

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”

March 2, 2017

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

Thank you for this opportunity to share my views. My testimony will address the Judgment Fund, its use in two troublesome settlements, and the need to amend the statute that created it.

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

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¹ Much of this portion of my testimony is based on 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.

administrative detail. Its pursuit of these two contending goals led it to try different approaches before ultimately establishing the Judgment Fund in 1956 as the means of paying most settlements and judgments against the federal government. The Fund, originally limited 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 settlements against the United States”² The Judgment Fund is available only under specific circumstances, but when available it makes payments without any review by Congress.

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 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

² U.S. Gov’t Accountability Office, GAO-08-978SP, 3 Principles of Federal Appropriations Law 14-10 (3d ed. 2008).

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”³ Judgments adverse to the United States were reported to Congress

³ See 18 **Cong. Rec.** 2678 (1887) (statement of Rep. Tucker).

which appropriated funds to pay them. Later statutes reinforced the practice of appropriating for specific judgments.

Congress carried on using the legislative claims system to decide tort claims, although 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”⁴ 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 “appropriations available to such agency.”⁵

⁴ Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 403(c), 60 Stat. 812.

⁵ 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)).

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 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.”⁶ 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 is an open-ended appropriation available 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 under” one of the listed authorities.⁷ The “not otherwise provided for” language means that particular

⁶See **H.R. Rep. No. 95-98**, at 184 (1977).

⁷ 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”],

payment 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.”⁸

II. Troublesome Settlements

The Judgment Fund’s chief purpose is to pay court ordered judgments and settlements negotiated by the Department of Justice.⁹ The Judgment Fund is not “an all-purpose fund for judicial disbursement.”¹⁰ Rather, it can be used “only on the basis of . . . a substantive right to compensation based on the express terms of a specific statute.”¹¹ The Attorney General and his delegates have broad authority

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
(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).

⁸ See 2008 **GAO Principles of Federal Appropriations Law** at 14-39, 14-40 (citing 66 Comp. Gen. 157, 160 (1986)).

⁹ See *id.* at 14-31 to -32.

¹⁰ *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 432 (1990).

¹¹ *Id.*

to settle imminent litigation under his supervision.¹² They do not have authority to circumvent limitations Congress places on statutes that authorize the payment of money damages.¹³

Two recent \$100 million settlements are problematic because they paid much more money than the government was likely to lose, and because the decisions to settle on generous terms appear to have been politically motivated. Native American farmers,¹⁴ Hispanic farmers,¹⁵ and women farmers¹⁶ filed class action suits against the U.S. Department of Agriculture (USDA) alleging unlawful discrimination under the Equal Credit Opportunity Act (ECOA). Their suits followed ECOA litigation alleging that black farmers were treated unfairly in USDA

¹² 28 U.S.C. § 2414 states:

Except as otherwise provided by law, compromise settlements of claims referred to the Attorney General for defense of **imminent litigation** or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States, made by the Attorney General or any person authorized by him, **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 settlements.

(Emphasis added).

¹³ See Paul Figley, *Ethical Intersections & the Federal Tort Claims Act: An Approach for Government Attorneys*, 8 ST. THOMAS U. L. J. 347 (2011).

¹⁴ See *Keepseagle v. Glickman*, 194 F.R.D. 1, 3 (D.D.C. 2000).

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

¹⁶ 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).

programs. The black farmer litigation ended with settlements amounting to over \$2.2 billion for which Congress made specific appropriations.¹⁷

A. The *Keepseagle* Settlement

In the *Keepseagle* litigation, Native Americans brought a class action suit alleging USDA discrimination in reviewing applications for farm loans or benefits

¹⁷ 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, "EOCA'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.

programs and in investigating complaints of discrimination. They sought equitable 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 \$760 million settlement. The settlement created a two-tier, non-judicial process that provided generous payments.¹⁸

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. The government also had substantial arguments on the merits. A detailed New York Times article by Sharon LaFraniere noted that depositions of some plaintiffs showed their cases were weak, the government expert's lengthy report had concluded that "Native Americans had generally fared as well as white male

¹⁸ The Track A procedures provided that a claimant would recover \$50,000 cash upon showing of a basic claim to a neutral arbiter who would review a paper record on a substantial evidence standard; USDA could not provide records or arguments to dispute the claim. Track B claimants could recover up to \$250,000 in an arbitration in which they had a preponderance of the evidence burden of proof.

farmers,” and case law suggested any final judgment for plaintiffs might be reversed on appeal.¹⁹

Even assuming a complete victory for the plaintiffs, the settlement was remarkably generous. The \$760 million settlement created a Settlement Fund of \$680 million paid from the Judgment Fund. According to a posting on plaintiffs’ attorneys’ website, this gave plaintiffs “about 98% of what [they] could possibly have won at trial”²⁰ Even on those terms, the settlement was demonstrably a vast overpayment because it was predicated on an unrealistic number of claimants. Although the complaint had predicted at least 19,000 claimants, only 4,472 farmers perfected their claims. Consequently, 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 left over money to the United States, that money was not returned to the Treasury. Various Native American groups continue to litigate how it should be used.

¹⁹ See Sharon LaFraniere, *U.S. Opens Spigot After Farmers Claim Discrimination*, N.Y. Times, Apr. 25, 2013, <http://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html>.

²⁰ See Keepseagle COHEN MILSTEIN, <http://www.cohenmilstein.com/cases/95/keepseagle> (alluding to plaintiffs’ economist’s report).

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:

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

The Times article argued that politics was a key factor in the government's decision to settle. It quoted an internal Department of Agriculture memo as saying, "settlements would provide 'a way to neutralize the argument that the government favors black farmers over Hispanic, Native American or women farmers'" It does not appear that the decision to settle the *Keepseagle* litigation was made on the case's litigative merits.

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

B. The Hispanic and Women Farmers Claims Process

Hispanic farmers and women farmers filed class action suits similar to *Keepseagle – Garcia v. Veneman* and *Love v. Veneman*. Both were 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 in January, 2010, the only means left for a *Garcia* or *Love* plaintiff to pursue an ECOA claim was to individually litigate it.

On February 25, 2011, USDA and the Department of Justice unilaterally announced a claims program for Hispanic farmers and women farmers, including "at least \$1.33 billion from the Judgment Fund, plus \$160 million in debt relief, to implement a unified, non-judicial claims resolution process."²² In January of 2012, the government announced a revised plan, the "Framework for Hispanic or Female Farmer's Claims." The Framework was similar to the *Pigford* and *Keepseagle* processes, but had no judicial supervision or class counsel, and attorneys' fees were to be paid by the claimants.

The litigative risk posed by *Garcia* and *Love* hardly justified the

²² News Transcript, Release No. 0100.11 USDA Office of Communications, Agriculture Secretary Tom Vilsack and Assistant Attorney General Tony West Announce Process to Resolve Discrimination Claims of Hispanic and Women Farmers (Feb. 25, 2011) <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2011/03/0100.xml>.

government's decision to establish this new claims program. First, no class had been, or ever would be certified, making the prospect of sizeable adverse judgments extremely remote. Second, when the settlement process for Hispanic and women farmers was announced on February 25, 2010, the government did not know how many claimants there would be. (At a status conference the previous week, government counsel had pressed plaintiffs' counsel in *Garcia* for the number of Hispanic claimants, noting that their allegations had ranged from 20,000, to 50, to 82,000, to 16,000.²³) The government's interest in voluntarily settling thousands of claims had not been foreseen by the judge, "given the history of the case."²⁴

From all appearances, politics provided a key motivation for creation of the Hispanic or Women Farmer's Claims Process. 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. Hispanic and women farmers sought treatment equivalent to that provided in *Pigford*.

Eight senators sent President Obama a letter noting that "approximately \$2.25

²³ Status Conf. at 5, 10, *Garcia v. Veneman*, 1:00-cv-02445 (D.D.C. Feb. 19, 2010) (reasoning that without "a solid number" a government settlement proposal would be "shooting in the dark").

²⁴ Status Conf. at 11-12, *Garcia v. Veneman*, 1:00-cv-02445 (D.D.C. Feb. 19, 2010) (detailing the comment of Judge Robertson).

billion” had been allotted to “resolve USDA discrimination against black farmers,” and calling for equal treatment for Hispanic farmers and ranchers.²⁵ The Hispanic and Women Farmer’s Claims Process was reportedly molded at White House meetings over the strong objections of career lawyers who argued, *inter alia*, “that the legal risks did not justify the costs.”²⁶

The political nature of the Process is further demonstrated by the Administration’s public descriptions which made the Process seem comparable in scope to the *Pigford* settlements. It was not. The announcements of the program said it would include “at least \$1.33 billion from the Judgment Fund”²⁷ In fact, no special fund was created. Awards amounting to \$159,950,000 were paid,

²⁵ Letter from Robert Menendez, Senator, to Barack Obama, President (June 17, 2009), <http://www.menendez.senate.gov/newsroom/press/senators-urge-settlement-in-usda-discrimination-lawsuit-by-hispanic-farmers>.

²⁶ See LaFraniere, *supra* at n.19 (discussing political pressures supporting a settlement).

²⁷ E.g., *Secretary Vilsack’s Efforts to Address Discrimination at USDA*, USDA OFFICE OF THE ASST. SECT. FOR CIVIL RIGHTS, http://www.ascr.usda.gov/about_cr_background.html; News Transcript, Release No. 0100.11 USDA Office of Communications, Agriculture Secretary Tom Vilsack and Assistant Attorney General Tony West Announce Process to Resolve Discrimination Claims of Hispanic and Women Farmers (Feb. 25, 2011; January 25, 2012 News Release No. 0024.12, “Agriculture Secretary Vilsack Announces Updated and Improved Process to Resolve Discrimination Claims of Hispanic and Women Farmers.”

all directly from the Judgment Fund.²⁸ Accordingly, Hispanic and women farmers and ranchers received about 12% of the announced \$1.33 billion.

III. Amending the Judgment Fund

The Judgment Fund was created for the simple task of paying judgments and settlements. It does that job well. While the law provides for the Executive Branch to make those payments without additional congressional approval, it was never intended as a way to bypass Congress' authority to decide whether to finance \$100 million programs or policy proposals. Nonetheless, the Judgment Fund has been used as an unreviewable source of funds for Executive Branch initiatives.²⁹

The *Keepseagle* settlement is a troubling example for two reasons. First, it was obviously settled for far more than its litigative value, and apparently for political reasons. Second, it squandered \$380 million of Judgment Fund money that will be spent on concocted programs that are unrelated to any claim against the government – a result certainly not contemplated by the Judgment Fund

²⁸ 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>.

²⁹ These include the 1991, \$278 million Bush Administration settlement for weapons never delivered to Iran; the 1998, \$324,600,000 Clinton Administration settlement for twenty-eight F-16 fighters never delivered to Pakistan; and this year's payment of \$1.3 billion to Iran for interest on deposited money.

legislation.

The Hispanic and Women Farmers Claims Process is problematic because the Executive Branch created this entirely new claims program without legislative input or judicial supervision, and financed it from the Judgment Fund. As counsel for the government explained in court, “the Government has decided . . . that it would develop what it’s calling an ‘Administrative Claims Program.’ This is not a - - in a proceeding subject to judicial review This is a voluntary alternative to litigation for those individuals who elect to proceed”³⁰ The program was “extrajudicial.”³¹

By creating the Hispanic and Women Farmers Claims Process through an administrative decree, the Administration bypassed the appropriations process. This was not an accident. As Secretary Vilsack explained the program in a December 1, 2010, news conference:

And in that settlement, the procedures that will be followed are very closely aligned to the procedures that are being utilized in the Keepseagle litigation, which has been settled, and the Pigford litigation, which now we can move forward on.

So there may be slight differences and slight variations, but fundamentally it's about essentially you asserting a claim, providing enough substantial evidence, documentary evidence, of the fact that

³⁰ Status Conf. at 10, *Garcia v. Veneman*, 1:00-cv-02445 (D.D.C. Aug. 24, 2012) (quoting government counsel).

³¹ *Id.*

you tried to do business or you did do business with USDA and you were not treated fairly or you were discriminated against vis-à-vis another class of farmers and that you are, as a result, entitled to receive compensation. 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.**³²

The Judgment Fund is now on the Executive's radar as an easy way to fund new programs and initiatives that are somehow related to claims against the government. Absent legislation, it is likely to be used again. The problem is not partisan. While the *Keepseagle* settlement and the Hispanic and Women Farmers Claims Process are products of the Obama Administration, it is fair to anticipate that other Administrations will follow the same path if that path remains open.

The tension here is between Congress and the Executive Branch. Congress' power of the purse is a key part of the Constitution's system of checks and balances. To preserve that power, Congress should place a limit on the size of payments that the Executive Branch can make from the Judgment Fund.

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

³² 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.

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.³³ New subsection (a)(4)(B) is taken from the longstanding Department of Justice Civil Division limitation on delegations of authority to compromise cases.³⁴

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

³³ 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).

³⁴ See 28 C.F.R. Part 0, Subpart Y, Appendix [Directive No. 1-10] § 1(e) (1).

the Executive of authority to make payments against the need to protect Congress from expending unnecessary time and effort on pro forma legislation.

The Judgment Fund statute should also be amended to provide greater transparency. I strongly support enactment of legislation like H.R. 1096, the “Judgment Fund Transparency Act of 2017,” and S. 386, the “Judgment Fund Transparency and Terrorism Financing Prevention Act of 2017.” Consideration might also be given to requiring regular, independent audits of Judgment Fund payments, perhaps by the Government Accountability Office or the Administrative Conference of the United States.

Thank you for this opportunity to express my views.