

**OVERSIGHT OF THE JUDGEMENT FUND:
IRAN, BIG SETTLEMENTS, AND THE LACK
OF TRANSPARENCY**

HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTEENTH CONGRESS
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CONTENTS

SEPTEMBER 7, 2016

	Page
OPENING STATEMENTS	
The Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Chairman, Subcommittee on the Constitution and Civil Justice	1
The Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on the Constitution and Civil Justice	3
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary	4
The Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary	45
WITNESSES	
Paul F. Figley, Professor, Associate Director of Legal Rhetoric, Washington College of Law—American University	
Oral Testimony	6
Prepared Statement	8
Jeffrey Axelrad, Professor, Professional Lecturer in Law, The George Washington University Law School	
Oral Testimony	32
Prepared Statement	34
Neil Kinkopf, Professor of Law, Georgia State University College of Law	
Oral Testimony	37
Prepared Statement	39
LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING	
Prepared Statement of the Honorable Chris Stewart, a Representative in Congress from the State of Utah	46
APPENDIX	
MATERIAL SUBMITTED FOR THE HEARING RECORD	
Response to Questions for the Record from Paul F. Figley, Professor, Associate Director of Legal Rhetoric, Washington College of Law—American University	54

OVERSIGHT OF THE JUDGEMENT FUND: IRAN, BIG SETTLEMENTS, AND THE LACK OF TRANSPARENCY

WEDNESDAY, SEPTEMBER 7, 2016

HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Subcommittee met, pursuant to call, at 10:30 a.m., in room 2237, Rayburn House Office Building, the Honorable Trent Franks, (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Goodlatte, King, Cohen, Conyers, Jackson Lee.

Staff Present: (Majority) John Coleman, Counsel; Jake Glancy, Clerk; (Minority) Perry Apfelbaum, Staff Director & Chief Counsel; James J. Park, Chief Counsel; Susan Jensen, Senior Counsel; Veronica Eligan, Professional Staff Member; and Matthew Morgan, Professional Staff Member.

Mr. FRANKS. Hearing will come to order. Welcome to all of you. I will now recognize myself for an opening statement. Our Nation's founding generation understood that the establishing popular control over government finance would provide an essential check on the executive branch. The tyrannical assertion of authority by the British Crown, as detailed in our Declaration of Independence, no doubt fostered this trust of unelected officials who were not directly accountable to the people.

In order that the purse strings stay close to the people, Article I, section 9, clause 7 of the United States Constitution provides that, "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."

History shows that there was once a time that Congress took seriously its role as guardian of the public Treasury and developed an organized method of raising revenue, appropriating that money for specific use, and accounting for the propriety and legality of its use.

Nevertheless, Congress has now ceded so much of its fiscal control to the executive branch. Early this year, Matthew Spalding of Hillsdale College testified before the House Budget Committee at

a hearing titled, “Reclaiming Congressional Authority through the Power of the Purse.”

In his written testimony he stated, “Congress must hold the power of the purse not because it is necessarily better at exercising it than the President is—though it well may be—but because it has been given this particular power as a check on the executive. Even more important, Congress has an obligation to jealously maintain control of the nation’s purse because it is the guardian of the public treasure, and so the public good.” Today’s hearing is about the Judgment Fund, which is a permanent, indefinite appropriation to pay judgment awards against the United States, as well as settlement negotiated by the Department of Justice.

This fund, which is administrated by the Bureau of Fiscal Service at the Department of Treasury, is indefinite because it sets aside an unlimited amount of money to pay judgments against the United States. It is permanent because Congress is not required to appropriate money to fund its use each year.

Indeed, the Judgment Fund’s legislative history indicates that its purpose was to reduce the workload of Congress. For most payments, the Judgment Fund is an efficient means to ensure timely redress for those with legitimate claims against the United States. Yet, in cases settled under questionable circumstances in which it is not clear that the claim would have resulted in a monetary judgment in court, there is clear need for transparency. When the public wants information, including Congress, that information should be easily accessible.

Now while the U.S. Department of Treasury provides an outline database for the “purpose of tracking the status of approved Judgment Fund payments,” it is difficult to search. The fields are incomplete, and it provides little information useful to the general public. The Treasury Department, at the request of the House of Representatives and the Senate Appropriations Committee, also submits an annual report to Congress, but it, likewise, provides completely inadequate information to easily identify a payment or to sufficiently provide for context for the payments listed.

More recently, the public has sought information regarding a \$1.7 billion settlement payment to the Islamic Republic of Iran related to the sale of military equipment, equipment stemming back to before the 1979 Iranian Revolution; \$1.4 billion was purportedly paid from the Judgment Fund as an interest on the principal amount.

I find the entire situation stunning, and I would like to submit for the record an August 27, 2016 article written by Andrew McCarthy that was published by the National Review. In this article, Mr. McCarthy details that an astonishing lack of information available to the public regarding this payment. My hope is that today’s hearing will bring some desperately needed transparency related to this matter. The Judgment Fund as a general issue, and what more may be done to reassert the appropriate and constitutional Congressional authority over the Nation’s purse strings, and I want to thank the witnesses again for being here today, and I look forward to their testimony, and I now yield to the Ranking Member for an opening statement.

Mr. COHEN. Thank you, Mr. Chair. We are back. That should be good: people's representatives in Washington. It is not necessarily good, though, because this Committee is the Subcommittee on the Constitution. And I was so proud to be a Member of the Judiciary Committee when I was elected to Congress that I asked; it was my first choice to be on the Judiciary Committee: so important, fundamental, Constitution law, guaranteed rights.

And here we are in an election year and this Committee has not had one single hearing on the Voting Rights Act, maybe as important of a law as exists to give people the most fundamental right: the right to vote, to have a say in who they elect.

That is what America is about. You go around the country, and what do people talk about? America, civil justice system, the rule of law, and people getting democracy and the right to vote. And this Committee has not had one hearing on the Voting Rights Act that the Supreme Court ruled unconstitutional, which means we need to come back and do something about it, which Jim Sensenbrenner well knows and a few other republicans. Not many. Not many.

At one point, to be on the bill to reestablish a Voting Rights Act, the Democrats wanted you to get a Republican for you to get on, so it would not be imbalanced, so I went on the floor to people I knew and people I thought might be okay and people I worked with, gone on CODELs with, and thought might have some interest to find Republican Members, so I could be on the bill. I might as well have gone to the South Indian Ocean and tried to find that airplane. It would have been easier than to find a Republican who was willing to put his name on a Voting Rights Act.

That is what this Committee should be dealing with, is extending the opportunity for people to vote, and when the Supreme Court struck down the Voting Rights Act it said that the States that were suspect needed pre-clearance. Times have changed.

Well, times have changed in a way, indeed, and they were not all in the solid south from going around the Carolinas and Georgia and Alabama and Mississippi and Louisiana and Texas. There were a few places in the rest of the country, so times change because some of the rest of the country got to be bad, too. But those are the primary states that have done things to jeopardize people's right to vote, so the courts have had to say, "North Carolina, your law is not good. You are going to have to go change it." They also did one in the Midwest. I think it might have been Wisconsin, but anyway.

That is what we ought to be doing, and some policeman are shooting people without due process. They are not resorting to the use of deadly force before using all other reasonable means of apprehension.

And so the police do a lot of good work. The police are essential to government and an ordered society and liberty and freedom and all that stuff. But there has been a whole lot of African American folks killed and videoed, and it is no coincidence that they have not had videos around to see White people get killed because it is not happening. It is Black people getting killed, and that is a deprivation under color of law. And have we had one hearing about that? No, but we are here on some law passed when Ike was President,

when republicans were republicans: 1950's. We got our priorities all messed up.

We ought to be dealing with voting rights and due process and death, and that is what we ought to be instead of trying to pick a partisan fight with the Administration over bringing some people home from Iran and giving them back the money they gave us in the 1970's to buy weapons they never got and less interest than they desired because we negotiated a good deal on the interest. Lucky we had that opportunity to bring those guys home. I commend the Administration for what it did to bring those people home, including the reporter; he got a lot of attention, but there were other Americans whose lives were just as valuable.

So I wish, Mr. Chairman, we would have hearings on the Voting Rights Act, on police shootings, on deadly force, on due process, and on the rights and the fundamentals that makes this Committee the Committee that it is and not go off on obscure topics to find ways to try to politicize the Administration and the election, and with that, I yield back the balance of my time.

Mr. FRANKS. I thank the gentlemen, and the Chair now recognizes the full Judiciary Committee Ranking Member, Mr. Conyers of Michigan for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman. I begin by welcoming three professors: Professor Figley, Professor Kinkopf, and Professor Axelrad to our discussion this morning. I also commend our Ranking Subcommittee Member for his insight on directions that we might otherwise attend to in the course of this session.

Now, the purpose of the hearing today is to examine the Judgment Fund of the Treasury Department created in 1956 to reduce its appropriations workload, and prior to establishing the fund, Congress devoted an inordinate amount of its time appropriating monies to satisfy run-of-the-mill, I would call them, legal judgments and settlements on a case-by-case basis.

Today, the Fund permits agencies to obtain payment for legal judgments and settlements without having to request appropriations from Congress under limited, statutorily-prescribed circumstances. Unfortunately, some on the Committee are more interested in criticizing the Administration's recent settlement of long-standing claims with Iran than in conducting an oversight of the fund.

To begin with, it was legally permissible for the State Department to request that the payments come from the Judgment Fund. The payment settled a longstanding claim made before the U.S.-Iran Claims Tribunal that related to a curtailed arms deal between the United States and the prerevolutionary government of Iran.

The tribunal was created to hear claims between our country and the Iranian nationals and their respective governments that arose as a result of the deterioration in relations following the Iranian Revolution. In order to avoid an adverse judgment before the tribunal, the State Department negotiated a \$1.7 billion deal to settle the claim, of which \$1.3 billion in interest payments came from the Judgment Fund itself.

As Professor Figley points out in his testimony, this is legally permissible, and past Administrations going back decades have used the fund to settle claims with Iran. In addition to being per-

fectly legal, the Iran settlement saved taxpayers billions of dollars. According to the State Department, negotiators determined that the United States could have possibly owed Iran billions more for over 30 years worth of interest on the \$400 million principal had the claim been adjudicated before the tribunal.

Rather than demonstrate that the Judgment Fund may encourage executive branch officials to negotiate profligate settlements, the Iran payments instead show that the State Department was acting to protect United States' financial interest.

And so finally, in terms of transparency, I note that the payments were disclosed to the public at the time that they were made, which was in January of this year, announced by the Obama administration itself.

So while much has been made of the timing of the payments in relations to Iran's release of American prisoners, it is undisputed that the Administration made no effort to hide these payments or that separate, unrelated teams carried out the negotiations for the settlement and the prisoner release. Although few would oppose greater transparency for government actions, the majority's examples of purported executive branch overreach, and that is not all of the majority, but those that have in settlement negotiations fail to show that the Administration has misused the Judgment Fund.

And so I look forward to the examinations and contributions of our witnesses we welcome here today, and I thank the Chairman.

Mr. FRANKS. And I thank the gentleman, and without objection, other Members' opening statements will be made part of the record.

So now, let me please introduce our witnesses. Our first witness is Professor Paul Figley. Professor Figley teaches torts and legal rhetoric at American University's Washington College of Law. Welcome, professor.

Our second witness is Professor Neil Kinkopf. Professor Kinkopf teaches constitutional law, legislation, and civil procedure at Georgia State University College of Law. And welcome to you, professor.

Our third and final witness is Professor Jeffrey Axelrad. Professor Axelrad is an adjunct professor at George Washington University Law School. And welcome to you, sir.

Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired.

Before I recognize the witnesses, it is the tradition of the Committee that they be sworn, so if you would please stand and be sworn.

Do you swear the testimony you are about to give before this Committee is the truth, the whole truth, and nothing but the truth so help you God? You may be seated. Let the record reflect that all the witnesses responded in the affirmative.

So I now recognize our first witnesses, Professor Figley, and if you would please turn on your microphone, sir, before beginning.

TESTIMONY OF PAUL F. FIGLEY, PROFESSOR, ASSOCIATE DIRECTOR OF LEGAL RHETORIC, WASHINGTON COLLEGE OF LAW—AMERICAN UNIVERSITY

Mr. FIGLEY. Thank you, Mr. Chairman. The proposals before the Committee today are nonpartisan. They are grounded in our constitutional system of checks and balances. The Founders, following the English model, assigned the power of the purse to the legislative branch. With regard to paying judgments and settlements, Congress has made decisions over the course of decades that, in their cumulative effect, have resulted in a significant transfer of power from Congress to the executive.

While this transfer was neither foreseen nor intended it is real. At this point, Congress has ceded almost all authority over the payments of judgments and settlements and greatly reduced its ability to track those settlements. Many of those decisions made sense at the time.

Prior to the emergence of the Internet, Congress withdrew requirements and reports about payments and judgments about settlements to reduce the paperwork that was then inaccessible for most purposes. Because there are no requirements for publication of those payments now, tracking payments to particular recipients, events, or attorneys is unduly complicated.

Databases on Treasury Department websites are posted on a voluntary basis and exclude the names of recipients and individual attorneys. The lack of mandatory publication of Judgment Fund payments obscures any public accounting of those payments. For example, it masked the payment of \$1.3 billion to Iran last January. It also undermines the Administration's Open Government Directive that calls for proactive dissemination of useful information "online in an open format that can be retrieved, downloaded, indexed, and searched."

These problems would be solved by enactment of H.R. 1669. Congress, through the Judgment Fund statute, has granted authority to the executive to pay judgments and settlements. Congress had largely controlled such payments until 1956 when the Judgment Fund, with a cap of \$100,000, was enacted.

Since 1977, there has been no limit on the size of Judgment Fund payments. The Judgment Fund was created for the simple task of paying judgments and settlements of claims against the United States. While it provided for the executive branch to make those payments without Congressional approval, it was never intended to bypass Congress' authority to decide whether to fund programs or policy initiatives, but it has demonstrably been used in that way.

The Judgment Fund as it now stands undermines Congress' power of the purse by providing an unlimited, unreviewable source of funds for some executive branch initiatives.

Republican and Democratic Presidents used it to further foreign policy goals by settling claims asserted by other countries. The Obama administration used it to quietly pay \$1.3 billion to Iran to settle a class action suit for much more money than necessary and to fund a new claims program it created without Congressional approval or judicial supervision. But for the open-ended nature of the

Judgment Fund, those Presidents would have had to seek money from Congress for their initiatives.

Congress, in the exercise of its power of appropriation, could have then chosen to provide the funding or not. As James Madison explained in Federalist No. 58, “the House of Representatives cannot only refuse, but they alone can propose the supplies requisite for support of government. They, in a word, hold the purse.” Congress can and should restore its authority to decide whether to approve huge payments to foreign countries, to establish generous compensation programs, or to fund other initiatives suggested by the executives that are somehow connected to some claim against the government. It can do so by placing limits on the size of payments that can be made from the Judgment Fund. Thank you.

[The prepared statement of Mr. Figley follows:]

Statement of Paul F. Figley*
Before the Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
United States House of Representatives
"Oversight of the Judgment Fund: Iran,
Big Settlements, and the Lack of Transparency"
September 7, 2016

Mr. Chairman, Mr. Ranking Member, Members of the Subcommittee:

Thank you for providing me this opportunity to share my views on "the Judgment Fund: Iran, Big Settlements, and the Lack of Transparency."

My testimony will address the Judgment Fund and its historical backdrop, the need for public disclosure of claims payments, and Executive Branch use of money from the Judgment Fund to finance political initiatives such as this year's \$1.3 billion payment to Iran. I strongly support enactment of H.R. 1669, the "Judgment Fund Transparency Act of 2015." I also suggest that Congress restore its authority over government spending by placing limits on the size of payments that can be made from the Judgment Fund.

For two hundred years Congress struggled to find an effective method for

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deciding and paying disputed claims against the government.¹ It sought to retain control over payments made from the public fisc, a responsibility assigned it by the Appropriations Clause, but by a method that did not drown its members in administrative detail. Its pursuit of these two contending goals led it to try different approaches. By the 1960s, the myriad steps taken by Congress had resulted in a significant transfer of power from Congress to the Executive that was neither foreseen nor intended. In the subsequent four decades, Congress has followed that same path to the point where it has now ceded almost all authority over claims payments and greatly reduced its ability to track those expenditures.

The Judgment Fund² is the mechanism Congress established to pay most settlements and judgments against the federal government. The Fund, originally created in 1956 and limited then to paying judgments of \$100,000 or less, was repeatedly expanded until the current, 1977 version that automatically pays settlements and judgments regardless of amount. It is “a permanent, indefinite appropriation for the satisfaction of judgments, awards, and compromise

¹ Much of this portion of my testimony is taken from my article, Paul Figley, *The Judgment Fund: America’s Deepest Pocket & its Susceptibility to Executive Branch Misuse*, 18 U. Pa. J. Const. L. 145 (2015). Please see that article for a more complete exposition of these points.

² 31 U.S.C. § 1304 (2012).

settlements against the United States”³ The Judgment Fund is available only under specific circumstances, but when available it makes payments without any review by Congress. The government uses it to pay out billions of dollars.

The Judgment Fund sits at the intersection of two longstanding policies rooted in the Constitution, Legislative Branch authority over the purse and public accounting of government expenditures. The Constitution addresses them both in Clause 7 of Article I, Section 9: “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.” The lack of mandatory publication of Judgment Fund payments obscures any public accounting of those payments. As it is now being used, the Judgment Fund undermines Congress’ power of the purse by providing an unreviewable source of funds for some Executive Branch initiatives.

I. The Payment of Claims and Judgments

A. Historical Background

The Appropriations Clause puts the power of the purse—the authority to spend public funds—in the hands of Congress. The Clause requires that Congress

³ U.S. Gov’t Accountability Office, GAO-08-978SP, 3 Principles of Federal Appropriations Law 14-10 (3d ed. 2008).

pass an appropriation before funds can be paid out of the Treasury. The Appropriations Clause directly pertains to any claim for money damages from the federal government. It requires a specific funding source for any government payment, including settlements and court-ordered judgments. Agency appropriations cannot be used to pay judgments against the United States or its agencies, absent specific authorizing legislation. Such legislation could be an appropriation for a particular settlement or judgment, a general appropriation for categories of settlements or judgments, or a statute that authorizes payments from a pre-existing appropriation. If Congress chose not to appropriate money to pay a judgment, the judgment would not be paid. Accordingly, until Congress had enacted an applicable waiver of the United States' sovereign immunity, the federal government could not be sued for damages.

The absence of an applicable waiver of sovereign immunity in the early Republic did not leave citizens without a remedy. The First Amendment gave each citizen the right "to petition the government for redress of grievances." Individuals used that right to seek private legislation granting them financial remedies for claims against the government. From the outset, Congress directly resolved individual claims with legislation.

Although Congress tried various non-legislative methods for resolving claims

in the 18th and 19th centuries, it retained authority over payments. From the 1820s to 1855, claims were resolved principally through the congressional claims process. Initially, the system seemed to function adequately, but dissatisfaction grew in Congress because of the legislative time spent on claims and the poor results that were obtained.

When Congress passed the Amended Court of Claims Act of 1863 it gave that court authority to enter final judgments on claims based on federal laws, regulations, or contracts. It also provided that final judgments “be paid out of any general appropriation made by law for the payment and satisfaction of private claims . . .” Accordingly, individual judgments could be paid without the need for a case specific appropriation. Congress made periodic appropriations to pay those judgments, beginning in 1864.

Congress continued to use the legislative claims system to resolve other claims, principally for takings under the Fifth Amendment and torts. For those claims the problems of the legislative claims system persisted--the mass of private claims consumed Congress’ time and attention, and meritorious claims were delayed or left unresolved.

In 1887 Congress enacted the Tucker Act, expanding the Court of Claims’ jurisdiction to also include Constitutional claims in non-tort cases. A key purpose

was to remove Congressional responsibility for deciding “a large mass of private claims which were encumbering our business and preventing our discharging our duties”⁴ Judgments adverse to the United States were reported to Congress which appropriated funds to pay them. Later statutes reinforced the practice of appropriating for specific judgments.

Congress continued to use the legislative claims system to decide tort claims. The procedures were unfair and the process was burdensome to Congress. In 1946 Congress passed the Federal Tort Claims Act. As originally enacted, the FTCA provided that its judgments be paid under the same procedure as the Tucker Act, by enactment of a specific appropriation. Initially, the FTCA provided that administrative settlements made by agencies and all settlements made by the Attorney General of cases in litigation were to be paid by the head of the relevant agency from “appropriations that may be made therefor”⁵ Congress duly appropriated funds to pay such settlements. To remove the bureaucratic burden of continually enacting appropriations bills to pay settlements, Congress amended the FTCA in 1950 to allow payment of administrative settlements from

⁴ See 18 **Cong. Rec.** 2678 (1887) (statement of Rep. Tucker).

⁵ Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 403(c), 60 Stat. 812.

“appropriations available to such agency.”⁶

B. The Judgment Fund

As the number of judgments requiring Congressional approval increased in the 1950s, so did the burden on the Executive and Legislative branches of going through the routine process of preparing, explaining, and enacting the necessary legislation. Delays in receiving Congressional approval of legislation to pay court judgments increased interest charges and caused consternation to successful plaintiffs. To address these problems, in 1953 the General Accounting Office recommended the establishment of a permanent, indefinite appropriation for the payment of judgments. In 1956 Congress acted on that recommendation by creating the Judgment Fund — an open-ended, permanent appropriation for the payment of judgments of district courts and the Court of Claims that did not exceed \$100,000. Under the new procedure, judgments for that amount or less were paid automatically, without the need for legislation. Use of the Judgment Fund successfully reduced the administrative burden, interest charges on judgments, and the irritations caused by delayed payments.

In 1961, in view of the success of the 1956 statute, Congress expanded the

⁶ See Act of Sept. 23, 1950, Pub. L. No. 81-830, § 9, 64 Stat. 985, 987 (1950); H.R. Rep. No. 81-2984, at 9-10 (1950).

scope of the Judgment Fund so that it could be used to pay settlements of claims in circumstances where it would pay final judgments. In 1977, Congress further extended the Judgment Fund to cover, inter alia, all Court of Claims and FTCA judgments regardless of amount, and all FTCA settlements for more than \$2,500. Congress took this action to eliminate what it had come to see as an “extra, unnecessary legislative step and improve the efficiency with which the government makes settlement on its just debts.”⁷ In 1978, it adopted the same, open-ended use of the Judgment Fund for several other statutes that had required congressional appropriations for payments.

The Judgment Fund pays settlements and court ordered judgments, but it is available only under very specific circumstances.⁸ It can pay awards or settlements

⁷ See H.R. Rep. No. 95-98, at 184 (1977).

⁸ Its key provisions, now codified at 31 U.S.C. § 1304(a), provide:

- (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—
- (1) payment is not otherwise provided for;
 - (2) payment is certified by the Secretary of the Treasury; and
 - (3) the judgment, award, or settlement is payable—
 - (A) under section 2414 [“Payment of judgments and compromise settlements” from “district court . . . , the Court of International Trade,” “a State or **foreign court or tribunal**”], 2517 [Payment of Judgments from the Court of Federal Claims], 2672 [FTCA agency approved administrative claims], or 2677 [FTCA Attorney General approved settlements] of title 28;
 - (B) under section 3723 of this title [the “Small Claims Act,” allowing agency settlement of small property claims];
 - (C) under a decision of a board of contract appeals; or

only if they are “final” and not subject to further appeal. The Judgment Fund is available only for monetary awards, as opposed to injunctive relief that requires the expenditure of funds. It can only make a payment that “is not otherwise provided for,” which is one that cannot be legally paid from another appropriation or fund. This is so, even if an agency has run out of funds, because “there is only one proper source of funds in any given case.”⁹ Payments can only be made for litigative awards under statutes designated by Congress. A Judgment Fund payment must be certified by the Secretary of the Treasury, but the certification requirement is ministerial in nature.

The Judgment Fund’s chief purpose is to pay settlements and court ordered judgments. Normally agencies are not required to reimburse the Judgment Fund. Agencies are required to reimburse it for payments made under the Contract Disputes Act, the No FEAR Act, and some Equal Access to Justice Act matters.

(D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10 [Settlement of specific claims by the military], section 715 of title 32 [same], or section 20113 of title 51 [Specified “Powers of the Administration in performance of functions”].

³¹ U.S.C. § 1304(a) (emphasis added).

⁹ See 2008 **GAO Principles of Federal Appropriations Law** at 14-39, 14-40 (citing 66 Comp. Gen. 157, 160 (1986)).

II. Public Disclosure of Claims Payments

In the debate on the Statements and Accounts Clause at the Constitutional Convention, George Mason proposed that reports of expenditures should be required annually; James Madison argued that the legislature should be given discretion to choose when to make such disclosures. Ultimately Madison's view prevailed, resulting in the clause's "from time to time" language and allowing Congress to decide when to publish expenditures. Both sides in the debate agreed that the public had a right to know how the government spent its money.

The history of congressional requirements for public reporting of claims payments reflects a gradual series of changes that eventually led to less and less reporting. Today, no one can know all the claims the government pays in any year.

From the earliest days of the Republic, when Congress has paid claims through private legislation it has published the amount and the recipient's identity. When Congress established the Court of Claims in 1855 it required that in each case the court forward to it a report and draft bill for enactment. When it passed the Amended Court of Claims Act of 1863 it included a requirement that annual reports state the names of successful claimants and the amounts received. The Tucker Act had a similar requirement. The FTCA, as originally enacted, called for heads of agencies to annually report to Congress on all claims the agency paid

under its administrative claims authority, stating “the amount claimed and the amount awarded, and a brief description of the claim.”¹⁰ In 1965 Congress repealed the FTCA reporting requirement as part of an effort to reduce needless reports and publications

There is no readily available way to find what Judgment Fund payments have been made to a particular claimant or from a specific incident. No statute requires disclosure. The Bureau of Fiscal Services, the Treasury component responsible for the Judgment Fund, voluntarily maintains website databases containing some information about Judgment Fund payments. But the information does not include the facts regarding any claim, the identity of claimants, or, in some instances, the attorneys. Indeed, Treasury refuses to release the names of claimants or individual attorneys under the Freedom of Information Act on grounds that those names fall within FOIA’s exemption for “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”¹¹

The public has a right, grounded in the First Amendment and the common law to access all final judgments and court decisions. Treasury’s practice of

¹⁰ Federal Tort Claims Act, Pub. L. No. 79-601, § 404, 60 Stat. 812, 843 (1946) (codified as amended at 28 U.S.C. § 2673 (2006)).

¹¹ See 5 U.S.C. § 552(b)(6).

withholding case names, claimant's names, and fact summaries from its Judgment Fund databases makes that information difficult to collect in the aggregate, although such information is readily retrievable on a case by case basis for matters in litigation by anyone who knows the parties' names or the docket number. Requiring the public to file a FOIA request to get a docket number to use to find a plaintiff's name or complaint is akin to making records available only in one remote government file room. This sort of run-around is inconsistent with the Administration's Open Government Directive that calls for proactive dissemination of useful information, without "waiting for specific requests under FOIA," "online in an open format that can be retrieved, downloaded, indexed, and searched by commonly used web search applications."¹²

There is even more reason for easy public access when individuals, groups, or entities receive government funds. The Statement and Account clause of the Constitution directs that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." There is a long history of disclosure of names and amounts paid to those who sought private bills from Congress. As a matter of policy the Department of Justice will not agree

¹² Open Government Directive: Memorandum for the Heads of Executive Dep'ts and Agencies from Peter Orszag, Dir., Office of Mgmt. and Budget 2 (Dec. 8, 2009).

to settlements or consent decrees that contain confidentiality provisions. While that policy allows rare exceptions, those “must be considered in the context of the public’s strong interest in knowing about the conduct of its Government and expenditure of its resources.”¹³ There is little reason to keep successful claimants from being identified as successful claimants. As Judge Joseph Anderson observed in the context of confidentiality provisions, “the desire to protect someone from relatives, telemarketers, and burglars could also be used to keep secret the names of the winners of state-run lotteries. Yet no one would seriously argue that the names of lottery winners should be shrouded in secrecy enforced by the government.”¹⁴

Maintaining the fog around Judgment Fund payments undercuts the transparency that makes for better government. No strong governmental interest supports keeping Judgment Fund information secret. Routine publication of Judgment Fund payments would bring the disinfecting sunlight of disclosure and would discourage payments made for illegitimate or irrelevant reasons.

Congress should require public disclosure of detailed information on all

¹³ 28 C.F.R. § 50.23.

¹⁴ Joseph F. Anderson, Jr., Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy, 55 **S.C. L. Rev.** 711, 740 (2004)

Judgment Fund payments, as would be required by the “Judgment Fund Transparency Act of 2015,” H.R. 1669. This bill would amend the Judgment Fund to require that Treasury promptly place on a public website: the agency whose actions gave rise to the claim, the name of the plaintiff or claimant, the name of the attorney for the plaintiff or claimant, the amounts paid, a brief description of the facts, and the agency submitting the claim. This information is readily available; agencies now provide it (other than the summary) to Treasury when they submit claims or judgments for payment. A one-sentence fact summary could easily be included in the agency submission.

Congress might consider adding another subsection to H.R. 1669’s revision of § 1304. That subsection would state, “Except with regard to children under eighteen, the disclosure of information required in this section shall not be considered a ‘clearly unwarranted invasion of personal privacy’ for purposes of Title 5, United States Code.” This would clarify that Treasury should not continue its practice of not publishing names of claimants and individual attorneys.

III. Financing Political Decisions with Judgment Fund Money

A. Payments to Iran and Pakistan

Much attention has been given to last January's payment to Iran of \$400 million in principal and \$1.3 billion in interest in settlement of Iran's claim for money it had paid into a Trust Fund for the Foreign Military Sales Program. The United States had held that money since 1979. Iran pursued its claim in the Iran-United States Claims Tribunal. In a letter of March 17, 2016, Julia Frifield, Assistant Secretary, Legislative Affairs, at the State Department, informed Chairman Edward Royce of the House Committee on Foreign Affairs that, "The balance of \$400 million was paid from the Trust Fund itself. The payment for the compromise on interest was provided out of the Judgment Fund."

The Judgment Fund was available to pay this settlement. The Office of Legal Counsel concluded in 1984 that the Iran-United States Claims Tribunal "falls within the reach of foreign tribunals as that term appears in [the Judgment Fund statute]."¹⁵ The Judgment Fund had been used in 1991 to pay another settlement

¹⁵ Mem. from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, to D. Lowell Jensen, Acting Deputy Attorney General (Feb. 24, 1984) (quoted in Opinion of the *Office of Legal Counsel* July 10, 1989, 13 Op. O.L.C. 240 n.2 (regarding settlement with Iran of claims arising from USS Vincennes shooting down Iran Air Flight 655 on July 3, 1988); see Mem. From

with Iran on a matter pending before the Iran-U.S. Claims Tribunal, according to Assistant Secretary Frifield's March 17 letter. That \$278 million settlement was for weapons Iran had ordered and paid for, but did not receive because of a U.S. arms embargo. Similarly, the Clinton Administration used the Judgment Fund to pay \$324,600,000 of a settlement of Pakistan's claim for twenty-eight F-16 fighters that were embargoed.¹⁶

All of these payments had been delayed for political reasons, either as a response to Iran's seizure of American hostages or Pakistan's development of nuclear weapons. Likewise, decisions about the timing and amounts to be paid were made in a political context and to further each President's agenda.

B. Equal Credit Opportunity Act Class Actions

Native American farmers,¹⁷ Hispanic farmers,¹⁸ and women farmers¹⁹ filed class action suits against U.S. Department of Agriculture (USDA) alleging unlawful discrimination under the Equal Credit Opportunity Act (ECOA). Members of those

Benjamin R. Civiletti, U.S. Attorney General, to Jimmy Carter, President of the United States (Jan. 15, 1981).

¹⁶ See Todd David Peterson, Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice, 2009 *BYU L. Rev.* 327, 367-68 (2009).

¹⁷ See *Keepseagle v. Glickman*, 194 F.R.D. 1, 3 (D.D.C. 2000).

¹⁸ See *Garcia v. Veneman*, 211 F.R.D. 15, 17 (D.D.C. 2002) (denying class certification of Hispanic farmers).

¹⁹ See *Love v. Veneman*, 224 F.R.D. 240, 242 (D.D.C. 2004) *aff'd in part, remanded in part sub nom. Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006) (denying class certification of women farmers).

groups received payments from Judgment Fund money. Their suits followed successful ECOA litigation which alleged that black farmers were treated unfairly in USDA programs for loans, crop payments, and disaster payments and in investigations of those allegations.²⁰

In the Keepseagle litigation, Native Americans brought a class action suit alleging USDA discrimination in reviewing applications for farm loans or benefits programs and in investigating complaints of discrimination. They sought equitable

²⁰ The Pigford black farmer litigation had two discrete phases. In Pigford I the court certified a class for both liability and injunctive relief. Although plaintiffs' claims had some apparent merit, many were barred by the ECOA's statute of limitations. The Office of Legal Counsel was asked whether the government could waive the limitations defense and settle the claims. See Statute of Limitations & Settlement of Equal Credit Opportunity Act Discrimination Claims Against the Dep't of Agric., 22 Op. O.L.C. 11, at *1, 1998 WL 1180049 (1998). OLC reasoned that because the statute of limitations was part of the terms of the consent to the waiver of sovereign immunity "established by Congress," "modifying the terms of consent require[d] legislative action." Id. at *3. It concluded, "ECOA's statute of limitations applies to both administrative and litigative settlements of ECOA claims, and it may not be waived by the executive branch." Id. at *15. Congress resolved this jurisdictional problem by including a targeted waiver of the statute of limitations in an appropriations bill, effectively authorizing plaintiffs' claims. Cash settlements, exceeding \$770,000,000, were paid from the Judgment Fund.

A large number of claims were filed late and were not resolved on their merits. Dissatisfaction with these outcomes led to political efforts to reopen the process. In response, Congress included in the 2008 farm bill a new procedure for those claims to be decided. Congress set the maximum amount to be paid under the new statute, and appropriated \$100,000,000 for that purpose. The subsequent suits were consolidated in Pigford II and the parties agreed to a \$1,250,000,000 settlement. Because the Judgment Fund can be used only to make payments "not otherwise provided for" and Congress had appropriated money in the 2008 farm bill to pay the Pigford II claims, the Judgment Fund could not be used to pay the settlement. In 2010, Congress enacted the Claims Resolution Act of 2010 that appropriated the money for Pigford II.

and monetary relief. In 2001 Judge Emmet Sullivan certified a class only for injunctive relief and deferred the question of certifying a class seeking monetary relief. Nonetheless, in 2010 the parties agreed to a massive settlement.

The Keepseagle settlement did not reflect the strength of the government's litigative position. Because the plaintiffs' class had not been certified for monetary relief, plaintiffs faced the prospect of having to separately litigate each claim. Such a failed class action would typically have very little settlement value. Nonetheless, the government settled for \$760,000,000, including a Settlement Fund of \$680,000,000 paid from the Judgment Fund. This proved to be a vast overpayment. Although the complaint had predicted at least 19,000 claimants, only 4,472 farmers perfected their claims. A total of \$299,999,288 was paid from the Settlement Fund that had been established with Judgment Fund money, including \$60,800,000 in attorney fees and costs. That left \$380,000,712. Because no provision had been included in the settlement agreement for reversion of excess money to the United States, that money was not returned to the Treasury; various Native American groups continue to litigate how it should be disposed of.

The significant point from the Judgment Fund perspective is that over \$380,000,000 from the Judgment Fund, more than half the settlement amount, will be used for some purpose other than paying class members' claims. As Judge

Sullivan observed in denying a motion to modify the settlement:

Although a \$380,000,000 donation by the federal government to charities serving Native American farmers and ranchers might well be in the public interest, the Court doubts that the judgment fund from which this money came was intended to serve such a purpose. The public would do well to ask why \$380,000,000 is being spent in such a manner.²¹

In Garcia v. Veneman and Love v. Veneman, class action suits similar to Keepseagle were filed by Hispanic farmers and woman farmers, respectively. Garcia and Love were both assigned to the same judge and followed a similar path. In both cases the district court's decisions to deny class certification were affirmed on appeal. When the Supreme Court denied certiorari on those decisions, the only means left for a Garcia or Love plaintiff to pursue an ECOA claim was to individually litigate. For the next year the Department of Justice declined to settle either case on a class-wide basis.

On February 25, 2011, USDA and the Department of Justice unilaterally announced a claims program open to all Hispanic farmers and women farmers. Secretary Vilsack informed Congress that, "Under the plan, the United States will make available at least \$1.33 billion from the Judgment Fund to eligible claimants

²¹ Keepseagle v. Vilsack, 118 F. Supp. 3d 98, 104 (D.D.C. 2015).

to resolve their discrimination claims.”²² In the “Framework for Hispanic or Female Farmer’s Claims,” the government created “what it’s calling an ‘Administrative Claims Program’” as a “voluntary alternative to litigation” available to all Hispanic and women farmers, not just those in contact with the Garcia and Love attorneys.²³ Hispanic and women farmers and ranchers received about 12% of the announced \$1.33 billion. Awards amounting to \$159,950,000 were paid directly from the Judgment Fund;²⁴ no \$1.33 billion claims fund was created.

The litigative risk posed by Garcia and Love hardly justified the government’s decision to establish this new claims program. No class had been certified, making the prospect of sizeable adverse judgments extremely remote. The government’s interest in voluntarily settling thousands of claims was not anticipated by the court, “given the history of the case.”²⁵

For purposes of our discussion, the key point is that the Hispanic and

²² Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations for Fiscal Year 2012: Hearing before a Subcomm. of the S. Comm. on Appropriations 112th Cong. p.36, S. Hrg. 112-452 (2011).

²³ Status Conf. at 10-12, Garcia v. Veneman, 1:00-cv-02445 (D.D.C. Aug. 24, 2012) (quoting government counsel).

²⁴ Hispanic and Women Farmers and Ranchers Claims Resolution Process, Audit Report 50601-0002-21, Office of Inspector General, U.S. Dept. of Agriculture 32 (March 2016) <https://www.usda.gov/oig/webdocs/50601-0002-21.pdf>.

²⁵ Status Conf. at 11-12, Garcia v. Veneman, 1:00-cv-02445 (D.D.C. Feb. 19, 2010) (detailing the comment of Judge Robertson).

Women Farmers and Ranchers Claims Process was created by the Executive Branch without legislative input or judicial supervision. The Process is a new federal administrative claims program that gave select individuals cash payments directly from the Judgment Fund. There is reason to believe politics provided a key motivation for its creation. Following the Pigford II settlement, the Administration was under intense pressure from Congressional leaders and Secretary Vilsack to compensate Hispanic farmers in a similar manner. Eight senators sent President Obama a letter noting that “approximately \$2.25 billion” had been allotted to “resolve USDA discrimination against black farmers” and calling for equal treatment for Hispanic farmers and ranchers.²⁶ Hispanic and women farmers and ranchers lobbied for treatment comparable to that provided to other groups.

C. Limiting the Judgment Fund

The Judgment Fund was created to simplify the payments of final judgments and normal litigative settlements, and to reduce the burden of enacting unnecessary legislation. It was never intended to provide the Executive Branch a backdoor into the Treasury or to weaken Congress’ power of the purse. But it has done both.

²⁶ Letter from Robert Menendez, Senator, to Barack Obama, President (June 17, 2009).

The Executive has used the Judgment Fund to finance substantive policy initiatives, both abroad and domestically. President George H. W. Bush and President Obama used it to further foreign policy goals by settling claims Iran brought before the Iran-United States Claims Tribunal. President Clinton used it to it to further foreign policy goals by settling claims brought by Pakistan. The Obama Administration used it to settle the Keepseagle litigation on overly generous terms and to fund the Hispanic and Women Farmers and Ranchers Claims Process it had unilaterally created. But for the open-ended nature of the Judgment Fund, those Presidents would have had to seek money for these initiatives from Congress. Congress, in the exercise of its power of appropriation, could have then chosen to provide the funding – or not. As James Madison explained in *Federalist No. 58*:

The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people . . .

Congress can and should restore its authority to decide whether to approve

huge payments to foreign countries, to establish generous compensation programs, or to fund other initiatives suggested by the Executive that are somehow connected to someone's claim against the government. It can do so by placing limits on the size of payments that can be made from the Judgment Fund.

The Judgment Fund statute, could be amended (changes in bold) to state:

31 U.S. Code § 1304 - Judgments, awards, and compromise settlements.

(a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—

- (1) payment is not otherwise provided for;
- (2) payment is certified by the Secretary of the Treasury **(not in excess of X million dollars in any one case)**; and
- (3) the judgment, award, or settlement is payable—
 - (A) under section 2414, 2517, 2672, or 2677 of title 28;
 - (B) under section 3723 of this title;
 - (C) under a decision of a board of contract appeals; or
 - (D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 20113 of title 51.

- (4) Payments under this section are not authorized –**
 - (A) when the proposed payment is part of a judgment or settlement of multiple claims with payments totaling more than the amount stated in subsection (2); or**
 - (B) when for any reason, the proposed payment, as a practical matter, will control or adversely influence the disposition of other claims or judgments totaling more than the amount stated in subsection (2).**

The change in subsection (A)(2) follows the format of the original Judgment Fund

statute.²⁷ New subsection (A)(4)(b) is taken from the longstanding Department of Justice Civil Division limitation on delegations of authority to compromise cases.²⁸

The difficult policy question is deciding how low to set the cap in subsection (a)(2). That decision requires balancing Congress' desire to limit its delegation to the Executive of authority to make payments against the need to protect Congress from expending unnecessary time and effort on pro forma legislation. My suggestion, based primarily on a tort practice, is to set the cap at \$500,000,000.

Thank you for this opportunity to express my views.

²⁷ Pub. L. No. 84-814 § 1302, 70 Stat. 678, 694-95. It appropriated "such sums as may hereafter be necessary for the payment, not otherwise provide [sic] for, as certified by the Comptroller General, of judgments (**not in excess of \$100,000 in any one case**) rendered . . . against the United States" *Id.* (emphasis added).

²⁸ See 28 C.F.R. Part 0, Subpart Y, Appendix [Directive No. 1-10] § 1(e)(1)

Mr. FRANKS. Thank you, professor. And I now recognize, as our second witness, Professor Axelrad. Sir, please turn on that microphone before speaking.

**TESTIMONY OF NEIL KINKOPF, PROFESSOR OF LAW,
GEORGIA STATE UNIVERSITY COLLEGE OF LAW**

Mr. KINKOPF. Thank you, Mr. Chairman and Members of the Committee. It is a real honor to appear before you today. On July 3, 1988, the U.S.S. Vincennes was patrolling the Straits of Hormuz in the Persian Gulf. It identified an incoming aircraft as a hostile F14 fighter. It made 10 attempts to make contact with that fighter jet to establish its identity. None of those contacts was responded to, so the Vincennes shot the plane down.

It turns out it misidentified the plane. It was not an F14 fighter jet. It was Iran Air flight 655, a flight following its regular route from Tehran to Dubai. All 290 passengers aboard the plane were killed. The Reagan administration and following Bush administration dealt with the aftermath of this mistake. They settled claims filed by the Islamic Republic of Iran in the International Court of Justice *ex gratia*. *Ex gratia* means without admitting any liability.

And in fact, there were very strong defenses. After all, we tried 10 times to contact the plane, and it never responded. So, without admitting liability, the United States determined to make a payment to Iran out of the Judgment Fund for humanitarian purposes, and that was the expressed purpose of the payment, not to settle a valid legal claim, but for humanitarian purposes that would promote our foreign policy interests.

I raise this not because I want to engage in some kind of tit-for-tat or say, "Well, Republicans do this; Democrats do this." That is not my point. My point is that this illustrates just how broad the Judgment Fund's legal authority is and how it has always been understood over the span of decades by Administrations from both political parties.

Moreover, during that span, Congress has amended the Judgment Fund on numerous occasions, and in none of those amendments has it indicated a contrary view of the power granted by the Judgment Fund. Everything that the Obama administration has done is well within not only the letter of the Judgment Fund law, but within the spirit of that law. Paying a valid discrimination claim when the United States has admitted that, for decades on end, it discriminated on account of race against Native American, Hispanic, and female, and African American farmers and ranchers is not an abuse of the Judgment Fund. All right?

The United States has admitted liability in those cases and compensating victims of that kind of constitutional deprivation is a valid function of the Judgment Fund. In fact, it is why it is there. So, the Obama administration has not acted in any way contrary to the letter or the spirit of the law. Now, Professor Figley has raised, I think, very important transparency issues with respect to the Judgment Fund.

I think those issues should be addressed, and I think the legislation pending before this Committee with respect to the disclosure provisions would be salutary, would help the public to understand how the Judgment Fund is being used, and could provide a deter-

rent against abuse that might take place at some point in the future. Thank you.

[The prepared statement of Mr. Kinkopf follows:]

**Written Testimony of
Neil Kinkopf
Professor of Law, Georgia State University, College of Law
Before the House Judiciary Committee
Subcommittee on the Constitution and Civil Justice
“Oversight of the Judgment Fund: Iran, Big Settlements, and the Lack of
Transparency”**

September 7, 2016

The Judgment Fund fulfills a fundamentally important duty of the federal government: to provide an effective remedy when the rights of individuals are violated. Chief Justice John Marshall wrote the classic expression of this principle in *Marbury v. Madison*, 5 U.S. 137 (1803).

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.... The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

In plainer terms, the idea is that government officials are bound to respect the legal rights (including contractual rights, property rights, and the right to be free of tortious injury) of individuals. These rights are meaningless if there is no effective way to enforce them. The Judgment Fund provides an essential remedy. As such, this obscure and highly technical law actually advances one of our highest constitutional aspirations – that our government observe the rule of law.

Laudable as the Judgment Fund’s function may be, the Committee is to be applauded for exercising oversight into how the fund is actually managed in practice. The Judgment Fund is an extraordinary statute that confers important power and discretion on the Executive Branch. It is extraordinary in that it enacts an indefinite and unlimited appropriation, in contrast to the regular appropriations, which are available for a definite period and for specified purposes. Prior to the Judgment Fund’s enactment in the 1950s, Congress directly appropriated funds to pay specific claims against the federal government. This required the enactment of thousands of private bills each year. This system of private bills was not only a significant drain on congressional resources and time, it was unfair to individuals. Payment came to depend more on the political connections of the claimant than on the merits of the underlying claim.

In this respect, the Judgment Fund is an example of a common challenge in governing our ever-growing nation and its vast economy. It is simply impossible for Congress to legislate in a way that provides for every conceivable situation. As a result, Congress has followed the approach of setting out in broad terms the basic principles of the law and then delegating to the

Executive Branch the authority to elaborate those principles in application and in regulations that fill in the details. This approach to governing raises two concerns. First, the extensive authority delegated to the Executive Branch is subject to overreaching. Second, Congress can be seen as shirking its responsibility to exercise the constitutional legislative power. This is a concern because Congress is accountable to the people through elections, whereas the bureaucrats to whom power is delegated are not.¹

As to the first concern, the courts have been reluctant to interfere with the exercise of delegated authority by the Executive Branch. First, the Supreme Court has repeatedly held that a delegation of authority from Congress to the Executive Branch is valid as long as it is accompanied by an intelligible principle. In a classic case, the Court upheld the delegation to the Federal Communications Commission of the power to regulate the broadcast spectrum “in the public interest.” *NBC v. United States*, 319 U.S. 190, 225-226 (1943); *accord Whitman v. American Trucking Ass’n*, 531 U.S. 457 (2001). Second, the Court has held that if the President does not violate the Constitution even if the President acts beyond the scope of statutory power. *See Dalton v. Specter*, 511 U.S. 462 (1994). Third, when courts review agency action to determine whether it was within the scope of statutory authority, the courts tend to be highly deferential. *See, e.g., Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Congress has responded to both sets of concerns over the years. In order to avoid abdicating its constitutional responsibility and to make sure that bureaucratic decisions are subject to some accountable oversight, Congress for decades imposed the legislative veto procedure on delegated power. An agency exercising delegated authority could act, subject to a veto by Congress.² The Supreme Court has ruled legislative vetoes to be unconstitutional on the grounds that this mechanism violates the doctrine of separation of powers. *See INS v. Chadha*, 462 U.S. 919 (1983). The setting of that case is instructive. For many decades Congress dealt with the issue of whether to grant a suspension of deportation for foreign nationals through the mechanism of private bills. Each year Congress would consider hundreds of such measures, each specific to an individual alien. As with the Judgment Fund, this system was time consuming and outcomes depended more on political connections than on the merits of the case. Congress decided to set down standards for suspending deportation and to authorize the Attorney General to suspend deportation whenever he determined that the standards had been met. The Attorney General’s decision was subject to veto by a vote of either the House or the Senate. The Supreme Court struck down the legislative veto as unconstitutional because it gave Congress the ability to exercise power (to overrule the Attorney General) without going through bicameralism and presentment. The Supreme Court has further elaborated this principle, holding that Congress may not assign power to an official it controls, such as the Comptroller General. *See Bowsher v. Synar*, 474 U.S. 714 (1986).

¹ This problem is exacerbated when the recipient of delegated authority is an independent agency (*i.e.*, one headed by an officer who can only be removed for cause and so is not subject to the supervision and control of the President).

² Some legislative vetoes were effective on the vote of both the House and the Senate, others allowed a single chamber to veto administrative action, and still others allowed a Committee of the House or Senate to issue the veto.

In other statutes, Congress has imposed procedural and disclosure requirements on the Executive Branch. Examples include the Administrative Procedure Act, 5 USC 551, *et seq.*, and the Freedom of Information Act, 5 USC 552. The Courts have consistently upheld these requirements. The key distinction between these statutes and those, such as legislative vetoes, that the Court has struck down is that these laws do not grant power to Congress itself or anyone subject to direct congressional control.

I understand that Congress has considered legislation that would require disclosure of how the Executive Branch is administering the Judgment Fund. Such a requirement would be salutary and, in principle, it is impossible to imagine a reason to oppose such a measure. I have reviewed H.R. 1669, The Judgment Fund Transparency Act. The bill would clearly adhere to the constitutional requirements that the Court has articulated in that it would not grant power to Congress or to any official whom Congress can control. The information it would require the Executive to disclose would allow the public, and Congress, to monitor the use of the Judgment Fund and to have some basis for identifying instances of overreach. This bill seems a modest measure that respects the constitutional separation of powers while allowing Congress to fulfill its constitutional responsibilities.

I look forward to the opportunity to address any questions you may have.

Mr. FRANKS. Thank you, Professor. I will take a moment here to apologize for mis-introducing you. We had these turned around up here, and Professor Axelrad, the apology goes to you because I introduced you, and the other gentleman was in line to speak, so I apologize to both of you. But, Professor Axelrad.

TESTIMONY OF JEFFREY AXELRAD, PROFESSOR, PROFESSIONAL LECTURER IN LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. AXELRAD. Thank you for providing this opportunity to share my views on the Judgment Fund and on H.R. 1669. H.R. 1669 proposes needed amendments to provisions the Judgment Fund statute. My testimony is based on the basic principles and legislative history of statutory provisions applicable to payment of judgments and settlements that are outlined in Professor Figley's statement.

H.R. 1669 seeks to provide transparency when the Judgment Fund is the means of transferring funds from the public treasury to claimants and litigants with the exception of one provision, which I will discuss. Transparency of the bill is a sensible, modest requirement and furthers the public interest in learning who is receiving the payments.

Moreover, it is appropriate that Congress reclaim its role in appropriating funds in each instance when the largest payments are made. I also suggest one provision of H.R. 1669 be deleted because the provisions value is less than the unintended consequences.

The unintended consequences are predictable, significant confusion and diversion time and effort of government personnel. The Judgment Fund does have specific limits on its availability. An indispensable condition is the judgment or settlement be payable under certain sections of the United States Code. The Attorney General is charged with implementing the most significant of these statutory keys to the Judgment Fund.

The usual key for payment of non-contractual disputes is 28 U.S.C. section 2414, which gives the key to the Attorney General. This provision imposes a high and important responsibilities on the Attorney General. Most agencies do not have a direct fiscal incentive to guard against excessive payments from the Judgment Fund and that payments from the Judgment Fund do not reduce agency appropriations available for their programs.

It is the Attorney General's special duty to guard against unauthorized or excessive payments. Incentive to yield to their perceived special need du jour is all too evident. It is to the Justice Department that the unpopular, hard task of guarding the Judgment Fund against abuse falls. Eternal vigilance and reason careful analysis must be the hallmark of the Justice Department's exercise of this responsibility.

The revisions of H.R. 1669 and Professor Figley's proposed changes to H.R. 1669 further these vital functions and likely will enhance the ability of the Justice Department to stand firm against abuse of the Judgment Fund unless it is particularly clear that a payment is authorized.

For the most part, the requirements of H.R. 1669 are straightforward. One proposed requirement should be removed. That requirement is the bill's provision to create and make public a brief

description of the facts that gave rise to the claim. Many payments are made when the facts giving rise to the claim are disputed. The exercise of stating facts will slow down the process of seeking payment for all claims.

The delay will be due not only to the additional burdens, but to efforts to avoid criticisms when the facts are debatable, as is often the situation of ordinary claims and litigation. Consideration of how to phrase the facts that gave rise to the claim would save a more than trivial amount of agency time and resources, which, in my view, can be devoted to more worthwhile activities.

H.R. 1669 serves the goal of transparency in the expenditure of public funds by providing basic information on who receives the funds when the funds are paid pursuant to a settlement or a judgment. If the one subsection I have discussed is removed H.R. 1669 can achieve a salutatory outcome without significant cost. I would be happy to answer any questions.

[The prepared statement of Mr. Axelrad follows:]

STATEMENT OF JEFFREY AXELRAD¹
BEFORE THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE
UNITED STATES HOUSE OF REPRESENTATIVES
REGARDING H.R. 1669
September 7, 2016

Thank you for providing this opportunity to share my views on the Judgment Fund that 31 U.S.C. § 1304 establishes and on H.R. 1669, a bill to provide for transparency of payments made from the Judgment Fund. This bill proposes needed amendments to provisions of the Judgment Fund statute. This statute enables payment of many settlements and judgments of civil claims and cases to which the United States or its agencies is a party. My testimony is based on the basic principles and legislative history of statutory provisions applicable to payment of judgments and settlements that are outlined in Professor Figley's Statement.

H.R. 1669 seeks to provide transparency when the Judgment Fund is the means of transferring funds from the public treasury to claimants and litigants. With the exception of one provision, which I will discuss, transparency the Bill envisions is a sensible, modest requirement and furthers the public interest in learning who is receiving the payments. Moreover, it is appropriate that Congress reclaim its role in appropriating funds in each instance when the largest payments are made. I also suggest one provision of H.R. 1669 be deleted because the provision's value is less than the unintended consequences. The unintended consequences are predictable significant confusion and diversion of time and effort of government personnel. I

¹ I am a Professorial Lecturer in Law at George Washington University Law School. From 1967 -2003, I served as an attorney at the Department of Justice, including from 1977-2003 as Chief/Director of the Torts Section/Branch. My remarks represent my personal opinions and do not represent the views of The George Washington University or any other organization.

concur with Professor Figley that we have learned through experience that his proposed cap on payments is a sensible means by which Congress can reclaim its central role over large appropriations.

Backdrop

Article I, Section 9, Clause 7 of the Constitution addresses expenditure of funds from the public fisc:

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.

The legislative power—the power to make laws—is, of course, vested in Congress pursuant to Article I, Section 1 of the Constitution. For this reason, enactment of a law is necessary to pay a judgment or settlement that a court has entered or that has been agreed upon by the parties. The Judgment Fund, 31 U.S.C. § 1304, is such a law. This statute, as amended, creates a permanent, indefinite appropriation “to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgements or otherwise authorized by law” when the conditions set forth in Section 1304 are met. The limits and conditions of payment that Section 1304 specifies are fundamental to its reach. Sixth Circuit Judge Rogers has opined, in a somewhat different context but on the mark for consideration of the reach of Section 1304, that “[c]ourts cannot take public funds and give them to private parties unless it is particularly clear that Congress intended for the courts to do so.”² The Appropriations Clause makes it

² *Ford Motor Co. v. United States*, 768 F.3d 580,594 (6th Cir. 2014) (J. Rogers, concurring)

evident that this this principle applies equally, or possibly with greater force, to the Executive Branch.

Professor Figley's Statement provides the details of large settlements that raise very substantial questions about the use of the Judgment Fund to pay large amounts, sometimes actually creating entirely new claims programs that are not based on a law that Congress has enacted.

The Judgment Fund does have specific limits on its availability. An indispensable condition is that the judgment or settlement be payable under certain sections of the United States Code. The Attorney General is charged with implementing the most significant of these statutory "keys" to the Judgment Fund. The usual "key" for payment of non-contractual disputes is 28 U.S.C. § 2414. This statute provides in pertinent part—

[P]ayment of final judgments rendered by [courts] . . . shall be made on settlements by the Secretary of the Treasury . . . Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final. Except as otherwise provided by law, compromise settlements of claims referred to the Attorney General shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise.

This provision imposes high and important responsibilities on the Attorney General. To paraphrase my article on the topic,³ most agencies do not have a direct fiscal incentive to

³ Jeffrey Axelrad, *What is the Judgment Fund?*, 1 Ann. 2004 ATLA-CLE 435 (2004).

guard against excessive payments from the Judgment Fund, in that payments from the Judgment Fund do not reduce agency appropriations available for their programs. It is the Attorney General's especial duty to guard against unauthorized or excessive payments. The incentive to yield to the perceived special need *du jour* is all too evident. It is to the Justice Department that the unpopular, hard task of guarding the Judgment Fund against abuse falls. Eternal vigilance and reasoned, careful analysis must be the hallmark of the Justice Department's exercise of this responsibility. Conscientious performance of this function is essential to maintain the integrity of this payment system, and to prevent the Judgment Fund from being perceived as available as an Executive Branch slush fund. The provisions of H.R. 1669 and Professor Figley's proposed changes to H.R. 1669 further these vital functions and likely will enhance the ability of the Justice Department to stand firm against abuse of the Judgment Fund unless it is "particularly clear"⁴ that a payment is authorized.

H.R. 1669 and an Emendation

For the most part, the requirements that H.R. 1669 imposes are straightforward, enabling the public to learn the identity of the agency submitting Judgment Fund payments, coupled with the identity of recipients, and the amount of payments of the main—principal—liability and ancillary payments such as costs and attorney fees. Some, but not all, of this information is already public. The identity of persons, whether individuals, corporations, or other persons, however, is not made available at present when Judgment Fund statistics are compiled. Likewise, the amount paid to attorneys and the identity of the attorneys is not currently available. This information is central to knowing whether the

⁴ See footnote 2, above.

Judgment Fund is, or is not, being abused. It is even possible that this requirement will itself reduce the likelihood of abuse.

One proposed requirement does not further these goals. That requirement is the Bill's provision to create and make public "[a] brief description of the facts that gave rise to the claim." The bill recognizes that most government agencies are utilizing the Judgment Fund. Agencies required to state the "facts" will as a practical matter use different approaches to reciting the "facts" giving rise to a claim. Moreover, as I know from the differing versions of facts often presented in tort claims and cases, many payments are made when the "facts" giving rise to the claim are disputed. The exercise of stating "facts" will slow down the process of seeking payment for all claims. The delay will be due not only to the additional burdens, but to efforts to avoid criticism when the "facts" are debatable as is often the situation in claims and litigation. Consideration of how to phrase "the facts that gave rise to the claim" will consume a more than trivial amount of agency time and resources, which, in my view, can be devoted to more worthwhile activities. At present, a general description of the basis for the claim, but not the "facts" pertaining to a specific claim, is made available. See, <https://ifund.fms.treas.gov/ifradSearchWeb/JFPymtSearchAction.do> (click on optional search fields). Coupled with the identification and transparency requirements elsewhere in H.R. 1669, presently available information on the general basis for the claim suffices. If a particularly large judgment or settlement exceeds a cap that Congress re-establishes, Congress will need to enact an appropriation in each instance. Congress can and no doubt will expect additional information to justify enacting an appropriation to pay a large amount if it is not clear at the outset that enactment is appropriate.

For each of the foregoing reasons, I respectfully suggest that the Bill Section 2 (a)(d)(5) be removed from the Bill.

Conclusion

H.R. 1669 serves the goal of transparency in the expenditure of public funds by providing basis information on who receives the funds when the funds are paid pursuant to a settlement or judgment. This is a modest initiative. It may shine at least some light, as well, on how the Judgment Fund operates in practice, especially when a large settlement is paid. This will enhance the ability of both the Congress and the public to determine the practical operation and effect of the current payment regime. If the one subsection I have discussed is removed, H.R. 1669 can achieve these salutary outcomes without significant cost.

I will be happy to answer any questions.

Mr. FRANKS. I now recognize the Chairman of the full Committee, Mr. Goodlatte, for a statement.

Mr. GOODLATTE. Thank you very much, Mr. Chairman. James Madison, in the Federalist No. 58 stated, "The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of government. They, in a word, hold the purse, that powerful instrument by which we behold in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance and finally reducing as far as it seems to have wished all of the overgrown prerogatives of the other branches of the government.

This power of the purse may in fact be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people for obtaining a redress of every grievance and for carrying into effect every just and salutatory measure."

Today, we examine the effects that occur when this power is usurped by the executive branch. Indeed, in its current form, the Judgment Fund allows the executive branch to pilfer taxpayer dollars to fund its overgrown prerogatives, without requiring any Congressional action.

Congress must check these abuses by conducting rigorous oversight and determining whether additional legislation is required to curb abuses of the Judgment Fund. In recent years, however, it has become apparent that little information is known about individual payments from the Judgment Fund, particularly with regard to the payment of settlements. Searches for individual payments from the Judgment Fund in a database maintained by the Treasury Department reveals little about the underlying facts, how the funds were used, and even who received them. In a system of government in which Congress is accountable for the way in which taxpayer dollars are spent, this is unacceptable.

I look forward to the witnesses' testimony today and to their recommendations regarding how Congress, the immediate representatives of people, can improve its oversight of this permanent, indefinite appropriation as well as improve transparency for the public. And I look forward to the questions, which will now ensue, with regard to that testimony. Thank you.

Mr. FRANKS. And I thank the Chairman. And before I begin my question time here, I would like to first ask for unanimous consent to submit for the record a statement by Representative Chris Stewart of Utah, who is sponsor of H.R. 1669, the "Judgment Fund Transparency Act of 2015."

I want to thank Mr. Stewart for his leadership on this issue and for his submission to this Committee. And without objection, it will be entered into the record.

[The prepared statement of Mr. Stewart follows:]

**Prepared Statement of the Honorable Chris Stewart,
a Representative in Congress from the State of Utah**

Thank you Mr. Chairman for allowing me to include this written statement for today's important oversight hearing of the Judgment Fund.

The Judgment Fund is the mechanism that Congress established in 1956 to pay settlements and judgments issued against the United States. It is a "permanent, indefinite appropriation" that is available to make payments without any review from Congress. By now we're all familiar with the Administration's decision to take \$1.3 billion out of the fund, convert it to cash, and deliver it to Iran. Yet this isn't the only recent egregious use of the fund. Three years ago, the *New York Times* reported on what was likely an illegal billion dollar payout to thousands minority farmers who never even sued the government.

The Treasury Department files a yearly report on the Judgment Fund with Congress and also maintains a webpage that can be searched. However, the cryptic and otherwise limited information related to each payout has made the database almost entirely useless. There is no information on what the government did wrong nor is there information on who benefited from a payout. Journalists and transparency groups revealed last month that between 2009–2015, the Federal Government paid over \$25 million out of the Judgment Fund to "unnamed" or "redacted" recipients. It is unacceptable to leave the American people in the dark about how so much of their money is being spent.

To address the shortcomings of the current Fund, I've sponsored legislation, H.R. 1669. This legislation will require Treasury to make public any payment from the judgment fund and include: The name of the agency named in the judgment; the name of the plaintiff or claimant; the amount paid in principal liability and any ancillary liability such as attorney fees, and interest; and a brief description of the facts which led to the claim.

This bill is especially urgent given the Administration's brazen dishonesty with the American people about the circumstances behind the payment of \$400 million worth of foreign currency to the Iranian regime. Not only has the President emboldened our enemy and provided cash to them despite the fact that they are determined to kill Americans and attack our country and allies, but he hid his actions from the American people. It took months for the Administration to admit the payment was "leverage" for the release of Americans held hostage. And yet even now, the Judgment Fund's website does not list the payment of this ransom to Iran.

The Judgment Fund Transparency Act may not prevent bad decisions, but it will help expose those decisions to the American people. I hope that though this hearing, the Committee will be informed on how to improve this process and make the Judgment Fund a tool for the American public to understand the decisions made by their government. I urge the committee to pass this bill and send it to the floor.

Mr. FRANKS. I will now proceed under the 5-minute rule of questions, and I begin by recognizing myself for 5 minutes.

Professor Figley, if I can, I will begin with you, sir. I would like to share a portion of the investigative journal Claudia Rossett's review in the *New York Sun* in which she reported that the sum of \$1.3 billion in interest paid by the United States to the Islamic Republic of Iran was not clearly identified on the Department of Treasury's website.

"The 13 payments that may explain what happened are found in an outline database maintained by the Judgment Fund. A search for Iran, since the beginning of this year, turns up nothing, but a search for claims in which the defendant is the State Department turns up 13 payments for \$99,999,999.99."

Boy, you might be able to round that up pretty easily. "They were all made on the same day, all sharing the same file and control reference numbers, all certified by the U.S. Attorney General, but each assigned a different identification number. They add up to \$1,299,999,999.87 or 13 cents less than the \$1.3 billion Mistery Obama and Kerry announced in January.

Together with a 14th payment of just over \$10 million, the grand total paid out of Treasury from the Judgment Fund on that single day, January 19th, for claims pertaining to the State Department comes to roughly \$1.31 billion. Treasury has provided no answers to my queries or anyone else's about whether these specific payments were made for the Iran settlement, nor why these transfers comprised 13 payments, each of which was 1 cent under \$100 million, nor whether the \$10 million related to the same matter.

So, professor, Ms. Rossett's digging only turned up more questions really. And it is clear that the public has a right to know how its taxpayer dollars are being spent. And while the same information is publicly available on the Treasury Department's website, it lacks sufficient detail to identify specific claims. What information, in your opinion, should be provided so that every American, if they so wish, can find out about specific payments from the Judgment Fund?

Mr. FIGLEY. If the Treasury Department Judgment Fund search database had columns for recipient and attorney, then we would have a lot more information than we have now. When I say that the Judgment Fund masked the payment of the \$1.3 billion, it did so by allowing the payment to be made without identifying who the money went to.

Mr. FRANKS. All right. Thank you, professor. So, Professor Axelrad, I will ask you; in your written testimony, you state that most agencies do not have a direct fiscal incentive to guard against excessive payments from the Judgment Fund and that payments from the Judgment Fund do not reduce agency appropriations available for their programs, kind of a disincentive right there.

I mean, we have already as a Congress ceded so much of our Article 1 powers, which is a government is what it spends. This is of profound significance, and for agencies to be disincentivized to reduce these payments is kind of a lining up of the planets. It is the Attorney General's special duty to guard against unauthorized or excessive payments. Can you elaborate on this duty? And specifically, what are the statutory limitations on the Attorney General's authority with regard to the Judgment Fund?

Mr. AXELRAD. There are two kinds of limitations imposed on the Attorney General. First of all, the Judgment Fund statute itself must include a provision for the payment. 2414 of Title 28 is such a key. It provides for payments where the Attorney General approves a settlement or decides not to further appeal from a judgment of a Federal court.

In that event, the settlement must be under the underlying substantive statute. For instance, under the Federal Tort Claims Act, a lot of payments are made. If the claim is for a disputed claim where there might have been an accident or potential medical malpractice, the administrative procedure authorizes the payment even without litigation. But the Federal Tort Claims Act was a balance statute. It includes a number of exceptions.

If an exception applies, the Attorney General cannot settle the claim using the Judgment Fund because Congress has limited the reach of the underlying substantive statute. The same rule applies under other substantive statutes.

Mr. FRANKS. Thank you, professor. My time is up, so I now recognize Mr. Cohen, our Ranking Member, for 5 minutes of questions.

Mr. COHEN. Thank you, Mr. Chair. As I said in my opening statement, I thought we should be dealing with and continue to feel we should be dealing with Voting Rights Act and deprivation of rights under color of law, the shooting of citizens, using all other forms of apprehension instead of resorting to deadly force.

I think those are the issues we should care about, and criminal justice reform where people are being kept in jail for longer and longer periods of time, people not having their opportunity to have freedom when it is unnecessary to have them incarcerated for long times for drug offenses: crack cocaine which we have found there is—we passed a bill to say it was an 18-to-1 ratio instead of 100-to-1 ratio on crack and cocaine. President signed it; it is law. So for probably the only time in history, there has been a governmental body that has lessened the amount of evidence and, therefore accordingly, the sentence for a law that had been put on the books before.

So, you know, we dealt with that a little bit, but that is part of criminal justice sentencing reform to try to say that our sentencing today should be commensurate with the crime, that we should not be the Gulag of the world which we pretty much are, putting more people in prison than any other country. And so those are the things I think we ought to be doing.

Let me ask the three professors here, since we do not have the three tenors; we have three professors. None of you all think anything—the President or the Administration did in regard to Iran was illegal, do you? Anybody think it is illegal? No. I did not think so.

And it is interesting that we have this hearing today. We come back after the longest recess in modern history, almost 2 months away. Zika, opioids, Flint, Michigan, Voting Rights Act, Black Lives Matter; we come back with this. And coincidence, what a coincidence; Washington Post last night. “Congressional Republicans want to censor the Obama administration for sending \$400 million in ransom to Iran on the same day as American prisoners were released, an issue that will play big on the campaign trail 2 days before the election.”

And it goes on to say that there is a resolution that has been introduced, and we may vote on it, et cetera, et cetera. It is a great coincidence that they have this resolution, and they want to cite the President and the Administration and censor them for something that we have three professors here, the scholars chosen, two by the majority party and one by us, that says they did not do anything wrong.

But this is all part of the same game. We need to govern. We are not here as just a place to talk about issues and flame our electorate to see, maybe we can find an issue, and maybe they will elect our candidate, even though he is not in line with most of us. But maybe we will find a way to do it. It is pathetic.

I yield to Ms. Jackson Lee if she would like. I know she is not a Member of this Committee, but if you would like to finish up my time, I yield to you for that purpose without objection.

Ms. JACKSON LEE. Mr. Ranking Member you are very kind and your question—

Mr. FRANKS. The gentlelady needs to stand, please. Please continue, I am sorry.

Ms. JACKSON LEE. As I say, the Ranking Member is very kind. Thank you to the Chairman of the Subcommittee and the Chairman of the full Committee. Thank you to Mr. Conyers.

As I was proceeding, I am glad that you already asked the question, Mr. Cohen, as to whether or not the expending of the Iran funds was illegal. It was not illegal. I am reading the history of the whole claims process here in the beginning, as interpreted by one of the—one of the individuals. But let me raise the question with Mr. Kinkopf.

As you know in the early 1800's, we had Committees, Standing Committees reviewing every claim. And so let me just basically say the feasibility of doing that, even though we have a court of claims, the feasibility of Committees in Congress looking at claims, whether it be international or domestic, how feasible is that?

Mr. KINKOPF. Not feasible at all.

Ms. JACKSON LEE. And the basis upon which I understand the most recent—well, the previous expenditure of funds dealing with the Iran nonnuclear proliferation had to do with an existing judgment. Am I correct?

Mr. KINKOPF. That is correct.

Ms. JACKSON LEE. And so how would you interpret those expenditure of funds? As I read the Constitution, it says, "On the basis of an existing judgment."

Mr. KINKOPF. The expenditure of those funds was perfectly legal and authorized by the law, by the Judgment Fund law.

Ms. JACKSON LEE. And so is there something that we can improve? Is there a basis for us to review, taking and separating apart the legitimate expenditure of funds under the Iran agreement and that expenditure? Is there something else that we should be looking at?

Mr. KINKOPF. Well, I think it is legitimate to look at the transparency of the fund, you know? It is interesting, going to your first question, that no one has proposed that this authority be taken back to Congress, right? But, rather, that Congress do a better job of its oversight function with respect to the Judgment Fund.

And I think that that is true, right? Congress' oversight role is important, not only with respect to the Judgment Fund, but with respect to all authority that is delegated to the executive branch, which is vast and necessary. So the Judgment Fund is but one instance of that broader phenomenon of governing. And your role is to exercise oversight, make sure the laws are being administered in a way that you approve of, and if not, then to legislate to get them to be what you want them to be.

Ms. JACKSON LEE. So finally, in this instance, they were done appropriately with those funds. Is that yes?

Mr. KINKOPF. Absolutely.

Ms. JACKSON LEE. And so I have no quarrel with our reasoned review. But as I end, as my colleague has said, I do want to put on the record that we are in great need of the voting rights restoration. I hope that we will be doing a number of other elements from

Zika to Flint and other things that I hope we will be able to do in a bipartisan way as well. With that, I yield back. Thank you.

Mr. FRANKS. And I thank the gentlelady, and I apologize for interrupting her earlier. And we now recognize the Ranking Member of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman, and welcome the observations of the gentlelady from Texas. Could I ask, Professor Kinkopf, do you think that we should limit high-dollar judgments from going before the Judgment Fund, or if an agreement is particularly high or unpopular, even, that we should do something different from what is being done?

Mr. KINKOPF. Well, I think your question points to a problem with putting a cap based on dollar amount. One of the major problems of having Congress perform this function is one that history demonstrated, and that is getting your claim paid had more to do with your political connections than the merits of your claim, right? And so, putting a dollar cap on the Judgment Fund will return claims to Congress' jurisdiction, to Congress' power. And those same kind of political games that were played over a century before the adoption of the Judgment Fund can be played out again.

And I think in the years since the Judgment Fund was adopted, it would be fair to observe that, if anything, sort of the ability of Congress to get along and not politicize matters has gone down rather than up.

Mr. CONYERS. Professor Figley, do you have an additional view that you would like to share with us on this? Please do.

Mr. FIGLEY. Yes, sir. The Judgment Fund works very well when it is used to pay individual claims. At some point, it is available for other purposes, and it is—I absolutely agree that the Obama administration had the authority under the Judgment Fund statute to pay and settle the Iranian claim for interest.

But that is not to say that that was not a decision that had political overtones or something that Congress did not have an interest in. When you look to the use of the Judgment Fund to set up new programs, then I think there is a real problem, and that is what the Administration did with regard to the Hispanic and women farmers and ranchers process. The Judgment Fund was never intended to give discretion to any Administration to create new programs without financing obtained from Congress. I think a cap would solve that problem. Whether the cap should be \$500 million or \$2 billion I do not know.

But very few individual cases are worth that much money. And if Congress must spend some time dealing with those very large cases, it may be time well spent. There are very few things we can track back and see that John Quincy Adams, Abraham Lincoln, and Millard Fillmore agreed upon. But they all agreed that legislative people should not be deciding individual claims.

However, when it comes to major decisions involving huge amounts of money, Congress has an obligation, and the fact that the Judgment Fund has worked very well for many years on the vast majority of cases does not mean that Congress should not reassert its authority of this otherwise uncapped source of money.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. FRANKS. And I thank the gentleman. This concludes today's hearing. I want to thank all of the witnesses for attending. I want to thank the audience, and I thank the Members.

And without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record. And with that, this hearing is adjourned.

[Whereupon, at 11:26 a.m., the Subcommittee adjourned subject to the call of the Chair.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

Response to Questions for the Record from Paul F. Figley, Professor, Associate Director of Legal Rhetoric, Washington College of Law—American University

Answers to Questions for the Record received on September 15, 2016

Paul Figley

Before the Subcommittee on the Constitution and Civil Justice

U.S. House of Representatives Committee on the Judiciary

Following the Hearing on

**“Oversight of the Judgment Fund: Iran, Big Settlements,
and the Lack of Transparency” (September 7, 2016)**

1. H.R. 1669 explicitly requires the disclosure of “The name of the plaintiff or claimant,” and “The name of counsel for the plaintiff or claimant.” These provisions are clear on their face and would seem to preclude Treasury from withholding those names as protected by the Privacy Act. Why do you nonetheless recommend an additional provision that would state, “Except with regard to children under eighteen, the disclosure of information required in this section shall not be considered a ‘clearly unwarranted invasion of personal privacy’ for purposes of Title 5, United States Code”?

The Department of the Treasury has been aggressive in withholding names of people and individual attorneys who receive Judgment Fund payments. Those names are not published on Treasury’s on-line spreadsheets. The Bureau of Fiscal Services’ annual “Judgment Fund Transparency Report[s] to Congress” spreadsheets (<https://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/congress-reports.htm>) contain a column for “Plaintiff’s Counsel,” but not “Plaintiffs”; many entries under “Plaintiff’s Counsel” are blank or contain “(REDACTED FOR PRIVACY).” The Bureau of Fiscal Services’ “Judgment Fund Payment Search” on-line spreadsheet (<https://jfund.fms.treas.gov/jfradSearchWeb/JFPymtSearchAction.do>), does not contain columns for “Plaintiffs” or “Plaintiff’s Counsel.”

When Treasury produces Judgment Fund transmittal documents in response to Freedom of Information Act requests, it provides copies of court documents that show each case’s docket number and court. Treasury deletes from those court documents the names of individuals and individual attorneys,

asserting that their disclosure would be “a clearly unwarranted invasion of personal privacy” protected by exemption 6 of the FOIA.

Absent some language in the statute explicitly addressing the FOIA, I am concerned that Treasury will read the “[u]nless the disclosure of such information is otherwise prohibited by law” language in HR 1669 as a license to continue withholding names of recipients and attorneys. Of course, the Committee has a much better understanding of these matters and may well conclude that clarifying language is not necessary.

2. The Judgment Fund has been in its current form since 1966. What facts or changed circumstance warrant placing a cap on it now?

In the vast majority of instances the Executive Branch has been a good steward of the Judgment Fund. Only on rare occasions has an Administration made huge payments from the Judgment Fund in situations where a neutral observer would see a political motivation to the payment. But those instances are increasing. It is fair to expect that they will continue to increase.

In my written testimony I mentioned three examples involving foreign policy: the 1991, \$278 million settlement by the Bush Administration for weapons that had not been delivered to Iran; the 1998, \$324,600,000 settlement by the Clinton Administration for twenty-eight F-16 fighters that were never delivered to Pakistan; and this year’s payment of \$1.3 billion by the Obama Administration for interest on money Iran had paid into a Trust Fund for the Foreign Military Sales Program. Each of these payments was in settlement of an arguably valid claim and, therefore, could properly be paid from the Judgment Fund. Still, the nature of the payments’ negotiation and timing reflect that political considerations were in play. Absent the Judgment Fund’s open-ended grant of authority, each President would have needed an appropriation from Congress to make those foreign payments.

The enrolled Justice Against Sponsors of Terrorism Act provides another example where an Administration might use the Judgment Fund to make a huge payment to a foreign country. This could happen if American plaintiffs are successful in litigation under that Act, and the defendant country brings an

indemnity action against the federal government. While there is little likelihood that such an indemnity action would be successful in court, if an Administration settled the foreign country's claim, the Judgment Fund would pay it without Congressional review.

The Obama Administration has also used the Judgment Fund in politically-charged domestic situations. It settled the *Keepseagle* class action litigation. That case had little settlement value because a class for monetary claims had not been certified and the number of claimants was unknown. The settlement took \$680 million from the Judgment Fund, but despite generous terms for each claimant, only about paid out \$300 million. Because the settlement did not provide for the return of leftover money to the United States, the government will not recover the remaining \$380 million. Various Native American groups are litigating over how that money will be spent.

The Obama Administration also used the Judgment Fund to finance a new administrative claims program, the Hispanic or Female Farmers Claims Process. It did so after the *Garcia* and *Love* class action suits by Hispanic and female farmers had failed. There was intense political pressure on the Administration to do something for these farmers that was comparable to the compensation provided in the Pigford litigation. The resulting Hispanic or Female Farmers Claims Process, which was announced as a \$1.3 billion program, paid claimants \$160 million – all from the Judgment Fund.

Congress should place a cap on the Judgment Fund. The Executive Branch has increased its use of the Fund to finance \$100 million political initiatives, including domestic programs. The uncapped Judgment Fund provides a way to obtain financing without going through the appropriations process. Secretary Vilsack was candid about this when he explained the Administration's creation of the Hispanic or Female Farmers Claims Process:

There [are] two significant differences, between the Pigford II litigation which Congress appropriated money for and the Love and Garcia claims, which you've alluded to as the Hispanic and women cases.

The first difference is that the Supreme Court of the United States denied class certification to the Garcia plaintiffs and I believe also to the Love plaintiffs, but clearly neither one of those two cases were certified as a class action

And the second difference is that **we don't have to have an appropriation from Congress** for Garcia/Love; **this is something that can be resolved**, as is the case with virtually every other claim against the United States **from the Judgment Fund**.¹

With the Judgment Fund now on the Executive's radar as an easy way to finance new programs and initiatives, it is likely to be used again. Congress should preserve its authority over the purse by putting a cap on the Judgment Fund now.

3. How could we make federal agencies more accountable with regard to the Judgment Fund?

Several options are available.

A. One would be to require agencies to reimburse the Judgment Fund for all payments attributable to that agency. That is the process for payments made under the Contract Disputes Act and the No FEAR Act, and for some Equal Access to Justice Act payments. Up until 1966, Federal Tort Claims Act settlements were paid from agency funds. When the FTCA was revised that year, the statute directed that the Judgment Fund pay FTCA settlements below \$100,000 (then the limit on Judgment Fund payments) and above \$2500.² The reason for this change was not addressed in the committee reports or by the one witness who appeared at the hearing on the proposed legislation.³ In 1977, Congress further extended the Judgment Fund to cover, *inter alia*,

¹ News Transcript, Release No. 0629.10, USDA Office of Communications, Media Conference Call on 2010 Farm Income Forecasts, Trade, Statistics and Final Passage of Pigford II Settlement (Dec. 1, 2010) (emphasis added)
http://www.usda.gov/wps/portal/usda/usdahome?contentid=2010/12/0629.xml&navid=Recovery_News&deployment_action=retrievecontent.

² Act of July 18, 1966, Pub. L. No. 89-506, §§ 1(c), 6, 80 Stat. 306, 306-07.

³ See S. REP. NO. 89-1327 (1966) (lacking discussion on the issue); H.R. REP. NO. 89-1532 (1966) (same); *Improvement of Procedures in Claims Settlement and Government Litigation: Hearing before the Subcomm. of the H. Comm. on the Judiciary*, 89th Cong. 5 (1966).

all FTCA judgments regardless of amount, and all FTCA settlements over \$2,500.⁴

Making agencies reimburse the Judgment Fund for all payments would certainly catch their attention, but it might not significantly alter their behavior. Agencies are not motivated by the single interest of maximizing monetary value; they respond to political interests rather than financial ones. Agencies will weigh the political cost of choosing a safer (or lower risk) option against the cost of reducing their core agency functions and more politically-valued programs.⁵ When damages are paid out as a consequence of such choices, an agency can rationalize the payment as “a cost of public policy.”⁶ Accordingly, agencies are not responsive to financial deterrence in the same way that private entities are.

Requiring agencies to reimburse the Judgment Fund for all payments might significantly disrupt the programs of smaller agencies. A single government-caused traffic accident that killed ten physicians attending a conference could result in Judgment Fund payments of \$30 million. If the agency’s budget was \$100 million, such payment would require dramatic changes in operations. Of course, Congress could appropriate money to make up the shortfall and restore the agency’s operations.

B. A second option would amend the Equal Access to Justice Act to require agencies to reimburse the Judgment Fund for all payments made under that statute.

EAJA created three fee-shifting mechanisms to allow eligible parties to recover costs and attorneys fees incurred in agency adjudications and civil litigation against a federal agency or the United States. The first, applicable to judicial cases and codified at 28 U.S.C. § 2412(b), makes the United States liable for attorney fees “to the same extent that any other party would be liable under

⁴ Supplemental Appropriations Act of 1977, Pub. L. No. 95-26, ch. 14, 91 Stat. 61, 96–97; S. REP. NO. 95-64, at 173, 204-06.

⁵ Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. Pa. J. Const. L. 797, 826 (2007) (“When the political cost of diverting public resources to loss prevention is sufficiently high, government will not make the investment even when it is economically justified.”).

⁶ See Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1539 (1992)

the common law or under the terms of any statute which specifically provides for such an award” unless another statute prohibits such an award. *Id.* Accordingly, the United States is liable for attorney fees under federal fee-shifting statutes and exceptions to the “American Rule” on attorneys’ fees. The statute provides that fees awarded under § 2412(b) are to be paid from the Judgment Fund unless the agency is “found to have acted in bad faith,” in which case they are to be paid from the agency’s funds. § 2412(c)(2).

EAJA’s other two fee-shifting mechanisms are similar to each other. The second litigation fee mandate, codified at 28 U.S.C. § 2412(d), applies when the United States loses in a judicial proceeding “unless the court finds [its] position . . . was substantially justified” The administrative adjudications mandate, awards fees when a losing agency’s position is not found by the adjudicative officer to be “substantially justified.” 5 U.S.C. § 504(a)(1). When EAJA provides costs and attorneys fees under these provisions, those are paid from the Judgment Fund which is reimbursed from the offending agency’s appropriation.⁷

There is tension between § 2412(b)’s directive that attorneys’ fees be paid from the Judgment Fund if a fee-shifting statute or common law attorneys fee rule applies (absent agency “bad faith”), and the requirement of § 2412(d) and § 504 that they be paid from agency appropriations if the agency lost (unless its position was “substantially justified”). While the line between these alternatives may be clear in the abstract, in practice it may be hard to see, particularly when the people negotiating the payment are the attorney who will receive the fee and the government attorney who handled the dispute. It may be too easy for them to agree that the money should come from the Judgment Fund rather than the agency.

There are indications that the Judgment Fund has been used to pay EAJA fees that should have been paid from agency appropriations. The proposed Equal Access to Justice Reform Act of 2003 recognized in its findings “the practice of Federal agencies of paying their EAJA liabilities from the General Treasury rather than their own agency budgets, relieving those agencies of the financial

⁷ See Paul Figley, *The Judgment Fund: America’s Deepest Pocket & its Susceptibility to Executive Branch Misuse*, 18 U. Pa. J. Const. L. 145, 172-74 (2015).

consequences of their misconduct (i.e., EAJA liability) and burdening the Federal budget unnecessarily.”⁸ The availability of the Judgment Fund to pay EAJA fees is reportedly part of the strategy in “sue and settle” environmental litigation.⁹ The most detailed available information on EAJA payments made in EPA cases is a 2011 Government Accountability Office study from 2005 to 2010; it showed that 86% of EAJA payment money came from the Judgment Fund as opposed to 14% from agency appropriations.¹⁰

Requiring agencies to fund all EAJA awards would end such game playing and would give agencies an incentive to avoid unnecessary litigation.

C. A third option would require permanent publication of all payments made from the Judgment Fund attributable to an agency and, where reimbursement is required, the history of those reimbursements.

The advantages of publishing Judgment Fund payments on Treasury websites are addressed in my prior testimony.

Congress could also require publication of annual reports from Treasury that identify month by month information on which agencies were behind on Contract Disputes Act, No FEAR Act, and other Judgment Fund reimbursement obligations. The practice of posting current balances (and not retaining that information) is of no use in assessing which agencies have repeatedly missed

⁸ See H.R. 2282, § 2(a)(6), 108th Cong. (2003), quoted in Lowell E. Baier, *Reforming the Equal Access to Justice Act*, 38 J. LEGIS. 1, 61–63 n.433 (2012) (noting that a nearly identical bill was introduced in 2005).

⁹ See Michael J. Mortimer & Robert W. Malsheimer, *The Equal Access to Justice Act and US Forest Service Land Management: Incentives to Litigate?*, 109 J. FORESTRY 352, 353–54 (2011); see also Henry N. Butler & Nathaniel J. Harris, *Sue, Settle, and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 HARV. J.L. & PUB. POL’Y 579, 582–86 (2014) (describing the “sue and settle” process and summarizing the problems it causes). House Agriculture Committee Ranking Member Collin C. Peterson explained this viewpoint in an Op-Ed piece: “[T]here seems to be a pattern of an activist lawsuit, followed by an EPA settlement, resulting in new EPA regulations to comply with the settlement . . . resulting in policy decisions being made by activists, bureaucrats and lawyers This so-called “sue and settle” strategy keeps the process in the dark. Collin C. Peterson, *Peterson Op-Ed: Time to Clean Up the EPA*, 112 H. PRESS RELEASE (Mar. 18, 2011), <http://democrats.agriculture.house.gov/press/PRArticle.aspx?NewsID=1101>.

¹⁰ See U.S. Gov’t Accountability Office, GAO-11-650, *Environmental Litigation: Cases against EPA and Associated Costs over Time* 22, 40-49 (2011).

payments or whether there is an ongoing problem with delays. GAO has recommended annual reports to Congress on amounts owed on CDA payments, recognizing that Treasury already supplies that information to OMB.¹¹ The No FEAR Annual Non-Compliant Agency Report provides little information when posted and disappears shortly thereafter.¹²

Congress could also restore the EAJA reporting requirements, as suggested in the Open Book on Equal Access to Justice Act.¹³ This would require annual reports to Congress and online databases providing detailed information for each EAJA award. When it enacted the Equal Access to Justice Act in 1980, Congress required an annual report of such information.¹⁴ The report was expected to allow Congress to evaluate EAJA's cost and identify agencies engaged in unreasonable activity.¹⁵ This report requirement was repealed as part of the Federal Reports Elimination and Sunset Act of 1995.¹⁶ Since 1995 there has been no way to conduct oversight of EAJA payments.¹⁷ Even when the GAO performed detailed audits of specific agencies it was unable to ascertain all EAJA fees paid on account of those agencies.¹⁸

¹¹ U.S. Gov't Accountability Office, GAO-08-295R, *The Judgment Fund: Status or Reimbursements Required by the No FEAR Act and Contract Disputes Act 9* (2008)

¹² Bureau of the Fiscal Serv., *Annual Non-Compliant Agency Report*, <http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/noncompliance.htm>.

¹³ Open Book on Equal Access to Justice Act, H.R. 384, 114th Cong. (2015).

¹⁴ See Equal Access to Justice Act, Pub. L. No. 96-481, § 203(a)(1), 94 Stat. 2321, 2325-27 (1980) (adding new 5 U.S.C. § 504(e) regarding administrative proceedings expenses); *id.* § 204(a), 94 Stat. at 2327-29 (adding new 28 U.S.C. § 2412(d)(5) regarding litigative proceedings expenses).

¹⁵ See S. REP. NO. 96-253, at 18, 21-22 (1965). Initially assigned to the Chairman of the Administrative Conference of the United States, the reporting duty for § 2412(d)(5) was transferred to the Attorney General by the Federal Courts Administration Act of 1992. See Pub. L. No. 102-572, § 502(b), 106 Stat. 4506, 4512 (1992).

¹⁶ See Pub. L. No. 104-66, § 1091(b), 109 Stat. 707, 722 (1995).

¹⁷ Admin. Conference of the U.S., *Report of the Chairman on Agency and Court Awards in FY 2010 under the Equal Access to Justice Act 5-6* (2013) (noting problems in acquiring useful data).

¹⁸ See *e.g.* U.S. Gov't Accountability Office, GAO-14-458T, *Limited Data Available on USDA Attorney Fee Claims and Payments 1, 6* (2014) (noting that 29 of 33 U.S. Dept. of Agriculture agencies did not track and could not provide relevant data).