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Fees, Fines and Penalties: Has Congress Lost Control of the Purse?

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Congress's Power of the Purse in the Administrative State



ANTONIN SCALIA
LAW SCHOOL

Fees, Fines, and Penalties: Has Congress Lost Control of the Purse?¹

By Kevin R. Kosar²

Introduction

On December 1, 2016, Congress held a joint hearing to discuss its spending authority, and the diminution thereof. The focus of the two House of Representatives subcommittees was on one narrow aspect of this multifaceted problem: executive agencies' collection of revenues and subsequent reuse of those funds without congressional direction.

Chairman Mark Meadows (R-NC) gavelled the meeting into order and announced,

“[I]n recent years, an alarming trend has emerged, as we see the executive branch collecting various moneys for fees, fines, penalties, and settlements [and using] this money without providing Congress a clear accounting of how much money is being collected and what it's being spent on. For example, according to the President's fiscal year 2017 budget proposal, \$231.8 billion in user fee charges go directly to an agency which subsequently spent the fund without congressional action, and an additional \$302.2 billion in user fees will be spent according to the legislation that established the charge. These are enormous sums of money that have the possibility of being spent without any true congressional oversight.”³

The chairman further observed,

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

¹ For helpful feedback, I am thankful to the participants at the February 2, 2021 workshop hosted by the C. Boyden Gray Center for the Study of the Administrative State at George Mason University's Antonin Scalia Law School. I also thank Elayne Allen of the American Enterprise Institute for her close reading of this paper. Any errors are my own.

² Resident Scholar, American Enterprise Institute, kevin.kosar@aei.org.

³ U.S. Congress, House of Representatives, Committee on Oversight and Government Reform, Subcommittee on Government Operations and Subcommittee on Health Care, Benefits and Administrative Rules, *Restoring the Power of the Purse: Legislative Options*, 114th Congress, Washington, Government Publishing Office, December 1, 2016, <https://www.govinfo.gov/content/pkg/CHRG-114hhrg25006/pdf/CHRG-114hhrg25006.pdf>.

unacceptable. I still have no idea how much the Internal Revenue Service collected with its fines and penalty authority, which we all know would be significant.”⁴

This hearing was significant for a few reasons. Not least, it exhibited that the House’s most powerful oversight committee was largely clueless at the extent to which agencies were self-funding themselves. Was it \$350 billion in FY2017 or \$534 billion? The confusion was highlighted in an exchange between Rep. Jim Jordan (R-OH), and a witness from the Government Accountability Office (GAO).

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

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

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

“Ms. Krause. I am not familiar with that number.

[...]

“Mr. Jordan: “...Do you know how much we spend in discretionary spending each year? Or last year, do you know how much we spent in discretionary [funds] last year?”

“Ms. Krause. I don't know that number off----

“Mr. Jordan. One-point-two trillion. So we have a number that’s collected in just fees, just one-third of the three areas, that's almost half of what we spend annually in discretionary spending. That's a pretty big number. That \$534 billion is approaching what we spend on national defense each year. And, again, the people’s representatives in the United States Congress don't have a direct say on how that money is spent once it's collected, right?”

⁴ Ibid.

The committee also was unsure what, if anything, to do about it.⁵ Some legislators worried that Congress had wholly given away a chunk of its spending power to executive agencies. By abdicating the power of the purse, agencies were free to thumb their noses at Congress because they could fill their coffers with fees, fines, and penalties and spend the money with a free hand.

But the legislators were not unanimous on this point. One member disagreed and argued that Congress had delegated authority but maintained direction over the use of funds.

The only solution to loss of purse control that was discussed was a bill that would have required every dollar collected by agencies to be returned to the U.S. Treasury, where it would remain until obligated through an appropriation act.⁶ Although this legislation aimed to reassert Congress' power over the purse, it would create myriad practical difficulties. Payments from the federal crime victims fund to compensate or assist individuals who suffered at the hands of predators, for example, could be delayed were Congress required to appropriate each of those payments.⁷

This paper attempts to begin to address some of this confusion. If Congress wants to reclaim the power of the purse, then it will need to better understand whether there really is a problem. In short, has Congress lost control of the purse by delegating authority to agencies to self-fund their activities with fees, fines, and penalties?⁸

To answer this question, this paper first begins by reviewing the constitutional provisions and statutory provisions that required funds collected to be deposited in the Treasury and reappropriated. The paper then tries to clarify the extent to which agencies are collecting fees, fines, and penalties. It subsequently reviews Congress' rationales for delegating authority, and tries to assess the degree to which Congress is directing the expenditure of those funds by examining the organic statutes and appropriations laws (and accompanying reports) of three agencies.

⁵ A HOCR committee member might well take the view that the committee should defer to the authorizing and appropriating committees with jurisdiction over all these delegations of spending authority.

⁶ H.R. 5499, the Agency Accountability Act, 114th Congress. <https://www.congress.gov/bill/114th-congress/house-bill/5499>

⁷ This is especially true today as lapses of appropriations and government shutdowns have become not uncommon. On the crime victims fund, see <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/crimevictimsfundfs/index.html>.

⁸ Obviously, there are means by which Congress has lost control of the purse, such as enacting entitlements.

The Constitution and the Power of the Purse

The Founders assigned to Congress the authority to raise revenues and to direct their expenditure. The relevant provisions are the Spending Clause and the Appropriations Clause found in Article I, section 8 and section 9. They state:

“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States;” [and]

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

These two clauses form the purse and its strings. The spending power is a positive grant of governmental authority to the legislature---it may acquire funds to do something within the bounds of the enumerated powers of the federal government and General Welfare purposes.⁹ The latter appropriations power is a limitation---only Congress may withdraw funds from the U.S. Treasury and it must do so through the enactment of a law.

None of this was accidental. The Founders saw peril in giving revenue-raising power to the executive branch. Thus, they sought to

“ensure that the executive would not spend money without congressional authorization.... The framers were unanimous that Congress, as the representatives of the people, should be in control of public funds—not the President or executive branch agencies. This strongly-held belief was rooted in the framers’ experiences with England, where the king had wide latitude over spending once the money had been raised.”¹⁰

Europe had been wracked with wars started by monarchs who could fund authority absent parliamentary assent. England’s parliament made strides in addressing this problem with its Revolution Settlement (1689), which “attacked two mutually reinforcing pillars of monarchical authority.... Royal revenues and royal control over a standing army.”¹¹ This agreement removed nearly all of the king’s revenue raising power and made calling up an army a parliamentary power.

⁹ Congressional Research Service, “Congress’s Power Over Appropriations: Constitutional and Statutory Provisions,” report 46417, June 20, 2020, <https://www.everycrsreport.com/reports/R46417.html>.

¹⁰ “Power of the Purse,” undated, <http://history.house.gov/Institution/Origins-Development/Power-of-the-Purse/>.

¹¹ Josh Chafetz, *Congress’s Constitution: Legislative Authority and the Separation of Powers* (Yale, 2017), p. 51.

The Founders went further still. Whereas the weakened English king still could raise some “ordinary revenue,” the authors of the Constitution made no provision in Article II of the Constitution for any executive taxing, impost, or other revenue raising activities.¹² They also lodged the power to initiate revenue raising in the House of Representatives, the branch most tightly tethered to the public.

Numerous judicial rulings have underscored the curb on executive authority to raise revenues and spend them. For example, during the Civil War the army seized the property of a man for committing treason, and then sold it and deposited the proceeds in the Treasury. President Andrew Johnson later on pardoned the individual and gave him complete amnesty, and the man then demanded the return of the funds from the sale of his property. The Supreme Court in *Knote* (1877) disagreed. Although the Army collected the funds consequent to congressional empowerment:

“if the proceeds have been paid into the Treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the Treasury can only be withdrawn by an appropriation by law. However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers -- it cannot touch moneys in the Treasury of the United States, except expressly authorized by act of Congress.”¹³

Since this decision, Court rulings have mostly affirmed a “robust” reading of the appropriations clause’s limitation on executive authority to spend funds collected.¹⁴

Congress further affirmed its constitutional control over funds collected by executive agencies by enacting the Miscellaneous Receipts Act (MRA) in 1849.¹⁵ The statute requires any federal employee or agent thereof in receipt of money from

¹² Ordinary revenue consisted of various claims on property and fees, such as “all the tithes arising in extraparochial places.” William Blackstone, *Commentaries on the Laws of England* (1765-1769), book 1, chapter 8, <https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-108/>. For good measure, the Founders took additional steps. They limited Congress’ power to fund an army to a maximum duration two-years, after which it would need to enact an additional statute (Article 1, Section 8, clause 12); and they assigned Congress the “power to declare war” (Article 1, section 8, clause 11). They also included mandates in the organic statute of the U.S. Treasury that its two leads report to Congress. See Chafetz pp. 57-58. In defending the Constitution against creating an excessively powerful executive, both James Madison and Alexander Hamilton pointed to Congress’ control over the purse and sword. Chafetz, p. 57.

¹³ *Knote v. United States*, 95 U.S. 149 (1877).

¹⁴ One exception is funds collected but not deposited in the Treasury. For further details, see Congressional Research Service, “Congress’s Power Over Appropriations: Constitutional and Statutory Provisions,” pp. 17-21.

¹⁵ 9 Stat. 398 (1849), <https://www.loc.gov/law/help/statutes-at-large/30th-congress/session-2/c30s2ch110.pdf>; 31 U.S.C. 3302(b), <https://www.law.cornell.edu/uscode/text/31/3302#>

“duties received from customs, from the sales of public lands, and from all miscellaneous sources, for the use of the United States, shall be paid by the officer or agent receiving the same into the Treasury of the United States at as early a day as practicable without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever.”

In short, funds collected consequent to the law by an agency must go to the Treasury’s general fund ---not the agency’s account--- and be reappropriated, unless Congress has authorized the agency to hold or expend the funds.¹⁶ And as GAO adds, “Once money is deposited into a ‘miscellaneous receipts’ account, it takes an appropriation to get it out.”¹⁷

The MRA, as the Congressional Research Service has observed, tightens congressional control of the purse. “Congress does not directly administer the Treasury. Nor does Congress act as the collecting agent for funds owed to the government. Thus, without a requirement that federal agencies pay funds they receive into the Treasury, the executive branch could, practically speaking, narrow the Appropriations Clause’s reach.”¹⁸

Law professor Andy Spalding offers an illustrative example of how that could happen:

“Say the DOJ [Department of Justice] settles a financial fraud case for \$100 million. Someone over in the agency feels that some of this money should be spent on providing educational programs for the public on how to detect financial fraud. So he deposits \$90 million in the U.S. Treasury, and gives the remaining \$10 million to a local community organization. Yes, this would violate the MRA. Why? Because once that money is placed in the federal government’s hands, it’s Congress’ to spend. The statute makes this unmistakably clear: if the government ‘receives’ the money, it’s to go to the Treasury and subsequently be reallocated as Congress sees fit. For an executive agency to receive money and then turn around and spend it would be to usurp Congress’ power of the purse.”¹⁹

¹⁶ There are unusual instances wherein this rule does not hold, such as under the “necessary expense” rule. Government Accountability Office, *Principles of Federal Appropriations Law*, 4th ed., chapter 3, <https://www.gao.gov/assets/690/687162.pdf>.

¹⁷ Government Accountability Office, “Principles of Federal Appropriations Law,” 3rd ed., chapter 6, p. 6-168 (3d ed., 2006), <https://www.gao.gov/assets/210/202819.pdf>. The District of Columbia Circuit Court has written the MRA “derives from and safeguards a principle fundamental to our constitutional structure, the separation-of-powers precept embedded in the Appropriations Clause.” *Scheduled Airlines Traffic Offices v. Department of Defense*, 87 F.3d 1356, 1361 (D.C. Cir. 1996). <http://openjurist.org/87/f3d/1356/scheduled-airlines-traffic-offices-inc-v-department-of-defense>

¹⁸ Congressional Research Service, “Congress’s Power Over Appropriations: Constitutional and Statutory Provisions,” p. 22.

¹⁹ Andy Spalding, “The Much Misunderstood Miscellaneous Receipts Act (part 1),” *The FCPA Blog*, Sept. 29, 2014. <http://www.fcpcablog.com/blog/2014/9/29/the-much-misunderstood-miscellaneous-receipts-act-part-1.html>

Congress has enacted other statutes narrowing agencies discretion over the use of funds, including limiting the purposes for which they may be expended.²⁰

Yet, undeniable as Congress' authority of the collections of fees, fines, and penalties may be, as the remainder of the paper describes, Congress regularly has given agencies varying degrees of discretion to self-fund themselves and to control the use of these monies.

How Much in Fees, Fines, and Penalties Do Agencies Collect?

Legislators may be forgiven for not knowing the aggregate amount of the executive branch's collection of fees, fines, and penalties. Even the Office of Management and Budget, which has the best data on these funds, can only hazard an estimate. This is partly due to an accountancy challenge: some of the budgetary accounts receive funds of more than one type (e.g., fee vs. some other revenue). OMB's rule is that if the account has 50 percent or higher fees the whole value of the account is tabulated at fees. And if the fee amount falls below 50 percent, none of it is tabulated as fees.²¹

The best publicly available source for data on fees, fines, and penalties is the Analytical Perspectives chapter of the *Budget of the United States Government* (herein, "*Budget*"). But its presentation is not without shortcomings. Pursuant to law, it presents federal revenues as coming in three broad types ---governmental receipts, offsetting collections, and offsetting receipts--- and fees,²² fines, and penalties²³ fall under all three categories.²⁴ Its chapters on federal receipts

²⁰ E.g, the Purpose Statute (31 U.S.C. 1301(a)), which mandates funds be used for their statutory purpose, and limitations on transferring funds from one appropriation account to another (31 U.S.C. 1532). The Anti-Deficiency Act (31 U.S.C. 1341) forbids agencies from obligating funds beyond those which have been appropriate. Kate Stith, "Congress' Power of the Purse," Yale Law Journal, vol. 97, 1987-1988, pp. 1364-1396, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2282&context=fss_papers.

²¹ Government Accountability Office, "Fees, Fines, and Penalties: Better Reporting of Government-wide Data Would Increase Transparency and Facilitate Oversight," GAO-19-221, March 2019, pp. 17-18, <https://www.gao.gov/assets/700/697345.pdf>.

²² A fee is a charge "assessed to users for goods or services provided by the federal government." Government Accountability Office, "A Glossary of Terms Used in the Federal Budget Process," GAO-05-734-SP, September 2005, p. 100, <https://www.gao.gov/assets/80/76911.pdf>.

²³ The terms fine and penalty, although not explicitly defined by OMB or GAO, appear to refer to governmental demands for payment in consequence of an individual or entity violating a law, regulation, or policy, with fines being imposed by courts and penalties by executive agencies.

²⁴ GAO defines these three terms thus: "Governmental receipts result from the exercise of the government's sovereign powers;" offsetting collections and offsetting receipts "result from businesslike transactions with the public or transactions between appropriated activities" Offsetting collections and receipts differ in that offsetting collections are credited to agencies' appropriations or fund expenditures accounts and may sometimes be spent by the recipient agency without congressional reappropriation, whereas offsetting receipts are credited to agencies' receipts accounts and typically require congressional reappropriation. Government Accountability Office, "A Glossary of Terms Used in the Federal Budget Process," GAO-05-734-SP, September 2005, pp. 28-29, <https://www.gao.gov/assets/80/76911.pdf>.

focus on the broader revenue type---governmental receipts and offsetting collections and receipts are treated as subcategories. Thus, for example, the Budget’s treatment of governmental receipts lists them as “fees, penalties, and forfeitures” under “miscellaneous receipts” and “trust funds,” and includes them with “Customs duties and fees.” The GAO reports that OMB staff say the agency does not “have a requirement to prioritize reporting fine, fee, and penalty data over more detailed information or other types of funds.”²⁵

Analytical Perspectives’ subsection on “user fees” is the best, albeit incomplete, presentation of data on fees, fines, and penalties.²⁶ The data below come from the FY2017 to FY2021 editions (**Table 1**).²⁷

Table 1. User Charges, AKA Fines, Fees, and Penalties (billions of dollars)

Year	Offsetting Collections	Offsetting Receipts	Total
2015	\$208.1	\$134.9	\$343.0
2016	\$208.3	\$121.2	\$329.5
2017	\$210.1	\$120.7	\$330.8
2018	\$220.8	\$138.0	\$358.8
2019	\$203.8	\$145.3	\$349.1

Source: Budget of the United States Government, FY2017-FY2020.

These funds are not an insubstantial amount of money; in 2015 through 2019 they comprised around 10 percent of the total U.S. government receipts, and approximately 27.5 percent of discretionary spending.²⁸

As a generalization, agencies may obligate their offsetting collections without further congressional reappropriation or action. That might imply that about 6 percent of federal revenues are largely beyond the power of the purse. But as will be seen later in the paper,

²⁵ Government Accountability Office, “Fees, Fines, and Penalties: Better Reporting of Government-wide Data Would Increase Transparency and Facilitate Oversight,” GAO-19-221, March 2019, p. 27, <https://www.gao.gov/assets/700/697345.pdf>.

²⁶ Office of Management and Budget, Budget of the United States Government, FY2021, Analytical Perspectives, p. 136, Table 12-1, “Offsetting collections and offsetting receipts from the public,” <https://www.govinfo.gov/content/pkg/BUDGET-2021-PER/pdf/BUDGET-2021-PER.pdf>.

²⁷ The data exclude the \$150 billion in annual revenues generated through activities listed under the “other collections credited to expenditure accounts” and “other collection” lines. They are excluded because they seem qualitatively different from fees, fines, and penalties. They include revenues from activities such as Supplemental Security Income collections from the states, GSE equity related transactions, and interest from credit financing accounts.

²⁸ Total revenues are found in Analytical Perspectives in the “receipts by source” table. Discretionary spending between FY2015 and FY2019 was \$1.2 to \$1.3 trillion. Congressional Budget Office, Discretionary Spending infographics, annual, <https://www.cbo.gov/publication/most-recent/graphics?page=1>.

Congress can exert authority over offsetting collections through limiting and directive language in both authorizing and appropriations statutes.

More than half of the annual user charge revenues come from delivery and other services provided by the U.S. Postal Service, and energy sales by the Tennessee Valley Authority and the Bonneville Power Administration. Unfortunately for legislators who wish to conduct oversight or anyone else who wants to know, Analytical Perspectives does not provide a break-out of sources for the rest of the funds.²⁹

The data are plain---Congress has delegated some authority over fines, fees, and penalties to executive agencies. But why?

Congress and the Delegation of Spending Authority Over Fees, Fines, and Penalties

Understanding how one-third of federal revenues came to be generated is a long, complex story, and beyond the scope of this paper. But what is indisputable is that Congress has delegated degrees of authority over fees, fines, and penalties from the earliest days of the Republic.

During the very first Congress, a law was enacted to raise revenues through customs duties and tonnage. The federal collectors, naval officials, and surveyors who worked in the ports were paid from the fees they collected from vessels they examined.³⁰

“That there shall be allowed and paid to the collectors, naval officers and surveyors, to be appointed pursuant to this act, the fees and per centage following, that is to say: To each collector, for every entrance of any ship or vessel of one hundred tons burthen or upwards, two dollars and a half; for every clearance of any ship or vessel of one hundred tons burthen and upwards, two dollars and a half; for every entrance of any ship or vessel under the burthen of one hundred tons, one dollar and a half...”³¹

In part, this arrangement was driven by the realities of the day: appropriating tax dollars up front to pay for port operations and having all collections returned by mail or some other means to the Treasury was burdensome and logistically difficult.³² The arrangement also aimed to incentivize

²⁹ Nor, it is worth noting, does Analytical Perspectives cross map these fees, fines, and penalties to their respective statutory authorities. This is another hurdle to legislative oversight.

³⁰ On licit and illicit augmentations to agency appropriations, see Government Accountability Office, “Principles of Federal Appropriations Law,” 3rd ed., vol. 2, pp. 6-166 et seq.

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

³² The young nation was broke, and it was not at all obvious how many ships would land each year.

work. Federally-commissioned port employees could be paid promptly for the quantity of work they completed.³³

This ports arrangement was not an aberration. Delegating some authority over the purse to contend with practical contingencies was common, according to the Congressional Research Service.

“Before 1849, federal agencies commonly deducted sums from money the agency received in the ordinary course of its operations and used those deductions to pay expenses. Thus, for example, in 1845 revenue agents responsible for collecting duties on imports deposited in the Treasury only 85% of the duties they collected. The agents used the balance, 15% of all collections, to cover expenses and other payments. The withheld amount was a large sum of money for the time, more than 10% of all federal revenues raised in a typical fiscal year.”³⁴

Recalling the MRA of 1849, it is worth pausing to note that it was enacted 60 years after the ratification of the Constitution. It appears to have been motivated by congressional concerns that agencies were keeping too much of the money to spend on their operations.³⁵

And when Congress enacted the MRA it specifically exempted the Post Office from its coverage.³⁶ Again, having the agency return all the funds to the Treasury that it collected for postage and then have those funds reappropriated was logistically problematic---especially in an era when Congress was not regularly in session.

Since the enactment of the MRA, Congress has authorized agencies to hold and expend revenues they collected in the form of fees, penalties, and duties.³⁷ The rationales for these delegations have varied, as illustrated below.

- A 1902 statute authorized the proceeds from the sales of public lands to be placed in a special Treasury fund, which could then be drawn upon by the Secretary of the Interior to

³³ Before income taxes, customs fees comprised most federal revenues.

³⁴ Congressional Research Service, “Congress’s Power Over Appropriations: Constitutional and Statutory Provisions,” p. 22.

³⁵ *Ibid.*

³⁶ “Provided, That nothing herein contained shall be construed to alter the existing laws regulating the collection of the revenues of the Post-Office Department.” 9 Stat. 398 (1849).

³⁷ Often Congress empowers agencies to establish revolving and special funds to receive monies and other assets, which may then may be obligated and spent without congressional action. See Budget of the United States, FY2021, Analytical Perspectives, p. 287, <https://www.govinfo.gov/content/pkg/BUDGET-2021-PER/pdf/BUDGET-2021-PER.pdf>. On the mission drift and loss of purse control that can occur with trust funds, see General Accounting Office, “Library of Congress’ Revolving Trust Funds,” B-198730, October 21, 1980, <https://www.gao.gov/assets/140/131119.pdf>.

spend on irrigation projects of his choosing.³⁸ In this instance, Congress appears to have used delegation of fund and collection authority to overcome a collective action problem within Congress. Legislators in non-western states objected to having general taxes spent to provide benefits overwhelmingly consumed by western states. Hence, Congress directed western land sale proceeds to be used for western water projects.³⁹

- Congress also has authorized many agencies to receive gifts, which may be spent by the agency within narrow or broad purposes without congressional action. One justification for this policy is that philanthropists' often are particular about what they want their donations spent on. Many do not wish to donate to the federal government as a whole. Hence, Congress has given at least three dozen agencies the authority to receive gifts in a very diverse range of federal activities, including those advancing educational, cultural, and medical objectives.⁴⁰ The Armed Forces, for example, have a variety of gift receipt authorities with varying degrees of delegated authority for their use.⁴¹
- Congress also established various self-funding governmental entities and enterprises, such as government corporations.⁴² These entities, which include the U.S. Postal Service and the Tennessee Valley Authority, were designed to be self-funding by selling goods and services. Accordingly they were freed from many government operational rules, and given broad discretion to spend their revenues to upgrade their operations so as to ensure prompt and high quality service for customers.⁴³

Congress has had other reasons for allowing agencies to self-fund themselves through fees, fines, and penalties. Fees lend themselves to government provision of nonpublic goods. They can enhance equity---anyone who wishes to have the U.S. Postal Service (USPS) deliver a letter can purchase a stamp; others need not contribute. User charges can improve agency efficiency, and they can be adjusted up or down in response to demand. (E.g., If the deer population grows too

³⁸ An Act Appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands, June 17, 1902.

<https://www.loc.gov/law/help/statutes-at-large/57th-congress/session-1/c57s1ch1093.pdf>.

³⁹ Bureau of Reclamation, Bureau of Reclamation: A Very Short History, August 15, 2018,

<https://www.usbr.gov/history/borhist.html>.

⁴⁰ General Accounting Office, "Review of Federal Agencies' Gift Funds," B-198730, September 24, 2980,

<https://www.gao.gov/assets/140/131116.pdf>.

⁴¹ 10 U.S.C. 2601 et seq.

<https://uscode.house.gov/view.xhtml?path=/prelim@title10/subtitleA/part4/chapter155&edition=prelim>

⁴² Ronald C. Moe, "Managing the Public's Business: Federal Government Corporations," U.S. Congress, U.S. Senate, Committee on Governmental Affairs, S. Prt. 104-18, April 1995,

<https://babel.hathitrust.org/cgi/pt?id=uc1.31210024919431&view=1up&seq=1>.

⁴³ Government Accountability Office, Government Corporations: Profiles of Existing Government Corporations, GAO/GGD-96-14, December 1995. <https://www.gpo.gov/fdsys/pkg/GAOREPORTS-GGD-96-14/pdf/GAOREPORTS-GGD-96-14.pdf>.

large, the fee to hunt deer can be reduced to increase kills.) Fees also can be less politically sensitive than general taxes (but not always).⁴⁴

Penalties and fines, obviously, have the advantage of enabling an agency to recoup costs it incurs when prosecuting someone who commits a misdeed, and of making the guilty pay for the damage they have done. Enabling agencies to decide how to use the fees, fines, and penalties they collect can incentivize agencies to achieve higher outputs, improve customer service, and better allocate agency efforts and resources in response to market demands.⁴⁵

Lastly, Congress may choose to establish user charges to contend with nettlesome political issues, as seen in the aforementioned example of the Bureau of Reclamation. Congress has established more than 100 trust funds to provide steady streams of fees for dedicated purposes. Its motivations for adopting this dedicated funds model have varied, and include the concern that the annual appropriation process would not consistently deliver sufficient funds.⁴⁶

The Power of the Purse and Three Agencies That Collect Fees

To better assess Congress' power of the purse over fees, fines, and penalties, this section of the paper examines Congress' control over the three executive branch agencies' collection of fees, fines, and penalties.⁴⁷ This is done by examining both authorizing and appropriations statutes (and their related reports) to identify statutory language that falls under six metrics of congressional control. **(Figure 1)**

⁴⁴ Congressional Research Service, "Economics of Federal User Fees," report R45463, January 22, 2019, <https://fas.org/sgp/crs/misc/R45463.pdf>.

⁴⁵ The Independent Offices Appropriation Act of 1952 (31 U.S. Code 9701) sets the basic expectations for fee policies. OMB gives more fine grain directives. See Office of Management and Budget, Circular A-25 revised, undated, https://obamawhitehouse.archives.gov/omb/circulars_a025/.

⁴⁶ Congressional Research Service, "Federal Trust Funds and the Budget," report R41328, February 27, 2014, pp. 1-2, https://www.everycrsreport.com/files/20140227_R41328_530fc041e54005c503c1ae05ba80367eaa6791e4.pdf. Establishing a trust fund can create a constituency whose expectations of benefits create pressure on legislators. Additionally, legislators in some instances have used the trust fund model in hopes that its linkage of the benefits and the costs of the program would encourage fiscal discipline. Whatever merits the dedicated funding model may bring, it often does not work. OMB notes many of them may be depleted in the next 15 years. Office of Management and Budget, Budget of the United States Government, FY2021, p. 287. See also Congressional Research Service, "Trust Funds and the Budget," p. 7.

⁴⁷ These six metrics are narrowly drawn to focus on agencies' authorities related to self-funding. Hence, they do not include budget adoption autonomy or other matters that would fall under a broader rubric of control of the purse.

Figure 1. Congressional Control Metrics

Inflows:

- Pricing control: Is the agency limited in its discretion to set the size of the fee, fine, or penalty?
- Revenue autonomy: What percentage of the agency's revenues come from fees, fines, and penalties? (High, medium, low)

Outflows:

- Time: Is the agency limited in how soon it may obligate the funds?
- Amount: Is the agency limited in how much of the funds it may expend?
- Purpose: Is the agency limited in the purposes for which it may use of the fees, fines, and penalties?
- Reappropriation: Must the agency wait for Congress to reappropriate the funds?

Three types of agencies with authority to collect fees, fines, and penalties are examined: a typical executive agency (Bureau of Reclamation), a regulatory agency (Food Safety and Inspection Service), and a government corporation (U.S. Postal Service). The intention here is to see how the different agency model types may correlate with the authority that Congress has given them over their collections of funds, and to flesh out the varying ways federal agencies engage in these activities.⁴⁸ To make this task manageable, the analysis focuses on a single year (FY2018) that featured a full year appropriation (rather than a series of continuing resolutions) and accompanying committee reports.⁴⁹

Bureau of Reclamation

The major duty of the Bureau of Reclamation (BR) is to manage water supplies in collaboration with states and American Indian reservations in the west. It has constructed dams, reservoirs, and irrigation systems. The agency is funded both with appropriations from the Treasury's general

⁴⁸ The paper could have examined the largest collectors of fees, fines, and penalties by examining the U.S. Postal Service, the two largest power authorities (Bonneville authority and Tennessee Valley Authority), and the Defense Commissary Agency. However, these entities are less diverse models---all of them were designed to be largely if not entirely self-funding commercial enterprises.

⁴⁹ Original sources used include: P.L. 115-41, Consolidated Appropriations Act, 2018, <https://www.congress.gov/115/plaws/publ141/PLAW-115publ141.pdf>; Consolidated Appropriations Act: U.S. House of Representatives, Committee on Appropriations, Committee Print on H.R. 1625/Public Law 115-141, books 1 and 2, U.S. Government Publishing Office, 2018, <https://www.govinfo.gov/content/pkg/CPRT-115HPRT29456/pdf/CPRT-115HPRT29456.pdf> and <https://www.govinfo.gov/content/pkg/CPRT-115HPRT29457/pdf/CPRT-115HPRT29457.pdf>; and Office of Management and Budget, Budget of the United States, FY2018, Appendix, <https://www.govinfo.gov/content/pkg/BUDGET-2018-APP/pdf/BUDGET-2018-APP.pdf>.

fund and through some special funds, which are fed by “repayments and other revenues from water and power users, receipts from the sale, lease, and rental of Federal lands, and certain oil and mineral revenues.”⁵⁰ In FY2018, \$884 million of the agency’s \$1.153 billion in appropriations came from these special funds—or 76.6 percent. This \$884 million is an offsetting collection, which, as noted above, often implies that the funds may be spent without reappropriation.⁵¹

That is not the case here. Congress exerts significant direction over the BR’s revenue flows and expenditures. Congress sets by statute the moneys the BR must recover through fees and may retain from its various activities (e.g., 100 percent of the reclamation projects from states, 100 percent of proceeds from water sales, etc.) Congress has set guidelines for how much the BR may charge in user fees and has forbidden the agency from charging for some activities, such as parking or picnicking.⁵²

The vast majority of the BR’s annual funding comes from the Reclamation Fund, and Congress controls the annual disbursements from it.⁵³ Congress also greatly specifies which projects these outlays are spent on.⁵⁴ For example, the FY2018 appropriation states:

“as recommended by the Secretary in a letter dated November 21, 2017, funding provided for such purpose in fiscal year 2017 shall be made available to the North Valley Regional Recycled Water Program, the Orange County Sanitation District Effluent Reuse Implementation Project—Headworks Segregation, and the Groundwater Reliability Improvement Program (GRIP) Recycled Water Project.”⁵⁵

Congress also mandates how much the BR may spend on its staff and the number of vehicles it may acquire (**Figure 3**). The BR’s FY2018 annual appropriations specifies the timing for obligating funds, and forbids the agency from reprogramming and transferring funds in myriad ways (**Figure 4**).

⁵⁰ Office of Management and Budget, Budget of the United States, FY2018, Appendix, p. 614.

⁵¹ Department of the Interior, “Bureau of Reclamation, Budget Justifications and Performance Information, Fiscal Year 2018, p. 6, https://www.usbr.gov/budget/2018/fy2018_bor_budget_justification.pdf.

⁵² 16 U.S. Code 6802,

[https://uscode.house.gov/view.xhtml?req=\(title:16%20section:6802%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title16-section6802\)&f=treesort&edition=prelim&num=0&jumpTo=true](https://uscode.house.gov/view.xhtml?req=(title:16%20section:6802%20edition:prelim)%20OR%20(granuleid:USC-prelim-title16-section6802)&f=treesort&edition=prelim&num=0&jumpTo=true).

⁵³ Other moneys come from the “Central Valley Project Restoration Fund, consisting of revenues from project beneficiaries; the Colorado River Dam Fund, which generates revenue from the sale of Boulder Canyon power; and the recreation, entrance, and user fee account, consisting of fees collected pursuant to the Land and Water Conservation Fund Act of 1965.” Ibid.

⁵⁴ Initially, this fund was set up as a revolving fund in 1902. A dozen years later, Congress amended the law to require congressional action. Congressional Research Service, “Bureau of Reclamation Project Authorization and Financing,” InFocus, January 11, 2018, https://www.everycrsreport.com/files/2018-01-11_IF10806_f2bad7420df19660ccd4d5884cb1a69cfad91956.pdf.

⁵⁵ Committee Print on H.R. 1625/Public Law 115-141, book 1, p. 647.

Figure 3. FY2018 Appropriations for Bureau of Reclamation Staff and Motor Vehicles**POLICY AND ADMINISTRATION**

For expenses necessary for policy, administration, and related functions in the Office of the Commissioner, the Denver office, and offices in the five regions of the Bureau of Reclamation, to remain available until September 30, 2019, \$59,000,000, to be derived from the Reclamation Fund and be nonreimbursable as provided in 43 U.S.C. 377: *Provided*, That no part of any other appropriation in this Act shall be available for activities or functions budgeted as policy and administration expenses.

ADMINISTRATIVE PROVISION

Appropriations for the Bureau of Reclamation shall be available for purchase of not to exceed five passenger motor vehicles, which are for replacement only.

Source: Committee Print on H.R. 1625/Public Law 115-141, book 1, p. 648.

Figure 4. Restrictions on Reprogramming and Transferring Appropriated Funds

SEC. 201. (a) None of the funds provided in title II of this Act for Water and Related Resources, or provided by previous or subsequent appropriations Acts to the agencies or entities funded in title II of this Act for Water and Related Resources that remain available for obligation or expenditure in fiscal year 2018, shall be available for obligation or expenditure through a reprogramming of funds that—

- (1) initiates or creates a new program, project, or activity;
- (2) eliminates a program, project, or activity;
- (3) increases funds for any program, project, or activity for which funds have been denied or restricted by this Act, unless prior approval is received from the Committees on Appropriations of the House of Representatives and the Senate;
- (4) restarts or resumes any program, project or activity for which funds are not provided in this Act, unless prior approval is received from the Committees on Appropriations of the House of Representatives and the Senate;
- (5) transfers funds in excess of the following limits, unless prior approval is received from the Committees on Appropriations of the House of Representatives and the Senate:
 - (A) 15 percent for any program, project or activity for which \$2,000,000 or more is available at the beginning of the fiscal year; or
 - (B) \$400,000 for any program, project or activity for which less than \$2,000,000 is available at the beginning of the fiscal year;
- (6) transfers more than \$500,000 from either the Facilities Operation, Maintenance, and Rehabilitation category or the Resources Management and Development category to any program, project, or activity in the other category, unless prior approval is received from the Committees on Appropriations of the House of Representatives and the Senate; or
- (7) transfers, where necessary to discharge legal obligations of the Bureau of Reclamation, more than \$5,000,000 to provide adequate funds for settled contractor claims, increased contractor earnings due to accelerated rates of operations, and real estate deficiency judgments, unless prior approval is received from the Committees on Appropriations of the House of Representatives and the Senate.

Source: Committee Print on H.R. 1625/Public Law 115-141, book 1, p. 649.

The overall picture of Congress' power of the purse over the Bureau of Reclamation is summed up under the six congressional control metrics. In short, the agency's authority is low and congressional control is high.

Table 2. Congressional Control Metrics: Bureau of Reclamation

Agency Authority Over Fees, Fines, and Penalties	
Inflows	
• Pricing control	Limited
• Revenue autonomy	High
Outflows	
• Amount	Limited
• Time	Limited
• Purpose	Limited
• Reappropriation	Required

Food Safety and Inspection Service

The Food Safety and Inspection Service (FSIS) is an agency with the Department of Agriculture, whose main responsibility is to ensure imported and domestically produced meat, poultry, and egg products are safe to consume, properly packaged, and correctly labeled. The FSIS was established by the Secretary of Agriculture in 1981 pursuant to 5 USC 301, which is a general authority empowering department heads broad powers over their agencies.⁵⁶ Congress assigned the USDA to inspect meat, poultry, and egg products but delegated the discretion to craft the administrative bureau to conduct the work.⁵⁷ Hence there are few references to the Food Safety Inspection Service in the U.S. Code, and any effort to locate the limitations of its purposes would require reference to authorities assigned to the USDA as a whole.

⁵⁶ The entirety of the statute reads, “The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.”

⁵⁷ 21 USC 601 et seq., <https://uscode.house.gov/view.xhtml?path=/prelim@title21/chapter12&edition=prelim>. In 2002, Congress enacted a statute to notify the Secretary of Agriculture that his existing authorities were sufficient to expand the department’s inspection work. 21 USC 679(c). <https://uscode.house.gov/view.xhtml?path=/prelim@title21/chapter12&edition=prelim>.

The FSIS has two regulatory divisions: meat and poultry inspection, and egg product inspection.⁵⁸ Together they regulate about 10 to 20 percent of the U.S. food supply. (The Food and Drug Administration handles the remaining 80 to 90 percent.)⁵⁹

The agency is funded both with appropriations from the Treasury’s general fund and through fees levied on meat, poultry, and egg producers and exporters and importers thereof for “inspection and identification, certification, and laboratory services.”⁶⁰ In FY2018, approximately \$213.1 million of the agency’s \$1.25 billion in appropriations came from fees---or 16.7 percent.⁶¹ This \$213.1 million is almost entirely an offsetting collection, and the FSIS may spend it without Congress taking action. (Somewhat surprisingly, neither the FY2018 nor the accompanying explanatory statement make any reference to these fees and their use.)

The FSIS has authority to annually increase its fees through rulemaking, although how much it may boost them is unclear.⁶² The agency apparently also possesses limited authority to create new fees. The FSIS asked Congress to be able to expand its use of fees significantly in its FY2018 budget justification, but legislators did not grant that authority.⁶³

Congress’ FY2018 appropriation to the FSIS was brief, and contained little directive language on use of appropriated funds, and hardly any towards FSIS’ use of the fees it collects. (**Figure 5**)

⁵⁸ The statutory authority for FSIS’ activities are the Federal Meat Inspection Act (21 U.S.C. 601 et seq.), the Poultry Products Inspection Act (21 U.S.C. 451 et seq.), and the Egg Products Inspection Act (21 U.S.C. 1031 et seq.)

⁵⁹ Congressional Research Service, “FY2018 and FY2019 Agriculture Appropriations: Federal Food Safety Activities,” report R45413, November 27, 2018, p. 1, https://www.everycrsreport.com/files/20181127_R45413_5fad781c762a3df49ed696ee0d532a76d34bbc74.pdf.

⁶⁰ Food Safety and Inspection Service, “2018 Rate Changes for the Basetime, Overtime, Holiday, and Laboratory Services Rates,” January 10, 2018, Federal Register, 1233-1234, <https://www.federalregister.gov/documents/2018/01/10/2018-00283/2018-rate-changes-for-the-basetime-overtime-holiday-and-laboratory-services-rates>. It is worth noting that 21 USC 468 mandates the U.S. Government to bear the costs of inspections, but 7 USC 2291(a) authorizes the USDA to charge fees for “all overtime and holiday work performed.” See [https://uscode.house.gov/view.xhtml?req=\(title:21%20section:468%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title21-section468\)&f=treesort&edition=prelim&num=0&jumpTo=true](https://uscode.house.gov/view.xhtml?req=(title:21%20section:468%20edition:prelim)%20OR%20(granuleid:USC-prelim-title21-section468)&f=treesort&edition=prelim&num=0&jumpTo=true) and [https://uscode.house.gov/view.xhtml?req=\(title:7%20section:2219%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title7-section2219\)&f=treesort&edition=prelim&num=0&jumpTo=true](https://uscode.house.gov/view.xhtml?req=(title:7%20section:2219%20edition:prelim)%20OR%20(granuleid:USC-prelim-title7-section2219)&f=treesort&edition=prelim&num=0&jumpTo=true).

⁶¹ The FSIS’ FY2018 budget justification reports \$10.3 million came from a trust fund. Further research is needed to clarify the purposes of these funds. The FSIS also reported \$6940 collected in civil penalties in FY2018. Food Safety and Inspection Service, “2018 President’s Budget Food Safety and Inspection Service,” undated, p. 23-4 and 23-25, <https://www.fsis.usda.gov/wps/wcm/connect/67c06c96-65d8-4ca3-9157-ded9add3a6b5/FSIS-FY-2018-Budget.pdf?MOD=AJPERES>.

⁶² E.g., Food Safety Inspection Service, “2021 Rate Changes for the Basetime, Overtime, Holiday, Laboratory Services, and Export Application Fees,” Federal Register, December 11, 2020, pp. 79992-79994, <https://www.govinfo.gov/content/pkg/FR-2020-12-11/pdf/2020-27347.pdf>.

⁶³ The proposal would have increased the agency’s fee receipts to an estimated \$660 million per year, more than triple its existing receipts. Food Safety and Inspection Service, “2018 President’s Budget Food Safety and Inspection Service,” undated, p. 23-14. Further research is needed to clarify exactly what the bounds are on the FSIS’ authority to raise fees.

Figure 5. Restrictions on the Use of FSIS Appropriations

FOOD SAFETY AND INSPECTION SERVICE

For necessary expenses to carry out services authorized by the Federal Meat Inspection Act, the Poultry Products Inspection Act, and the Egg Products Inspection Act, including not to exceed \$50,000 for representation allowances and for expenses pursuant to section 8 of the Act approved August 3, 1956 (7 U.S.C. 1766), \$1,056,844,000; and in addition, \$1,000,000 may be credited to this account from fees collected for the cost of laboratory accreditation as authorized by section 1327 of the Food, Agriculture, Conservation and Trade Act of 1990 (7 U.S.C. 138f): *Provided*, That funds provided for the Public Health Data Communication Infrastructure system shall remain available until expended: *Provided further*, That no fewer than 148 full-time equivalent positions shall be employed during fiscal year 2018 for purposes dedicated solely to inspections and enforcement related to the Humane Methods of Slaughter Act (7 U.S.C. 1901 et seq.): *Provided further*, That not later than 180 days after the date of enactment of this Act, the Food Safety and Inspection Service shall issue equivalence determinations for all countries wishing to continue exporting Siluriformes to the United States: *Provided further*, That unless the requirements pursuant to the previous proviso have been met, thereafter, none of the funds made available by this or any other Act may be used to inspect, at point of entry, Siluriformes from countries exporting to the United States until all requirements under section 557.2 of title 9, Code of Federal Regulations have been met and a final determination of equivalence final rule has been published in the Federal Register adding such countries to the list under section 327.2 of title 9, Code of Federal Regulations: *Provided further*, That of the funds made available under this heading, \$7,500,000 shall remain available until expended for public health veterinarian recruitment and retention incentives: *Provided further*, That this appropriation shall be available pursuant to law (7 U.S.C. 2250) for the alteration and repair of buildings and improvements, but the cost of altering any one building during the fiscal year shall not exceed 10 percent of the current replacement value of the building.

Source: Committee Print on H.R. 1625/Public Law 115-141, book 2, pp. 19-20.

The overall picture of Congress' power of the purse over the Food Safety Inspection Service is summed up under the six congressional control metrics. In short, the agency's authority is high and congressional control is low.

Table 3. Congressional Control Metrics: Food Safety and Inspection Service

Agency Authority Over Fees, Fines, and Penalties	
Inflows	
• Pricing control	Limited*
• Revenue autonomy	Low
Outflows	
• Amount	Unlimited
• Time	Unlimited
• Purpose	Limited*
• Reappropriation	Not required

*Further study is required to make a determination.

U.S. Postal Service

The USPS is a government corporation---a wholly governmental enterprise that was designed by Congress to serve a public mission and to cover its operating costs.⁶⁴ Its primary duty is to deliver paper mail within the United States and its various territories (e.g., Virgin Islands, American Samoa, etc.), particularly “letter mail.”⁶⁵ Like other federal agencies, the USPS does go through the annual appropriation process. Congress provides the USPS a tiny appropriation each year, around \$60 million in FY2018, to reimburse the agency for delivering mail freely for the blind and ballots sent from Americans overseas.⁶⁶

According to the OMB, the agency brings in more offsetting collections than any other government agency---around \$70 billion per year, which come almost entirely from the sales of

⁶⁴ 39 USC 101. Note: 39 USC 201 defines the USPS as “an independent establishment of the executive branch of the Government of the United States,” <https://uscode.house.gov/view.xhtml?path=/prelim@title39/part1&edition=prelim>. That term is little defined in statute and of little utility. The agency meets all the criteria defining a government corporation. The USPS is one of 17 government corporations. Kevin R. Kosar, “Federal Government Corporations: An Overview, Congressional Research Service, report RL30365, January 7, 2009, http://www.kevinrkosar.com/RL30365_Kosar_Federal_Government_Corporations_An_Overview_01-07-09.pdf.

⁶⁵ “Letter mail” includes mail pieces addressed to an individual (e.g., a postcard sent from one person to another or mail sent from a business to a person or a business to a business.)

⁶⁶ U.S. Postal Service, Fiscal Year 2018 Budget: Congressional Submission, p. I-1, <https://www.prc.gov/docs/100/100212/USPS%20FY2018%20Congressional%20Submission%2005-22-17.pdf>.

postage.⁶⁷ The Post Office deposits these funds in the Postal Service Fund in the Treasury and draws freely upon them---no congressional action is needed. Hence, nearly 100 percent of USPS's funds come through fees.

Congress established through authorizing statutes broad guidelines for the USPS to follow for pricing its products and service. The agency must, to mention two examples, price its products “to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis” and limit price increases on its monopoly products (e.g., letter mail) within a price cap.⁶⁸ When the USPS wants to raise prices, it submits a request to the Postal Regulatory Commission (PRC), which will review the request to ensure it comports with the law and the lengthy regulatory regime established by the PRC. Congress delegated price-setting to the USPS and an independent regulator in recognition of its own limitations---competent price setting involves complex analyses of elasticities and such. Shifting authority carried an additional benefit---it enabled Congress to reduce the various interest group pressures that seek to thwart price increases and who engage in rent-seeking.⁶⁹ Congress also has limited the range of products and services the USPS may offer. Absent new statutory authorization, for example, it cannot go into banking or other nonpostal businesses as some advocates wish.⁷⁰

Congress gives the USPS minimal direction in the use of its meager annual appropriations. It forbids any of the funds being used “to consolidate or close small rural and other small post offices,” for example. But this mandate is little more than messaging---the USPS does not need to use these funds to shutter post offices, which it does as a normal part of its ongoing logistics network rationalization.⁷¹ The only sense in which Congress exerts real direction over the USPS's fees is indirect, and comes in the form of various mandates that are costly. For example, postal law requires the USPS to collectively bargain with its four unions over compensation and

⁶⁷ Office of Management and Budget, Budget of the United States, FY2018, Analytical Perspectives, p. 136, Table 12-1; and U.S. Postal Service, Annual Report, FY2018, pp. 8-9, <https://about.usps.com/what/financials/annual-reports/fy2018.pdf>.

⁶⁸ 39 USC 101(d), <https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title39-section101&num=0&saved=%7CZ3JhbnVsZWlkOIVTQy1wcmVsaW0tdGI0bGUzOS1zZWNoaW9uMTAx%7C%7C%7C0%7Cfalse%7Cprelim>; and 39 USC 3622(d)1(A), <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title39-section3622&num=0&edition=prelim>. In contrast to its monopoly or “market dominant” products, the agency has greater freedom to price its “competitive products” (e.g., parcel delivery), which comprise around one-third of its revenues.

⁶⁹ Publishers of periodicals, for example, long have lobbied Congress to protect their subsidized postage rates. Kevin R. Kosar, “Postage Subsidies for Periodicals: History and Recent Developments,” report R40162, Congressional Research Service, January 22, 2009, https://www.everycrsreport.com/files/20090122_R40162_ac24068697514e79c4a23cdb49135cf99b4962dd.pdf.

⁷⁰ 39 USC 404(e); and Postal Regulatory Commission, order 154, December 19, 2008, https://www.prc.gov/Docs/61/61647/Order_No_154.pdf.

⁷¹ Kevin R. Kosar, “Separating Myth from Fact about the Troubles of the Postal Service,” American Enterprise Institute, September 2020, p. 3, <https://www.aei.org/wp-content/uploads/2020/09/Separating-Myth-from-Fact-About-the-Troubles-of-the-Postal-Service.pdf>.

working conditions---a privilege that drives up USPS compensation costs and that few other federal employees possess.⁷² The annual appropriation also mandates that the agency deliver paper mail six days per week, which may cost the USPS \$1 billion per year.⁷³

The overall picture of Congress' power of the purse over the U.S. Postal Service is summed up under the six congressional control metrics. In short, the agency's authority is high and congressional control is low. (**Table 4**).

Table 3. Congressional Control Metrics: U.S. Postal Service

Agency Authority Over Fees, Fines, and Penalties	
Inflows	
● Pricing control	Limited
● Revenue autonomy	High
Outflows	
● Amount	High
● Time	High
● Purpose	Limited
● Reappropriation	Not required

Concluding Observations

It is tempting, especially for conservative constitutionalists and anyone concerned about the delegation of congressional authority, to demand that all fees, fines, and penalties be deposited in the U.S. Treasury general fund in accordance with the MRA. The practical demands of congressional governance, however, have taken practice far from this principle.

To return to a question posed at the beginning of the paper: Is this a problem?

⁷² In FY2018, the USPS' compensation costs (including retirement benefits) amounted to 76.2 percent of the agency's annual operating costs (\$56,887/\$74,573. U.S. Postal Service, "Annual Report, FY2018," p.8; and 39 USC 1201 et seq.

⁷³ Wendy Ginsberg, "The U.S. Postal Service and Six-Day Delivery: History, Issues, and Current Legislation," Congressional Research Service, report R40626, October 17, 2012, <https://www.everycrsreport.com/reports/R40626.html>.

The answer is: perhaps in some instances, but in none of the instances reviewed in this paper.⁷⁴

The number of agencies observed in this paper is too small to generalize across all of the oversight relationships between various congressional committees and agencies. Nonetheless, the findings do not support an alarmist perspective on the loss of the purse control over fees, fines, and penalties. Congress has delegated authority---sometimes significant, but it has built in guardrails to curb agencies' ability to garner and expend funds, at least in the instances reviewed in this paper. Congress did so for a variety of reasons that are not obviously objectionable. And the overall magnitude of monies being collected appears to be not particularly high. As noted above, 6 percent of federal revenues are offsetting collections, but it is not clear how many of those dollars are available for agency use without reappropriation. And the example of the Bureau of Reclamation illustrates that we should not assume that an agency that is highly self-funding via offsetting collections is immune from congressional direction.

That said, this paper's limited review does clarify why the House of Representatives' official oversight committee struggled to understand fees, fines, and penalties.

The first hurdle is straightforward: reporting. The OMB does not report data in the *Budget* that show all the agencies that receive fees, fines, and penalties. Nor does it list the total number of fees, fines, and penalties or how many revenues come through them. Nowhere can legislators see a cross mapping of these data points with the statutory authority that established them and which limits their purpose or agencies' discretion to spend them. When the GAO interviewed the OMB about these matters, the agency's respondents reported that no statute compels them to report these data so they do not do so.⁷⁵ As a practical matter, legislators who want to see these data must place a request with the OMB, which is time-consuming, make-work for both parties.

Congress can remedy this hurdle with a statute directing richer, more precise reporting, and it would be on strong footing to do so under the Constitution's "statements and receipts" clause.⁷⁶ Congress could help itself by empowering external oversight through public release of these data.

⁷⁴ A shortcoming of this paper is that does not examine agencies that self-fund themselves primarily through penalties received through enforcement actions. The cases reviewed in this paper involve agencies mostly relying on fees. Whether agency behavior towards Congress differs between agencies dealing with customers versus agencies contending with individuals accused of wrong-doing is worthy of examination.

⁷⁵ U.S. Government Accountability Office, Fees, Fines, and Penalties: Better Reporting of Government-wide Data Would Increase Transparency and Facilitate Oversight, GAO-19-221, March 2019, p. 27, <https://www.gao.gov/assets/700/697345.pdf>.

⁷⁶ Article I, section 9, clause 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." (Emphasis added by author.)

The second hurdle also is straightforward: complexity. The regimes that govern agencies' collections of these funds have developed over time and are quite complex, probably needlessly so in certain instances. They have been erected by generations of legislators sitting on the committees of jurisdiction---likely in coordination with the agencies themselves and relevant interest groups.⁷⁷ By all appearances, the legislators on the appropriations subcommittees who fund these agencies annually are very aware of the nuances of how these regimes work. In contrast, members of the House Oversight and Government Reform Committee and its subcommittees are far less likely to be steeped in the complexities of the regime's governing fees, fines, and penalties because it simply is not their job to work through these matters annually.

Which leads to additional questions that are appropriate for future research: When speaking of the power of the purse and the principal-agent nature of it, who is the principal? Congress as a whole? Any individual representative or senator? Only the authorizers and appropriators? And where does the House Oversight and Homeland Security Committee, which has a peculiarly broad jurisdiction across executive agencies, fit into oversight of the collection and expenditure of fees, fine, and penalties?⁷⁸

⁷⁷ Whether these might be deemed iron triangles or issue networks is worth investigating.

⁷⁸ The Senate does not have a similar committee with such wide-ranging oversight authority.