

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://jfund.fms.treas.gov/jfradSearchWeb/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.