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Nov. 29, 2016

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

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

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

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

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

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

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

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

<sup>2</sup> E.g., "How to Strengthen Congress," *National Affairs*, fall 2015.  
<http://www.nationalaffairs.com/publications/detail/how-to-strengthen-congress>

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

[https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/ap\\_13\\_offsetting.pdf](https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/ap_13_offsetting.pdf)

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

### Congress and the Power of the Purse

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

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

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

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

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

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

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

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

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

This principle of Congress as the keeper of the purse<sup>6</sup> was embodied in the Miscellaneous Receipts Act,<sup>7</sup> which was first enacted in 1849. The statute directs a federal employee in receipt of “public money” to “deposit the money without delay in the Treasury or with a depository designated by the Secretary of the Treasury under law.” The Government Accountability Office (GAO) explains:

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

Law professor Andy Spalding provides an instructive example:

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

### Practice vs. Principle

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

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<sup>6</sup> 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>

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

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

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

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

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

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

<sup>10</sup> 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](http://www.constitution.org/uslaw/sal/001_statutes_at_large.pdf)

<sup>11</sup> On licit and illicit augmentations to agency appropriations, see Government Accountability Office, “Principles of Federal Appropriations Law,” 3rd ed., vol. 2, pp. 6-166 et seq.

<http://www.gao.gov/special.pubs/d06382sp.pdf>

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

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

<sup>14</sup> An Act Appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands, June 17, 1902.

[http://www.constitution.org/uslaw/sal/032\\_statutes\\_at\\_large.pdf](http://www.constitution.org/uslaw/sal/032_statutes_at_large.pdf)

<sup>15</sup> Ronald C. Moe, “Managing the Public’s Business: Federal Government Corporations,” U.S. Congress, U.S. Senate, Committee on Governmental Affairs, S. Prt. 104-18, April 1995.

[http://www.mindserpent.com/American\\_History/books/Business/govt\\_bus.html](http://www.mindserpent.com/American_History/books/Business/govt_bus.html)

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

[http://www.kevinrkosar.com/RL30365\\_Kosar\\_Federal\\_Government\\_Corporations\\_An\\_Overview\\_01-07-09.pdf](http://www.kevinrkosar.com/RL30365_Kosar_Federal_Government_Corporations_An_Overview_01-07-09.pdf)

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

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

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

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

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

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

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

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

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

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

*Department of Justice*

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

*Nuclear Regulatory Commission*

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

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

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

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

### Conclusion: What Next?

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

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

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

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

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

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

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

[https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/ap\\_13\\_offsetting.pdf](https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/ap_13_offsetting.pdf)

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

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

	Actual 2015	Estimate	
		2016	2017
<b>Offsetting collections (credited to expenditure accounts):</b>			
User charges:			
Postal Service stamps and other USPS fees (off-budget) .....	73.5	74.8	75.3
Defense Commissary Agency .....	5.5	6.0	5.7
Employee contributions for employees and retired employees health benefits funds .....	13.9	15.1	16.1
Sale of energy:			
Tennessee Valley Authority .....	43.2	40.9	41.5
Bonneville Power Administration .....	3.3	4.0	4.2
All other user charges .....	68.7	65.2	71.8
Subtotal, user charges .....	208.1	206.0	214.6
Other collections credited to expenditure accounts:			
Commodity Credit Corporation fund .....	5.5	6.8	7.0
Supplemental Security Income (collections from the States) .....	2.6	2.7	2.7
Other collections .....	17.6	8.2	7.5
Subtotal, other collections .....	25.7	17.7	17.2
Subtotal, offsetting collections .....	233.9	223.7	231.8
<b>Offsetting receipts (deposited in receipt accounts):</b>			
User charges:			
Medicare premiums .....	67.1	72.1	79.1
Spectrum auction, relocation, and licenses .....	30.1	12.9	13.9
Outer Continental Shelf rents, bonuses, and royalties .....	3.5	2.8	3.2
All other user charges .....	34.2	35.7	40.1
Subtotal, user charges deposited in receipt accounts .....	134.9	123.5	136.3
Other collections deposited in receipt accounts:			
Military assistance program sales .....	32.4	36.0	37.4
Interest received from credit financing accounts .....	38.7	60.0	65.3
Proceeds, GSE equity related transactions .....	20.7	16.0	18.7
All other collections deposited in receipt accounts .....	55.5	51.1	44.4
Subtotal, other collections deposited in receipt accounts .....	147.3	163.1	165.8
Subtotal, offsetting receipts .....	282.2	286.6	302.2
<b>Total, offsetting collections and offsetting receipts from the public .....</b>	<b>516.0</b>	<b>510.3</b>	<b>534.0</b>
Total, offsetting collections and offsetting receipts excluding off-budget .....	442.4	435.4	458.6
<b>ADDENDUM:</b>			
User charges that are offsetting collections and offsetting receipts <sup>1</sup> .....	343.0	329.5	350.9
Other offsetting collections and offsetting receipts from the public .....	173.0	180.8	183.1

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