

A “Follow the Money” Approach to Separation of Powers

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Date : September 7, 2016

Michael Greve and Christopher C. DeMuth, Sr., *Agency Finance in The Age of Executive Government*, 16-25 *George Mason U. L. & Econ. Research Paper Series* (2016), available at [SSRN](#).

This year has featured no shortage of excellent doctrinal pieces in constitutional law—so many that I couldn’t choose among them. This article is different: more political science than law, although it does focus on separation of powers. Many Jotwell readers may not have read it. That’s unfortunate. It deserves follow-up work by constitutional law scholars.

Agency Finance in The Age of Executive Government, by [Michael Greve](#) and [Christopher DeMuth](#), opens up a wide agenda for constitutional scholarship premised less on doctrinal issues, and more on a series of interlacing fiscal developments that have shifted power to the executive branch. The burgeoning administrative state, the continuing shift towards executive governance, and the lack of political accountability of administrative agencies have long been academic legal literature fodder. Most of these articles explore the doctrinal and policy nuances of the dividing lines between the political branches. The courts, meanwhile, have occasionally cabined the executive with an institutionally appropriate focus on fact-specific and precedent-based analysis. But both the academy and the judiciary are fundamentally inadequate to the task of cabining the executive branch. Neither can substitute for congressional control over and channeling of executive action, the main control built into the constitutional scheme of separated federal powers. Congressional retreat has facilitated executive creep.

Taking a “follow the money” approach to power relations between the political branches, Greve and DeMuth highlight the many ways executive functions are funded outside congressionally controlled appropriations processes. Though “[t]he written Constitution is unequivocal, indeed emphatic, in committing fiscal powers to Congress and in withholding them from the executive,” (P. 2), agency funds increasingly arise from sources outside this mechanism. Little examined compared to other aspects of executive creep, the “growth of off-budget finance reflects a pervasive, secular trend to *executive government*.” (P. 4.)

The size of this growth is unclear, as there is incomplete disclosure of the sources and amounts of the revenue streams that come to executive agencies outside the budget and appropriations process. The incentives behind this development, and its effects, are also unclear. Why have non-appropriated funds become ever larger in relation to appropriated funds? What does this development augur for notions of actual government operations, compared to how government under the Constitution is “supposed” to operate?

“Off-budget” financing includes executive “taxes” in the form of “license fees, royalties, proceeds from public lands, the sale of ordinary goods and services, and legal fines and settlements.” (P. 6.) Many times, such funds are spent by agencies directly rather than being deposited back to the Treasury for congressional use. Examples abound: military PX, gym, and club fees; Customs and Immigration Service green card fees; FCC “universal service” fees and PCAOB assessments on audited companies; CFPB funding “drawn” from the Federal Reserve system; law enforcement by “private attorneys general” who are paid fees for their work; retention of asset forfeitures by the Department of Justice; and fines and settlements for corporate crimes.

The last of these—fines and settlements—is the largest. The authors present in detail the following patterns concerning fines and settlements:

(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. (P. 17.)

Though not explored in the article, much of this same analysis could be applied to other, smaller sources of executive branch revenue streams. And this series of issues could be explored in individual articles focusing on specific agencies.

What has driven monetary settlements with financial institutions and other corporate entities, as opposed to individual criminal prosecutions of culpable executives? The authors hypothesize several possibilities: (1) legal explanations, such as difficulty obtaining individual convictions or problematic evidence of wrongdoing; (2) political explanations, such as partisan control of federal agencies and state Attorneys General, lobbying proficiency of financial institutions, or personal connections; and (3) an agency-centered theory of non-appropriated budget maximization.

What conclusions may be drawn from the existence of large and growing amounts of agency self-funding? The authors list several, but the most interesting is that “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.” Though controversial, such “evolution” has massive ramifications for the American constitutional experiment.

Should the courts accord more (or less) deference to legislative delegation of taxing and spending power than of regulatory authority? Are there implicit or explicit quid-pro-quos, where heavily regulated and favored industry incumbents disgorge some of their profits through fines and settlements that fund the regulatory agencies imposing entry barriers on other potential competitors? What are the implications of this story for the connection between our formal institutions for governance and the actual operation of government?

These real-world operations should be carefully examined by constitutional and administrative law scholars as well as by empiricists. Greve and DeMuth have ably presented a window on a significant issue that—if the rest of us take heed of this important article—should give rise to a major research agenda for constitutional scholars and others.

Cite as: Charles Shanor, *A “Follow the Money” Approach to Separation of Powers*, JOTWELL (September 7, 2016) (reviewing Michael Greve and Christopher C. DeMuth, Sr., *Agency Finance in The Age of Executive Government*, 16-25 *George Mason U. L. & Econ. Research Paper Series* (2016), available at SSRN), <http://conlaw.jotwell.com/a-follow-the-money-approach-to-separation-of-powers/>.