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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* Associate Director, Legal Rhetoric Program, American University, Washington College of Law.

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 Fund[2] 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

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[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

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[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

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[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

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[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

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[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

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[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

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[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 farmers[19] filed class action suits against U.S. Department of Agriculture (USDA) alleging unlawful discrimination under the Equal Credit Opportunity Act (ECOA). Members of those

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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

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[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

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[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.

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[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.

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[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)