] *See* JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF ADMINISTRATIVE LAW 34-38, 44-45 (2012).

their activities. What exactly, then, *do* they maximize in pursuing big financial penalties and contriving their own tax programs?

Questions of this sort are the subject of a rich scholarship of considerable sophistication. It still strikes us, though, that this literature would benefit from better empirics that make use of the new factors-of-production of agency self-finance. For example, one school of thought contends that agencies seek to maximize *reputational* values as a means of enhancing their autonomy and keeping their critics at bay.[118] That potent theory suggests the question why enforcement agencies would now seek monetary recoveries rather than jail terms—or for that matter enhanced regulatory oversight—as a means of enhancing their reputation and autonomy. Perhaps as a means of maintaining an equilibrium of marginal costs and benefits among different agency stakeholders (with the costs falling as much as possible on those who are not immediate, knowledgeable stakeholders, *i.e.* the shareholders and customers rather than managers of regulated firms).[119] Or perhaps monetary "settlements" are put options on favorable regulatory treatment going forward. We know of no study that attempts to answer such questions. Beyond that, "reputation" and "autonomy" are instrumental to pursuing—what, and for whom? We do not want to dismiss the possibility that billion-dollar settlements are a *bona fide* regulatory tool, superior to ex ante regulation in achieving statutory goals. On the other hand, it may be that the executive state is seizing additional power from Congress rather than serving as its agent in accommodating modern politics. That is, the executive may be discovering that it is superior at taxing and spending as well as at writing rules, and is running off with the net proceeds to build independent empires—and Congress is institutionally incapable, or disinclined, to mount an effective resistance. Whatever the explanation, legislative and executive means and ends need to be integrated.

We hope that we have at least demonstrated that these are urgent questions. Large numbers of American citizens have come to believe that the administrative state has jumped the

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[118] *See* DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY (2001); Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 780–81 (2010); Jason A. MacDonald & William W. Franko Jr., *Bureaucratic Capacity and Bureaucratic Discretion: Does Congress Tie Policy Authority to Performance?*, 35 AM. POL. RES. 790 (2007); and Patrick S. Roberts, *FEMA and the Prospects for Reputation-Based Autonomy*, 20 STUD. AM. POL. DEV. 57, 81–83 (2006).

[119] As first modeled in Sam Peltzman, *Toward a More General Theory of Regulation*, 19 JOURNAL OF LAW & ECONOMICS 211 (1976).

constitutional levees, that it is no longer administering on their behalf, and that it has regressed into a racket for the wealthy and well-connected. Law and scholarship need to catch up with them.

<ins>Appendix 1</ins>

$100 Million+ Bank Settlements, 2000-2015

($000s)

Bank	Date	Treasury	FHA	Fan/Fred	SEC	Other Fed	States	Restitution	Conduct
PNC Financial	6/1/03	25,000						90,000	Earnings Management
Bear Sterns, Citigroup, eight others	10/31/03						487,500	900,000	Research Conflicts
BAWAG P.S.K. (Austrian Trade Unions)	6/1/06							337,500	Securities Fraud
Lloyds TSB Bank	1/1/09	175,000					175,000		IEEP Laundering
UBS AG	2/18/09	580,000			200,000				Tax Fraud
JP Morgan	11/4/09				25,000		50,000	647,000	Jefferson County Fraud
Credit Suisse AG	12/1/09	268,000					268,000		IEEP Laundering
Bank of America	2/4/10							150,000	Merger Disclosure
State Street	2/4/10				58,000			255,000	MBS Disclosure
Wachovia	3/1/10	160,000							IEEP Laundering
Goldman Sachs	7/15/10	300,000						250,000	MBS Disclosure
Barclays Bank	8/16/10	149,000					149,000		IEEP Laundering
Bank of America	12/7/10	25,000					4,500	107,800	Muni Bid-Rigging
Deutsche Bank AG	12/21/10	553,633							Tax Fraud
UBS AG	4/1/11	22,000					91,000	47,200	Muni Bid-Rigging
JP Morgan	6/21/11	27,730						125,870	MBS Disclosure
Morgan Keegan (Regions Bank)	6/22/11							200,000	MBS Disclosure
JPMorgan	7/1/11	50,000				35,000	9,500	133,700	Muni Bid-Rigging
Citigroup	10/19/11							285,000	MBS Disclosure
Wachovia (Wells Fargo)	12/1/11	8,900				20,000	4,250	115,100	Muni Bid-Rigging
National Mortgage Settlement--BoA, JPM, WF, Citi, Ally-GMAC	2/9/12		750,000			162,000	358,600	23,750,000	Mortgage Practices
Citigroup	2/17/12		158,300						FHA Insurance Claims
Flagstar Bank	2/24/12		132,800						FHA Insurance Claims
Deutsche Bank AG	5/10/12		202,000						FHA Insurance Claims
Barclays Bank PLC	6/1/12	360,000							LIBOR Manipulation
ING Bank N.V.	6/1/12	309,000					309,500		IEEP Laundering
Mizuho Securities USA	7/18/12	127,500							IEEP Laundering
JP Morgan	11/16/12							296,900	MBS Disclosure
Credit Suisse	11/16/12							120,000	MBS Disclosure
HSBC Bank USA	12/1/12	1,256,000				665,000			IEEP Laundering
Standard Chartered Bank	12/1/12	227,000							IEEP Laundering
UBS AG	12/1/12	1,200,000							LIBOR Manipulation
Bank of America	1/8/13			11,650,000					MBS Disclosure
Rabobank	1/29/13	800,000							LIBOR Manipulation
Royal Bank of Scotland	2/1/13	475,000							LIBOR Manipulation
Royal Bank of Scotland	11/7/13							150,000	MBS Disclosure
JP Morgan	11/19/13	2,000,000	4,000,000			1,915,400	1,066,000	4,000,000	MBS Disclosure
JPMorgan	1/1/14							1,700,000	Internal Controls (Madoff)
JP Morgan	2/4/14		614,000						Mortgage Disclosure
Morgan Stanley	2/7/14			1,250,000					MBS Disclosure
Bank of America	3/25/14			9,300,000					MBS Disclosure
Credit Suisse	5/19/14	1,800,000			196,000	100,000	715,000		Tax Fraud
BNP Paribas	6/30/14	6,733,600					2,240,000		IEEP Laundering
Sun Trust	6/17/14		418,000			10,000		540,000	Mortgage Practices
Lloyds Banking Group plc	7/1/14	191,000							LIBOR Manipulation
Sun Trust	7/1/14	16,000		10,000				294,000	MBS Disclosure
Citigroup	7/14/14	4,000,000				208,250	291,750	2,500,000	MBS Disclosure
Morgan Stanley	7/24/14							275,000	MBS Disclosure
Standard Chartered Bank	8/20/14	300,000							Internal Controls
Bank of America	8/21/14	6,636,000				2,031,000	943,000	7,000,000	MBS Disclosure
Bank Leumi Group (Bank Leumi le-Israel B.M.	12/1/14	270,000							Tax Fraud
Morgan Stanley	2/25/15	2,600,000							MBS Disclosure
Commerzbank AG	3/1/15	263,000						300,000	IEEP Laundering
Deutsche Bank AG	4/1/15	1,575,000					600,000		LIBOR Manipulation
Citigroup	8/17/15							180,000	Securities Fraud
Totals:		*33,458,363*	*6,275,100*	*22,210,000*	*479,000*	*5,146,650*	*7,762,600*	*44,750,070*	*120,081,783*
Totals from 2008 Financial Collapse:		*20,180,730*	*6,275,100*	*22,210,000*	*58,000*	*4,326,650*	*3,259,350*	*41,891,770*	*98,201,600*

Note: Some numbers are estimates. ***9/26/15***

APPENDIX 2
2012 NATIONAL MORTGAGE SETTLEMENT SUMMARY

http://www.ncsl.org/research/financial-services-and-commerce/national-mortgage-settlement-summary.aspx#IL

The five largest mortgage servicers recently agreed to a $25 billion settlement over some questionable mortgage loan servicing and foreclosure practices, including the so-called "robo-signing" activities that came to light in late 2010. Robo-signing refers to the practice of signing mortgage documents without verifying their accuracy as well as other procedural errors. The five mortgage servicers—Ally Financial, Bank of America, Citigroup, JPMorgan Chase and Wells Fargo—collectively service nearly 60 percent of the U.S. mortgage market. While mortgage loan servicers collect and process mortgage payments and handle defaults and foreclosures, the servicers often do not own the underlying loans.

The national mortgage settlement—which involved more than a year of negotiations with the states' attorneys general, the U.S. Department of Justice and other federal agencies—includes direct payments to the federal government, the participating 49 states and individual borrowers. Oklahoma was the only state not to join the settlement, choosing to settle separately with the five servicers for $18.6 million.

The federal government will receive $912 million for five whistleblower lawsuits and losses incurred by the FHA Capital Reserve Account, the Veterans Housing Benefit Program Fund and the Rural Housing Service. The 49 participating states will split $2.5 billion based on criteria such as the number of foreclosures and other factors, with California, Florida, Texas, New York and Illinois receiving the largest amounts respectively. The settlement agreement allows each state to designate up to 10 percent of the amount paid to each state as a civil penalty, fine or similar payment.

The National Association of Attorneys General will receive $15 million to create and administer the "Financial Services and Consumer Protection Enforcement, Education and Training Fund." The Conference of State Bank Supervisors will receive $65 million—$15 million will establish the "State Financial Regulation Fund" and $1 million will go to each state financial regulator who signed the consent judgment. The state members of the executive committee who negotiated the settlement and the Ameriquest Financial Services Fund will split $10 million to cover costs and attorneys' fees. Qualifying individuals whose homes were sold or taken in foreclosure between Jan. 1, 2008, and Dec. 31, 2011, who submit claims, will receive cash payments from the $1.5 billion set aside for that purpose.

Nearly $3 billion is committed to refinance "underwater" mortgages, for borrowers who are current on their payments, but whose mortgage is more than their home's current market value. The remaining settlement money, approximately $17 billion, is dedicated to consumers for mortgage modifications, short sales, deficiency waivers, anti-blight prevention activities and principal forbearance for unemployed borrowers, along with specific short sale provisions for military borrowers. Each servicer will receive credit for completing these consumer relief activities; however since only some count dollar-for-dollar, the banks will end up providing consumer relief in excess of the nearly $17 billion specified in the consent judgment.

Approved by U.S. District Judge Rosemary Collyer on April 4, the settlement is now effective. The five servicers have seven days—until April 11—to deposit their portions of the settlement into an escrow account. The consent judgment remains in effect for three and a half years, but the servicers are required to earn 75 percent of the consumer relief credits within the first two years or pay substantial cash penalties. Direct payments to mortgage borrowers will begin once a settlement administrator is retained, within 90 days of the settlement's effective date.

In addition to the payments, the servicers have agreed to follow new standards for handling mortgage loans and foreclosures. During the term of the settlement agreement, the servicers will oversee and manage third-party providers, such as foreclosure firms, law firms and independent contractors. The servicers must establish an easily accessible and reliable single point of contact for each first lien mortgage borrower and develop an online site where borrowers can check the status of their loan modifications.

"Dual tracking" practices are restricted under the agreement. Servicers are also prohibited from adopting employee compensation arrangements that encourage foreclosure over loss mitigation alternatives. The settlement also requires more transparency in the mortgage servicing process, such as making the general requirements for short sales more available. In addition, the settlement enhances protections for military personnel.

Joseph A. Smith, Jr., former North Carolina banking commissioner, will supervise the implementation of the settlement, along with the monitoring committee comprised of representatives from the state attorneys general, state financial regulators, the U.S. Department of Justice and the U.S. Department of Housing and Urban Development. He is responsible for determining whether the five financial institutions are in compliance with the servicing standards and have satisfied the relief requirements in accordance with the consent judgment.

Although the settlement resolves some violations, the federal government and state attorneys general did not release all the potential claims against these five servicers. The federal government and states can still pursue criminal prosecutions for criminal offenses and violations of the fair lending laws based on discriminatory conduct. Securitization claims based on the offer, sale or purchase of mortgage securities are not released by the settlement. The states also did not release any potential claims against Mortgage Electronic Registration Systems, Inc., MERSCORP, Inc. or any tax claims relating to real estate transfer taxes. Mortgage borrowers can still file claims on an individual or class action basis.

To review the settlement documents for each servicer, go to www.NationalMortgageSettlement.com. *The chart below summarizes how states allocated their share of the settlement funds.*

State Payment Settlement Amounts

State	Dollar Allocation	Use of Funds in the State
Alabama	$25,305,692	$1,119,730 to the Alabama Foreclosure Assistance Project administered by Legal Services Alabama to provide free civil legal representation to up to 6,000 low-income families facing foreclosure or other mortgage-related issues; $1,095,356 to Gateway to provide financial counseling, pre- and post-purchase housing counseling, foreclosure prevention, reverse mortgage counseling, and consumer outreach; $500,000 to the Woodlawn Foundation, Inc., for its homowner rehabilitation program to provide rehabilitation services to existing homeowners who are potentially facing foreclosure; $500,000 to the Alabama Statewide Foreclosure Prevention Mediation Program administered by the Alabama Center for Dispute Resolution to train mediators in foreclosure mediation and provide 300-500 foreclosure mediations; $440,000 to the Stepping In to Homeownership Project administered by the Women's Fund of Greater Birmingham to provide housing and workforce development services; $210,870 to the Foreclosure Relief Project administered by the University of Alabama School of Law to provide free legal services through six to 10 law students each semester; $2,530,569 to state General Fund as civil penalties, and The remaining funds are directed to the Office of the Attorney General.
Alaska	$3,286,839	The funds are directed to the state General Fund to be earmarked for housing development projects.

State	Dollar Allocation	Use of Funds in the State
Arizona	$97,784,204	$50 million to state general fund to used for areas covered by the National Mortgage Settlement, including agencies such as the state Real Estate Department, Department of Insurance and attorney general – Department of Law, and for other areas impacted by the alleged unlawful conduct of the defendants in the National Mortgage Settlement; $41 million for direct assistance to help keep people in their homes and consumer restitution; $5 million for enforcement and monitoring ($1.6 million per year for three years); $5 million for housing counseling ($1.6 million per year for three years); $4 million for legal services ($1.3 million for three years), and $2 million for outreach, marketing and education ($666,000 per year for three years).
Arkansas	$12,830,241	$9 million for the Arkansas Development Finance Authority; $2 million for the Arkansas Access to Justice Commission; $500,000 for the University of Arkansas School of Law legal aid clinic; $500,000 for the University of Arkansas at Little Rock School of Law legal aid clinic, and The remaining funds are directed to the state treasury for costs and fees associated with the settlement agreement.
California	$410,576,996	$1 million to the National Housing Law Project; $225,000 to the Asian Pacific Islander Legal Outreach; $1,750,000 to the Bet Tzedek Legal Services; $550,000 to the California Rural Legal Assistance; $700,000 to the Central California Legal Services; $450,000 to the Community Housing Development Corporation; $500,000 to the Community Housing Works San Diego; $75,000 to El Concilio; $200,000 to Fair Housing of Marin;

		$225,000 to Habitat for Humanity Stanislaus County; $250,000 to Housing and Economic Rights Advocates; $35,000 to the Inland Empire Latino Lawyers Association; $850,000 to the Inland Fair Housing and Mediation Board; $450,000 to the Legal Aid Foundation of Santa Barbara; $725,000 to Legal Services of Northern California; $550,000 to the Mission Economic Development Agency; $100,000 to the National Telemarketing Victim Call Center; $500,000 to Neighborhood Housing Services of Los Angeles County; $345,000 to NeighborWorks Orange County; $50,000 to the Tri-Valley Housing Opportunity Center $575,000 to the Unity Council; $295,000 to the Watsonville Law Center and 10% of the total payment as civil penalties and deposited in the Unfair Competition Law Fund.
Colorado	$50,170,188	$24 million for supplemental loan-modification programs; $18.196 million for affordable housing programs; $5.625 million for housing counseling through the state; $1.5 million for Colorado Legal Services; $750,000 for temporary staffing at the attorney general's office; $600,000 for the Colorado Foreclosure Hotline, and $500,000 for marketing and outreach efforts.
Connecticut	$26,102,142	$21 million to fund the Emergency Mortgage Assistance Program administered by the Connecticut Housing Finance Authority; $400,000 for the Foreclosure Mediation Program and Voluntary Attorney Foreclosure Advice pilot program;

		$500,000 for the Mortgage Crisis Job Training Program in the state Department of Labor; $2.6 million to the state General Fund as civil penalties, and The remaining funds will be used to fund attorneys and housing counselors in the Department of Banking, the Connecticut Fair Housing Center, the Office of the Attorney General and the Department of Economic and Community Development and to fund public service announcements promoting the Foreclosure Prevention Hotline and other related initiatives.
Delaware	$7,913,923	$4 million to the Delaware Emergency Mortgage Assistance Program; $3.5 million to fund housing counselors and outreach and education programs for homeowners; $2.75 million to the Office of the Attorney General for continuing financial fraud investigation and enforcement initiatives; $888,923 to the Community Legal Aid Society, Delaware Volunteer Legal Services and the Legal Services Corporation to support legal representation for borrowers facing foreclosure, and $500,000 to Delaware's Mortgage Mediation Program.
District of Columbia	$4,433,081	
Florida	$334,073,974	$35 million for down payment assistance; $10 million for housing counseling; $5 million for the state court system to help with foreclosure-related issues; $5 million to the Office of the Attorney General to fund legal aid programs; $9,117,895 to the Florida Prepaid Tuition Scholarship Program; $5,262,579 to the state courts system to provide technology solutions that expedite foreclosure cases through the judicial process;

		$16 million to the state courts system to provide supplemental resources to reduce the backlog of pending foreclosure cases; $9.7 million to the clerks of the court to enhance service levels to assist and support the courts in expediting processing backlogged foreclosure cases; $10 million to the Office of the Attorney General to provide legal aid to low- and moderate-income homeowners facing foreclosure; $10 million to the Department of Children and Families for capital improvements to certified domestic violence centers; $20 million to Habitat for Humanity of Florida; $50 million to reduce rents on new or existing rental units through the State Apartment Incentive Program; $10 million to fund the construction or rehabilitation of units through the State Apartment Incentive Loan Program; $40 million to fund the State Housing Initiative Program; $10 million to the Department of Economic Opportunity to fund a competitive grant program to provide housing for homeless persons; $10 million to the Department of Economic Opportunity to fund a competitive grant program to provide housing for persons with developmental disabilities; $5 million to the Office of the Attorney General to reimburse the office for costs and fees; The remaining funds are directed to the state General Fund as civil penalties.
Georgia	$99,365,105	The entire amount will be used for economic development, the money will be split equally between regional economic business assistance grants and other rural economic development efforts.
Hawaii	$7,911,883	$3 million to Legal Aid and its grant partners Consumer Credit Counseling Services of Hawaii, Hale Mahaolu, The Hawaii HomeOwnership Center and Hawaiian Community

		Assets $2 million to the department of Commerce and Consumer Affairs $1,176,293 to the state judicial system $149,225 to the Kuikahi and West Hawaii Mediation Centers $57,122 to the Mediation Center of the Pacific
Idaho	$13,305,209	$500,000 to the Consumer Protection Fund; $120,000 for the Idaho State Bar Volunteers Legal Program; $120,000 for the Idaho Legal Aid Services; $110,000 for distribution to other governmental entities or organizations as determined by the attorney general; $100,000 for the Community Action Partnership, and The remaining funds are directed to the state treasury.
Illinois	$105,806,405	$20 million to legal aid organizations; $5 million to pilot mortgage foreclosure mediation programs; $2 million to the Affordable Housing Corporation of Lake County; $1.5 million to Chicago Neighborhood Initiatives; $3 million to the Community Foundation of the Fox River Valley; $2.2 million the Community Investment Corporation; $1,237,000 to the Community Service Council of Northern Will County; $6 million to the Cook County Land Bank Authority; $2 million to the Decatur Housing Authority; $1.5 million to the Evanston Community Revitalization Partnership; $750,000 to Genesis Housing Development Corporation; $2 million to Habitat for Humanity Champaign County; $1 million to Habitat for Humanity Chicago South Suburbs; $1,360,000 to Habitat for Humanity of McHenry County;

		$3 million to the Hispanic Housing Development Corporation; $150,000 to Access Living of Metropolitan Chicago; $100,000 to Chicago Area Fair Housing Alliance; $448,448 to Chicago Metropolitan Agency for Planning; $50,000 to Corporation for Supportive Housing; $500,000 to DePaul University Institute for Housing Studies; $750,000 to Housing Action Illinois/NeighborWorks America; $500,000 to Housing Action Illinois/Neighborhood Housing Services of Chicago; $250,000 to Illinois Association of Community Action Agencies; $2.5 million to Illinois Housing Development Authority; $94,875 to Mission Strategy Consulting; $41,000 to the National Consumer Law Center; $150,000 to Teska Associates, and $500,000 to the Woodstock Institute.
Indiana	$43,803,419	$28.8 million for the Low Income Home Energy Assistance Program (LIHEAP); The remaining funds are directed to the Consumer Protection Division and its Homeowner Protection Unit (HPU) and other efforts to prevent foreclosure.
Iowa	$14,651,922	$1 million to the Iowa Infrastructure Fund; Mortgage Servicing Settlement Fund created under the control of the state Department of Justice; Banking Division Mortgage Servicing Settlement Fund created under the control of the Division of Banking of the Department of Commerce; Any unencumbered or unobligated moneys remaining in the Mortgage Servicing Settlement Fund or Banking Division Mortgage Servicing Settlement Fund on June 30, 2015, shall be transferred to the general fund of the state.
Kansas	$13,778,401	25% of the settlement to the Office of the Attorney General to 1) support the attorney

		general's investigation and prosecution of suppliers in the housing and financial sectors who violate the law; 2) to resolve consumer compliants regarding efforts to prevent foreclosures and remedy mortgage servicing abuses; and 3) defraying the investigative, administrative and consumer education costs associated with the settlement. The remaining funds are directed to the state General Fund as civil penalties.
Kentucky	$19,198,220	$1.5 million to the City of Louisville for the city's Vacant Abandoned Property Initiative, the Targeted Demolition Program that addresses the problem of blight by removing deteriorated structures that have been abandoned and the Affordable Housing Trust Fund, which provides grants to organizations dedicated to creating or preserving affordable housing for low and moderate-income families; $7.5 million to the Kentucky Housing Corporation (KHC); $250,000 to each of the four regional Legal Aid centers in Kentucky to be used to assist homeowners who are going through the foreclosure process or seeking to avoid foreclosure; $4 million to update the Kentucky All Schedule Prescription Electronic Reporting Program; $5 million to the Office of the Attorney General to assist consumers and investigate mortgage and securities issues. This includes potential litigation regarding MERS involvement in wrongful foreclosures, and $150,000 to the Cabinet for Health and Family Services for lead abatement through the Division of Public Health.
Louisiana	$21,741,560	
Maine	$6,907,023	
Maryland	$59,697,470	$8,600,000 for housing counselors; $6,227,863 for legal assistance organizations; $10,000,000 for Baltimore City local government housing program;

		$10,000,000 for Prince George's County local government housing program; $2,761,860 for new temporary enforcement positions in the Office of the Attorney General $2,138,000 for financial fraud prevention positions at Department of Labor, Licensing and Regulation; $14,000,000 for a neighborhood stabilization fund, and $5,969,747 to the state General Fund as civil penalties.
Massachusetts	$44,450,668	$16 million to be used to mitigate future impacts of the foreclosure crisis through the HomeCorps Loan Modification Initiative, HomeCorps Borrower Representation Initiative and the HomeCorps Borrower Recovery Initiative; $10 million for Crisis Response Innovation grants and Municipal and Community Restoration grants; $4.4 million to the state General Fund as civil penalties; $1 million to the state General Fund for legal expenses; $1.5 million for compliance and implementation of the consent judgment; $1 million to the Supplement Local Consumer Aid Fund, and The remaining funds are reserved for further implementation, HomeCorps programming and grants.
Michigan	$97,209,465	$7.5 million for foreclosure rescue scam victim restitution; $5 million for assistance for veterans who have been unable to qualify for existing mortgage and foreclosure assistance programs; $6 million for the Michigan Attorney General Home Protection Unit to investigate and prosecute foreclosure-related crimes; $25 million for blight elimination throughout the state; $20 million for foreclosure counseling for homeowners through the Michigan State Housing and Development Authority (MSHDA) and Michigan State University Extension

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		Offices; $3.7 million for housing and community development programs to develop and coordinate public and private resources to meet the affordable housing needs of low income households and revitalizing downtown areas and neighborhoods in Michigan; $5 million to the MSHDA to provide grants to help homeowners refinance existing mortgage loans; $15 million to provide assistance to homebuyers when purchasing a home, and $10 million to the Education Achievement Authority to help improve performance of Michigan's lowest performing schools.
Minnesota	$41,536,169	
Mississippi	$13,580,374	$5.8 million for the Mississippi Foreclosure Prevention Consortium and $7.7 million to the state's General Fund.
Missouri	$39,583,212	
Montana	$4,858,276	$3 million to create Keep My Montana Home; $863,000 to the Montana Legal Services Association to provide free advice and representation to some homeowners experiencing legal problems in the foreclosure process; $450,000 to the state General Fund as civil penalties, and The remaining funds to the Office of the Attorney General for ongoing enforcement activities to prevent and prosecute financial fraud or deceptive practices, monitoring of the settlement, public outreach and training.
Nebraska	$8,422,528	The entire amount will be deposited into the state's rainy day fund. The funds are eligible to be transferred from the rainy day fund for future expenditure.
Nevada	$57,368,430	$11.7 million to be used to create a dedicated call center staffed by housing counselors. The attorney general will seek legislative review and funding approval to continue the program when the legislature convenes in 2013.

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New Hampshire	$9,575,447	$3.5 million to New Hampshire Legal Assistance, Legal Advice Referral Center, and the New Hampshire Bar Association; $2.5 million to the New Hampshire Housing Finance Authority and $1,006,616 to the Department of Justice for the creation of a Financial Fraud Unit.
New Jersey	$72,110,727	The funds from the Mortgage Servicing Settlement Fund are to be transferred to the General Fund as state revenue to be appropriated, subject to the approval of the director of the Division of Budget and Accounting, for the following purposes: attorneys fees, investigation and other expenses related to the investigation and resolution of the mortgage servicing settlement, affordable housing, local planning services, developmental disabilities residential services, state rental assistance program, jomelessness prevention, shelter assistance, community-based senior programs, mental health residential programs, social services for the homeless, and Temporary Assistance for Needy Families, but only to the extent that the use of these funds comports with the settlement for the use of these funds.
New Mexico	$11,174,579	
New York	$107,642,490	$9 million to support the state's Foreclosure Prevention Services Program; $6 million to support housing and community renewal activities statewide through not-for-profit community-based housing organizations; $60 million to the Attorney General's Homeowner Protection Program to support housing counselors and legal services providers working with homeowners statewide and The remaining funds allocation to be determined.
North Carolina	$60,852,159	$4,780,000 to the Department of Justice, Consumer Protection Division, for financial fraud detection and prevention efforts; $6,690,000 to the Administrative Office of the Courts to be administered by the North Carolina Conference of District Attorneys. Funds shall be used for grants and training

		for prosecutorial offices to expand prosecution of lending and financial crimes; $30,520,000 to the Housing Finance Agency for housing counselors and other assistance to help distressed homeowners; $5,740,000 to the Civil Penalty and Forfeiture Fund and $2,870,000 to the Department of Justice, State Bureau of Investigation, to expand its accounting and financial investigative ability and its expertise to investigate financial and lending crimes.
North Dakota	$1,947,666	The entire amount will be spent to support housing projects in the state.
Ohio	$92,783,033	$75 million to the creation of a grant program for abandoned/vacant property demolition; $20 million to a grant program to provide assistance to families and individuals who are at risk of foreclosure or have already lost their home, and $2 million to to expand the Economic Crimes Division of the Ohio Attorney General's Office.
Oregon	$29,253,190	
Pennsylvania	$66,527,978	90% is allocated to the Pennsylvania Housing Finance Agency for the purpose of funding the Homeowner's Emergency Mortgage Assistance Program; 5% is allocated to the Office of the Attorney General for the purpose of funding housing consumer protection programs, and 5% is allocated to the Access to Justice Account for civil legal assistance related to housing issues.
Rhode Island	$8,500,755	The entire amount will be used to fund the Rhode Island Foreclosure Protection Program to prevent or reduce the number of initiated foreclosures in Rhode Island and assist homeowners struggling with mortgage payments. The program will be developed by the Office of the Attorney General in consultation with Rhode Island Housing.
South	$31,344,349	$10 million to the Department of Commerce Closing Fund for economic development

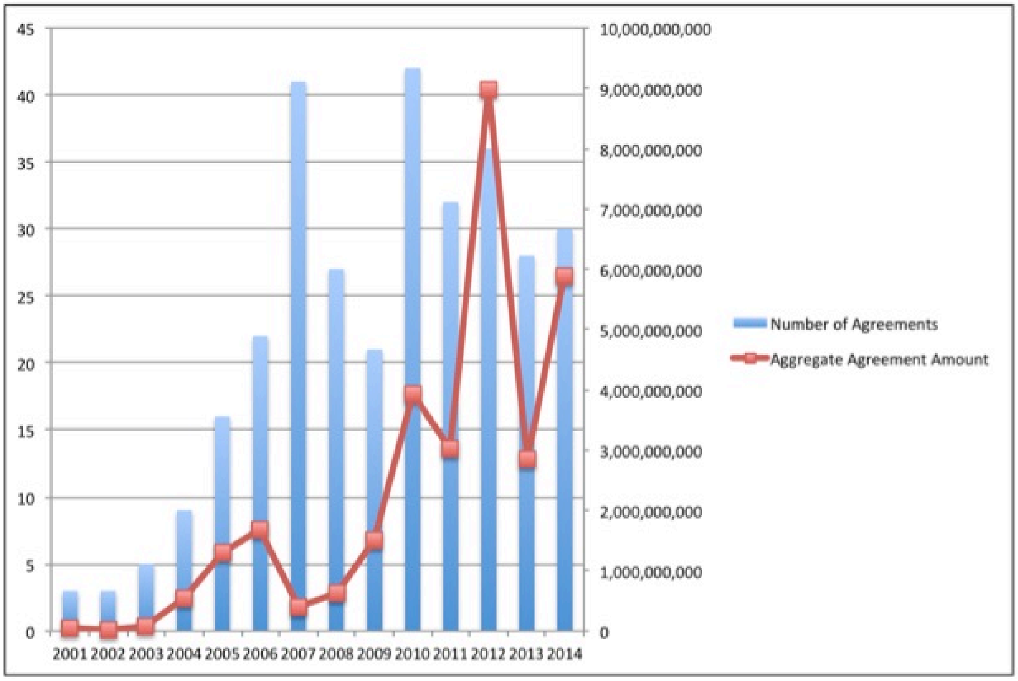
Carolina		and The remaining funds are directed to the state General Fund.
South Dakota	$2,886,824	$1 million to the South Dakota Home Builders Association for the purpose of revolving low interest loan fund to fund spec homes for low income applicants; $500,000 to GROW South Dakota to create loan products that will assist veterans and other low to moderate income South Dakota residents with home purchase and modification financing; $372,364 to the South Dakota Housing Development Authority to fund homebuyer education programs; $270,778 to the Ellsworth Development Authority to develop residential lots and rental units for low income residents in the housing Development Freedom Estates, outside of Ellsworth Air Force Base; $200,000 to Homes Are Possible Inc., for housing down payment and closing cost assistance; $144,341 to East River Legal Services to fund legal costs for low income applicants; $144,341 to Dakota Plains Legal Services to fund legal costs for low income applicants; $120,000 to Luther Social Services of South Dakota for credit counseling services; $50,000 to Beadle and Spink Enterprise Community to assist with collateral expenses for four governor homes in Beadle and Spink Counties; $40,000 to the Teton Coalition for the purpose of homebuyer education; $30,000 to Consumer Credit Counseling of the Black Hills for housing and foreclosure counseling, and $15,000 to James Valley Housing Inc., for the purpose of housing, education, counseling and closing cost loan assistance.
Tennessee	$41,207,810	$4,120,781 to the state general fund as civil penalties; $34.5 million to the Tennessee Housing Development Agency for its Keep My

		Tennessee Home financial assistance program and for foreclosure counseling; $250,000 to the Department of Commerce and Insurance, Division of Consumer Affairs, for the Consumer Education Fund; $700,000 to four legal aid entities (Memphis Area Legal Services, West Tennessee Legal Services, Legal Aid of East Tennessee and Legal Aid Society of Middle Tennessee and the Cumberlands); $1,862,029 to the attorney general's litigation settlement reserve; $1 million to the Department of Financial Institutions for examiner training, information technology support and equipment, Tennessee Financial Literacy Commission and consumer education efforts.
Texas	$134,628,48 9	$10 million to the Judicial Fund as civil penalties and The remaining funds to be directed to the state General Fund.
Utah	$21,951,641	$1.75 million for homeless shelters and services, $2 million for mortgage fraud investigations in the office of the attorney general and The remaining funds are directed to the state treasury.
Vermont	$2,552,240	$1,100,000 to fund affordable housing initiatives, including grants for foreclosure and homeownership counseling, financing mobile homes, increasing the state's affordable housing tax credit, capacity building among state and nonprofit agencies to assist mobile home owners, and exemption from several taxes to replace homes destroyed by recent flooding and natural disasters, and The remaining funds are directed to the state General Fund.
Virginia	$66,525,233	$7 million for the Virginia Housing Trust Fund and The remaining funds are directed to the state General Fund.
Washington	$54,242,749	$2 million to Aberdeen Neighborhood Housing Services, Inc.; $393,563 to Catholic Charities Housing Services; $600,000 to El Centro de la Raza;

		$2,145,800 to HomeSight to provide downpayment assistance to encourage purchase of foreclosed homes; $1 million to Homestead Community Land Trust to purchase and rehabilitate vacant and distressed homes; $13,053,044 to Legal Foundation of Washington; $2 million to Lifelong AIDS Alliance to address housing needs for individuals with chronic conditions or special needs; $2,137,700 to Resolution Washington to continue foreclosure mediation program; $3,074,354 to Spokane Neighborhood Action Partners; $3,860,000 to the City of Tacoma/Tacoma Community Redevelopment Authority to purchase and rehabilitate vacant and distressed homes; $950,000 to Washington Homeownership Resource Center; $3 million to Washington State Housing Finance Commission for its Home Advantage Rebound program; $3,120,000 to Washington State Housing Finance Commission for its statewide housing counseling program; $6,153,689 to Washington State Housing Finance Commission for its Washington Homeowner Stability Fund, and $311,850 to White Center Community Development Association.
West Virginia	$5,748,915	
Wisconsin	$30,191,806	$625,000 to retain experienced Assistant District Attorneys; $625,000 to retain experienced Assistant Attorneys General; $500,000 to support a WHEDA program for demolitions; $750,000 to a WHEDA program for equity investment in Milwaukee's industrial corridor; $750,000 to a WHEDA program for loan guarantees to Milwaukee small businesses; $780,000 in tribal law enforcement grants and victim/witness program grants;

		$496,050 in 2012-2013 support for foreclosure mediation in Milwaukee county and expansion of mediation statewide; $400,000 for future support for foreclosure mediation; $100,000 for law enforcement and prosecutor training on white collar crime; $139,000 for positions within the DOJ's Division of Legal Services' Consumer Protection Unit to assist consumers and investigate and prosecute mortgage-related fraud and white collar crime; $185,000 for the DOJ's Division of Criminal Investigation (DCI) to focus on white collar crime and $550,000 remains to be allocated.
Wyoming	$2,614,515	

Appendix 3



SOURCES: GIBSON DUNN & CRUTCHER, LLP, 2014 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAS) AND DEFERRED PROSECUTION AGREEMENTS (DPAS), 18-22, Jan. 6, 2015, available at http://www.gibsondunn.com/publications/documents/2014-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf (accessed Jan. 16, 2016); GIBSON DUNN & CRUTCHER, LLP, 2013 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAS) AND DEFERRED PROSECUTION AGREEMENTS (DPAS), 14-18, Jan. 7, 2014, available at http://www.gibsondunn.com/publications/documents/2013-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf (accessed Jan. 16, 2016); GIBSON DUNN & CRUTCHER, LLP, 2012 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAS) AND DEFERRED PROSECUTION AGREEMENTS (DPAS), 14-19, Jan. 3, 2013, available at http://www.gibsondunn.com/publications/documents/2012YearEndUpdate-CorporateDeferredProsecution-NonProsecutionAgreements.pdf (accessed Jan. 16, 2016); GIBSON DUNN & CRUTCHER, LLP, 2011 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAS) AND DEFERRED PROSECUTION AGREEMENTS

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