The Judgment Fund: America's Deepest Pocket & Its Susceptibility to Executive Branch Misuse

Paul F. Figley
American University Washington College of Law, pfigley@wcl.american.edu

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev

Part of the Administrative Law Commons, President/Executive Department Commons, and the Torts Commons

Recommended Citation

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.
THE JUDGMENT FUND: AMERICA'S DEEPEST POCKET & ITS SUSCEPTIBILITY TO EXECUTIVE BRANCH MISUSE

Paul F. Figley* 

TABLE OF CONTENTS

INTRODUCTION ................................................................................................. 146

I. A BRIEF HISTORY OF THE UNITED STATES’ PAYMENT OF CLAIMS & THE CREATION OF THE JUDGMENT FUND .............................................................................................................. 149
   A. The Period of Administrative-Legislative Resolution of Claims .......................................................................................................................... 150
   B. The Court of Claims .................................................................................. 155
   C. The Federal Tort Claims Act .................................................................... 159
   D. Creation of the Judgment Fund .................................................................. 161
   E. Normalizing Use of the Judgment Fund ...................................................... 167
       1. The Contracts Disputes Act ................................................................ 167
       2. The No FEAR Act .............................................................................. 169
       3. The Equal Access to Justice Act ......................................................... 171

II. A BRIEF HISTORY OF THE PUBLIC DISCLOSURE OF CLAIMS PAYMENTS ............................................................................................................................... 175
   A. The Statements and Accounts Clause ....................................................... 175
   B. Statutory Disclosure of Payments ............................................................... 176

III. ASSESSING JUDGMENT FUND PRACTICES ............................................ 179
   A. Raids on the Judgment Fund .................................................................... 179
       1. Legislative Branch Encroachment ......................................................... 179
       2. Executive Branch Encroachment ........................................................... 180
           a. Executive Branch Authority over the Judgment Fund .................... 180
           b. Single Event Settlements ................................................................. 184

* Associate Director, Legal Rhetoric Program, American University Washington College of Law, where he teaches Torts and Legal Rhetoric. Formerly Deputy Director, Torts Branch, Civil Division, U.S. Department of Justice. My sincere gratitude to Adeen Postar, Joseph W. Gross, Katie Wright, John C. Heinbockel, and J. Ryan Sims for their patience and research assistance. Thanks also to the staff of the journal for its excellent work in improving this Article.
INTRODUCTION

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 to 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 resulted in a significant transfer of power that was neither foreseen nor sought.\(^2\) In the subsequent four decades, Congress 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.

\(^1\) “[A] claim against the United States is well understood [to be] a right to demand money from the United States . . . which can be presented by the claimant to some department or officer of the United States for payment, or may be prosecuted in . . . court . . . .” Hobbs v. McLean, 117 U.S. 567, 575 (1886); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-978SP, 3 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 14-10 (3d ed. 2008) [hereinafter 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW], http://www.gao.gov/special.pubs/d08978sp.pdf (noting that the Hobbs decision resolved the question of what is a claim).

\(^2\) See William M. Wiecek, The Origin of the United States Court of Claims, 20 ADMIN. L. REV. 387, 388 (1968) (“This transfer was not a consciously-sought end in itself; it was brought about by responses to needs of the moment.”).
The Judgment Fund 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 settlements against the United States.” 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 every year, yet there is no practical way for Congress or the public to track where Judgment Fund money goes.

The Judgment Fund sits at the intersection of two longstanding policies rooted in the Republic’s foundational documents: 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 first half of Clause 7, the Appropriations Clause, was not much discussed at the Constitutional Convention. The second half of Clause 7, the State-

---

5 See infra Part I.D.
6 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14-8.
7 See infra notes 141-164 and accompanying text.
10 See 1994 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 8, at 12-6 (noting that no one knows the number of claims processed by the federal government each year); Jenna Greene, Federal Returns; Records Show Government Paid Billions To Settle Suits Last Year, 34 NAT’L L.J. (2012), 1, 1–2 (explaining that the Judgment Fund has “no fiscal year limitations” and describing the enormous range of payments made in 2011).
11 U.S. CONST. art. I, § 9, cl. 7.
ment and Accounts Clause, was debated; George Mason’s proposal to require annual reports of expenditures was opposed by James Madison and rejected.\textsuperscript{13}

This Article analyzes why it made sense for Congress to create the Judgment Fund, why Congress should require better reporting of payments made, and why it should consider reasserting some control over huge settlements that, in practical effect, create new government claims programs. The Article follows two strands: Congress’s desire to have claims handled by another branch, despite its authority over appropriations, and the public’s right to know about government expenditures.

This Article in Part I examines the history of federal payment of claims, the transition from legislative control over that process to creation of the Judgment Fund, and subsequent congressional efforts to have agencies reimburse the Fund for some categories of payments. Part II addresses the history of public disclosure of claims payments. Part III assesses how the Judgment Fund might be exploited and the problems caused by the lack of transparency of its payments. This discussion addresses legislative authority to use the Fund for new purposes that may be inconsistent with its original intent, executive branch control over its disbursements, and the potential for government attorneys, acting for political or personal reasons, to improperly help favored claimants by agreeing to unwarranted settlements or by pulling punches in litigation. This Part examines the latter problem in the contexts of settlements of single events, “sue and settle” litigation, and class settlements. Part IV proposes improvements for the Judgment Fund and claims payment practices. It suggests that Congress consider retrieving its authority to require that the appropriations process be used to fund new claims programs, such as the Hispanic or Female Farmer’s Claims Process the Obama Administration, unilaterally established and financed with Judgment Fund money.\textsuperscript{14} Part IV also includes several proposals to make reimbursement processes and claims payments transparent, retrievable, and public.

\textsuperscript{13} For more detailed descriptions of the debates surrounding Mason’s proposal, and its ultimate rejection, see Halperin v. CIA, 629 F.2d 144, 154–56 (D.C. Cir. 1980); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 618–19 (Max Farrand ed., rev. ed. 1966); Note, Secret Funding, supra note 13, at 609–11.

\textsuperscript{14} See infra notes 416–438 and accompanying text.
I. A BRIEF HISTORY OF THE UNITED STATES’ PAYMENT OF CLAIMS & THE CREATION OF THE JUDGMENT FUND

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 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.


17 See Figley & Tidmarsh, supra note 13, at 1262–67 (discussing the connection between the Appropriations Clause and federal sovereign immunity for money damages); see also John F. Manning, Clear Statement Rules and the Constitution, 110 COLUM. L. REV. 399, 437 n.192 (2010) (“The most plausible textual source for federal sovereign immunity [from money damages] is the Appropriations Clause . . . .”).

18 The doctrine of sovereign immunity provides that a sovereign state can be sued only to the extent that it has consented to be sued and that only its legislative branch can give such consent. See, e.g., United States v. Dalm, 494 U.S. 596, 610 (1990) (“If any principle is central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress.”); accord United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 514 (1940) (“Consent alone gives jurisdiction to adjudge against a sovereign.”).

19 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14-32 (noting that the Appropriations Clause “applies with equal force to payments directed by a court” and citing to Richmond, 496 U.S. at 424–26).

2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14-30 to 14-32 (noting that the Appropriations Clause “applies with equal force to payments directed by a court” and citing to Richmond, 496 U.S. at 424–26).
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.

A. The Period of Administrative-Legislative Resolution of Claims

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 a 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. The first such bill was passed in September of 1789. More than 700 petitions were presented to the First Congress. Congress organized itself to process such claims. In

20 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14-31 to 14-32; see also Am. Fed’n of Gov’t Empls., 388 F.3d at 409 (discussing the different forms congressional appropriations can take).
21 See Glidden Co. v. Zdanok, 370 U.S. 530, 570 (1962) (recognizing a 1933 study that found fifteen instances in seventy years in which Congress did not appropriate money to pay a judgment); 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14-31 (citing Glidden).
22 United States v. Testan, 424 U.S. 392, 399 (1976) (“Thus, except as Congress has consented to a cause of action against the United States, ‘there is no jurisdiction . . . in any . . . court to entertain suits against the United States.’” (quoting United States v. Sherwood, 312 U.S. 584, 587–88 (1941)); United States v. McLemore, 45 U.S. 286, 288 (1846) (“[T]he government is not liable to be sued, except with its own consent, given by law.”).
23 The Judiciary Act of 1789 did not waive sovereign immunity. See Cohens v. Virginia, 19 U.S. 264, 411–12 (1821) (“The universally received opinion is, that no suit can be commenced or prosecuted against the United States, that the judiciary act does not authorize such suits.”).
24 U.S. CONST. amend. I.
27 Id.
1794, the House established the Committee on Claims and later established other committees for specific categories of claims.\textsuperscript{29} The Senate did likewise.\textsuperscript{30}

Congress did try other mechanisms for resolving claims. Beginning in 1784, the Confederation Congress had used a three-member Board of Treasury to hear claims against the national government and report back to Congress.\textsuperscript{31} Maintaining a tight rein on the Board and each claim, the Confederation Congress kept control over payments.\textsuperscript{32} When the Constitution was ratified in 1789, Congress adopted a similar approach.\textsuperscript{33} It established commissions and auditors to evaluate claims, but retained the authority to decide whether and how much to pay.\textsuperscript{34} The statute that established the Department of the Treasury provided for Treasury auditors to receive and examine claims, and then forward them to the Comptroller for final decision.\textsuperscript{35} The congressional committee system and the Treasury Department system complemented one another, with Treasury handling routine contract matters while Congress dealt with non-contract matters and appeals of Treasury determinations.\textsuperscript{36} Undisputed claims could be paid promptly.\textsuperscript{37} The only recourse for those whose claims were denied was to petition Congress for relief.\textsuperscript{38}

\textsuperscript{28} Both the Continental Congress and the Congress of the Confederation established congressional committees to deal with claims. See 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14-3 to 14-4.

\textsuperscript{29} See Shimomura, supra note 26, at 644 (citing 4 ANNALS OF CONG. 883 (1794), H.R. REP. NO. 730, at 2–3).

\textsuperscript{30} See Shimomura, supra note 26, at 634–35 (describing how the Confederation controlled the Board “at almost every point”).


\textsuperscript{32} See Shimomura, supra note 26, at 634–35 (describing the “two general but separate claims systems” operated by Congress and the Treasury Department).

\textsuperscript{33} See Charles C. Binney, Origin and Development of Legal Recourse Against the Government in the United States, 57 U. PA. L. REV. 372, 378 (1909) (“As soon as the Treasury Department was
Congress tried different administrative approaches for handling disputed claims. A 1792 statute pertaining to claims for Revolutionary War pensions called upon circuit courts to consider evidence, reach conclusions, and forward them “to the Secretary of War, together with their opinion in writing....” The statute further provided that if the Secretary suspected a mistake, he was to withhold payment and report the matter to Congress. The question of whether Congress could require judicial officers to make such advisory opinions reached the Supreme Court in *Hayburn’s Case*, but before an opinion was rendered, Congress amended the statute to require the courts to only take evidence and forward it to the Secretary of War.

An 1816 statute for property claims arising from the War of 1812 provided for the appointment of a single commissioner whose decisions in favor of claimants were final and binding on the government. The commissioner was so generous in his awards that President James Madison suspended the commission’s proceedings until Congress could reconsider the grant of authority. Congress amended the statute to require review by the Secretary of War for all awards over $200. The problems raised by this profligate commissioner ad-

---

38 See Wiecek, supra note 2, at 389 ("If a claimant was dissatisfied with the decision of the Comptroller, his only recourse was to petition Congress.").
39 Act of Mar. 23, 1792, ch. 11, § 2, 1 Stat. 243, 244.
40 Id. § 4 ("Where the said Secretary shall have cause to suspect imposition or mistake, he shall have power to withhold the name of such applicant from the pension list, and make report of the same to Congress."); see also COWEN, supra note 33, at 5 n.10 (discussing the statute in depth).
41 2 U.S. (2 Dall.) 409 (1792).
42 Act of Mar. 23, 1792, ch. 17, 1 Stat. 243; see also Shimomura, supra note 26, at 639 (noting that this change apparently resolved the advisory opinion problem).
43 See Act of Apr. 9, 1816, ch. 40, § 14, 3 Stat. 261, 264 ("And when such judgment shall be in favour of such claim, shall entitle the claimant, or his legal representative, upon the production of a copy of such judgment . . . to payment of the amount thereof at the treasury of the United States.").
44 30 ANNALS OF CONG. 20 (1816); see also COWEN, supra note 33, at 7 (explaining that President Madison not only suspended these functions but asked Congress to “more clearly define the scope of [the special commissioner’s] duties under the Act”); Wiecek, supra note 2, at 389–90 (noting that President Madison suspended the commissioner’s “functions after less than a year of operations”).
45 Act of Mar. 3, 1817, ch. 110, § 5, 3 Stat. 397 ("[A]ll claims allowed by said commissioner, of two hundred dollars or upwards, shall be revised by the Secretary of War . . . and may be confirmed or rejected."); see also COWEN, supra note 33, at 7 (discussing changes to the 1816 Act in detail).
versely influenced Congress’s willingness to grant other tribunals the authority to make binding judgments on disputed claims. 46

Initially, claims payments were made from general appropriations. 47 As Congress increasingly specified the permissible uses of particular appropriations, claims that had been approved but did not fall within those specifications could not be paid until a suitable appropriation was made. 48 Accordingly, parties whose claims had been approved might not be paid for some time. 49

From the 1820s to 1855, claims were resolved principally through the congressional claims process. 50 Initially, the system seemed to function adequately, 51 but dissatisfaction grew in Congress because of the legislative time spent on claims and the poor results that were obtained. In 1832, John Quincy Adams argued that deciding private claims “is judicial business, and legislative assemblies ought to have nothing to do with it.” 52 In 1838, the House Committee on Claims issued a report on the congressional claims system. 53 It noted that the first three Congresses received 2,317 petitions, while the three Congresses immediately preceding the report received 14,602 petitions, of which only 5,891 were “[a]cted on” at all, 54 and only 603 “[p]assed both Houses.” 55 The committee recognized that claims were delayed and lingered from one session to another. 56

46 See Cowen, supra note 33, at 7–8 (“Experience with the commissioner under the 1816 Act may have affected the thinking of members of Congress for many years on the wisdom of delegating final authority to make awards.”); see also Wiecek, supra note 2, at 390 (detailing the reluctance of Congress to “part with control over the federal purse-strings”).

47 See 2008 GAO Principles of Federal Appropriations Law, supra note 1, at 14-5.

48 See id. at 14-6 (“[I]t was possible for Congress to refuse to appropriate the funds for a given judgment, leaving the judgment creditor with a valid entitlement against the United States but no funds legally available to satisfy it.”).

49 See id.

50 See Cowen, supra note 33, at 8 (noting that after 1817, Congress considered many claims independent of the Treasury Department); Wiecek, supra note 2, at 388 (characterizing this period, beginning in the 1820s, as the “legislative phase”).

51 See Wiecek, supra note 2, at 392 (noting that there was “no widespread agitation for a reform of claims procedures”).

52 8 John Quincy Adams, Entry of Feb. 23, 1832, in Memoirs of John Quincy Adams, Comprising Portions of His Diary from 1795 to 1848, at 480 (Charles Francis Adams ed., 1876) (“One-half of the time of Congress is consumed by [private bills], and there is no common rule of justice for any two of the cases decided. A deliberative assembly is the worst of all tribunals for the administration of justice.”).


54 Id. at 4–5.

55 Id. at 5.

56 See id. at 8 (“Claimants and agents persevere in renewing their applications, year after year, until the loss of time and expenses absorb the entire amount of a small claim.”).
In 1848, the House Committee on Claims issued another report on the claims system, updating the statistics from the 1838 report: “[D]uring the ten years embraced in these five Congresses, out of 16,573 petitions of private claimants to the House of Representatives, and 3,436 bills reported, only 1,796 passed the House, and but 910 passed both Houses.” The 1848 report noted other problems including, inter alia, unjust delays, ex parte testimony, gaming of the committee system to find a favorable forum, and manipulation to “procure passage of claims having no merit whatever.” It complained that private claims consumed one third of the time of the House of Representatives.

In the early 1850s, the scent of scandal increased the momentum for change. Claims were jumbled and confused; Congress paid one $7000 claim twice. Congressmen degraded their office by acting as claims representatives. The potential for bribery was real and ever-present. In December of 1854, Senator Richard Brodhead, speaking in favor of a bill to create a board of commissioners to decide private claims, summarized problems of the old system, including: the postponement of “honest claims”; the expenditure of time; the difficulties of a legislative body deciding “facts of a case”; the constant pressure from “private claimants, and their agents or attorneys”; and the unseemliness of “private claims [being] either passed or pressed into the appropriation bills the last nights of our sessions, contrary to the rules of the Senate, and injurious to the character of Congress.”

58 Id. at 5–6.
59 See id. at 6–7.
60 See CONG. GLOBE, 33d Cong., 2d Sess. 72 (1854) (statement of Sen. John M. Clayton) (describing the twice-paid claim); COWEN, supra note 33, at 12 (same).
61 See CONG. GLOBE, 30th Cong., 2d Sess. 308 (1849) (statement of Rep. Andrew Johnson) (complaining of “notices which . . . even members of Congress had put in the newspapers, proposing to prosecute claims against the Government of the United States”); see also Wiecek, supra note 2, at 395 (“Government officials, including Senators and Congressmen themselves, became part-time claims representatives.”).
62 See CONG. GLOBE, 32d Cong., 1st Sess. 2100 (1852) (noting the unanimous consent given to the appointment of a Senate committee “to inquire into abuses, bribery, or fraud, in the prosecution of claims before Congress”); COWEN, supra note 33, at 12–13 (describing “an atmosphere that was ripe for scandal”); Wiecek, supra note 2, at 395 (explaining that the potential problem of bribery of lawmakers was openly discussed).
63 CONG. GLOBE, 33d Cong., 2d Sess. 70 (1854) (statement of Sen. Brodhead).
B. The Court of Claims

Finally, in 1855 Congress acted. It passed the Court of Claims Act, marking the first step towards a system in which claims would be heard by judges. The original Court of Claims was empowered to: hear claims based on federal laws, regulations, or contracts; promulgate its own rules; issue subpoenas; and take evidence. The statute provided that government attorneys defend the United States and that both parties could cross-examine witnesses. The court lacked authority to enter final judgments; instead, it forwarded reports and draft bills to Congress for enactment. Money to pay claims came from enactment of specific bills.

When it received the first reports from the Court of Claims, the House debated whether to deal with them as final judgments ready to be paid, or as proposals to be sent to the various claims committees for extensive review. It chose to send them to the committees, effectively treating the new court as an advisory board. This decision destroyed the effectiveness of the Court of Claims and gave new life to the legislative claims system. Claimants who lost in the court ap-

64 Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (repealed 1982).
65 See COWEN, supra note 33, at 20 (describing the 1855 Act as just the “beginning”); Shimomura, supra note 26, at 652 (detailing the framework and powers of the new tribunal).
66 See Act of Feb. 24, 1855, ch. 122, §§ 1, 3, 10 Stat. 612, 618 (outlining the powers and responsibilities of the new tribunal).
67 See id. §§ 2, 5 (authorizing a solicitor to represent the government and providing parties an opportunity to cross-examine).
68 Id. §§ 7–9. The decision to deny the court authority to render final judgment was closely contested. See Shimomura, supra note 26, at 650–52 (discussing the legislative proposals and debates that aimed to relieve Congress of the inundation of claims).
69 See Act of Feb. 24, 1855, ch. 122, §§ 7–9, 10 Stat. 612, 613–14 (establishing procedures for the Court of Claims to submit reports and draft bills to Congress); see also Slattery v. United States, 635 F.3d 1298, 1301 (Fed. Cir. 2011) (“Any payment to the claimant was implemented by specific legislative enactment.”).
70 See CONG. GLOBE, 34th Cong., 1st Sess. 607, 607–10, 970–73, 1241–49 (1856) (debating whether Court of Claims judgments should be final or closely reviewed by Congress). Congressman Houston stated the issue succinctly:

If it be intended that we are simply to carry out the judgment of the Court of Claims in every case, we might as well pass the bills without referring them anywhere. If, however, our purpose is to make an examination of the cases ourselves . . . it ought to take the usual course . . . [and] go, as in other cases, to one of the standing committees . . . whose appropriate duty and business it is to make that particular examination.

Id. at 607.
71 Shimomura, supra note 26, at 653; Wiecek, supra note 2, at 397.
72 See Wiecek, supra note 2, at 398 (describing congressional review of Court of Claims decisions); see also Shimomura, supra note 26, at 653 (explaining the consequences of treating Court of Claims decisions as advisory).
pealed to Congress; claimants who won had to await an appropriation, and Congress closely examined pro-claimant decisions.\textsuperscript{73} Indeed, Court of Claims judgments from 1855 to 1860 totaled $529,000, but by 1860 Congress had paid only half that amount.\textsuperscript{74}

The inequities and delays of the old, legislative system persisted.\textsuperscript{75} In 1857, three members of the House were caught up in claims and bribery scandals.\textsuperscript{76} The number of claims increased dramatically with the coming of the Civil War.\textsuperscript{77} In his first inaugural address, President Abraham Lincoln recognized that the claims system was broken.\textsuperscript{78} With the goal of freeing Congress’s time so that it could deal with broader questions, he urged that the Court of Claims be granted authority to make final judgments:

\begin{quote}
[I]t is apparent that the attention of Congress will be more than usually engaged, for some time to come, with great national questions. It was intended, by the organization of the Court of Claims, mainly to remove this branch of business from the halls of Congress; but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation for want of power to make its judgments final.
\end{quote}

Both houses of Congress promptly considered but did not enact bills that would make claims judgments final.\textsuperscript{80} In 1862, the overwhelming number of war claims led them to renew their efforts.\textsuperscript{81}

President Lincoln’s recommendation that claims be adjudicated by the judiciary\textsuperscript{82} was adopted when Congress passed the Amended

\begin{footnotesize}
\begin{enumerate}
\item See Wiecek, \textsuperscript{supra} note 2, at 398 (“Adverse decisions of the court were usually accepted by Congress, but favorable decisions were debated.”).
\item Shimomura, \textsuperscript{supra} note 26, at 653.
\item See H.R. REP. NO. 513, at 1–3, 7 (1860) (urging that claims be decided by the district courts); Shimomura, \textsuperscript{supra} note 26, at 655 (noting that “all the old problems reappeared”); Wiecek, \textsuperscript{supra} note 2, at 398 (discussing deficiencies of the claims system in the 1850s).
\item Wiecek, \textsuperscript{supra} note 2, at 398.
\item See COWEN, \textsuperscript{supra} note 33, at 21 (recognizing the "extraordinarily large number of war claims").
\item President Lincoln said that

\begin{quote}
[i]t is important that some more convenient means should be provided, if possible, for the adjustment of claims against the government, especially in view of their increased number by reason of the war. It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department.
\end{quote}

Wiecek, \textsuperscript{supra} note 2, at 398.
\item Id. at 398–99.
\item Id. at 399; see also COWEN, \textsuperscript{supra} note 33, at 21 (noting in particular that the “Senate was closely divided on the finality issue”).
\item See Wiecek, \textsuperscript{supra} note 2, at 399 (“Pressures for the establishment of a court mounted as the war claims poured in.”).
\end{enumerate}
\end{footnotesize}
Court of Claims Act of 1863. This statute gave the Court of Claims authority to enter final judgments, subject to a right of appeal to the Supreme Court. It expanded the court’s jurisdiction over claims based on federal laws, regulations, or contracts to also include set-offs and counterclaims. The statute prohibited members of Congress from representing claimants before the court. It also addressed the source of payments of final judgments, stating that they “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.

The jurisdiction of the Court of Claims over claims based on federal laws, regulations, or contracts remained substantially the same

---

82 Id. at 398–99.
83 Amended Court of Claims Act of 1863, Ch. 92, 12 Stat. 765.
84 Id. §§ 3, 5, 12 Stat. at 765–66.
85 Id. § 3, 12 Stat. at 765.
86 Id. § 4, 12 Stat. at 766.
87 Id. § 7, 12 Stat. at 766.
88 See Slattery, 635 F.3d at 1302 (“This provision . . . removed the need for a special congressional appropriation to pay each individual judgment.” (citing Shimomura, supra note 26, at 652–53)). A last-minute amendment briefly undermined the finality of Court of Claims judgments by barring the payment of a claim until “after an appropriation therefor shall be estimated for by the Secretary of the Treasury.” Act of Mar. 8, 1868, ch. 92, § 14, 12 Stat. 765, 768. Section 14 was repealed after the Supreme Court dismissed for lack of jurisdiction the first appeal of a Court of Claims decision in Gordon v. United States, 69 U.S. 561 (1864). No written opinion was issued with the Court’s judgment, an oddity explained by a lost opinion and the death of a Chief Justice. See United States v. Jones, 119 U.S. 477, 478 (1886) (explaining that the delay in publishing Gordon was due, in part, to Chief Justice Roger Taney’s passing); Wiecek, supra note 2, at 401–03 (noting that “Taney died before the December term” of 1864). For our purposes, the key fact is that when he announced the Gordon judgment on March 10, 1865, Chief Justice Salmon P. Chase stated, “We think that the authority given to the head of an Executive Department by necessary implication in [Section 14] to revise all the decisions of that court requiring payment of money, denies to it the judicial power, from the exercise of which alone appeals can be taken to this court.” Jones, 119 U.S. at 478. A year after the Gordon decision, Congress repealed Section 14. Act of March 17, 1866, ch. 19, § 1, 14 Stat. 9; see also Gordon, 69 U.S. at 561 (holding that the Supreme Court has no appellate jurisdiction over Court of Claims decisions); Wiecek, supra note 2, at 403–04 (noting that, according to Congressman Lyman Trumbull, “[t]he sole object of this bill is to remove this obstacle [§ 14] to taking appeals to the Supreme Court”).
89 See Act of June 25, 1864, ch. 147, 13 Stat. 145, 148 (appropriating $300,000 to create a fund for the payment of Court of Claims judgments “rendered” in the next year); see also Slattery, 635 F.3d at 1303–04 (“Following the 1863 enactment, Congress made periodic general appropriations for payment of the judgments of the Court of Claims.”); Shimomura, supra note 26, at 686–87 (“Congress chose to appropriate funds annually on a lump sum basis.”).
until 1887.  

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 system persisted—the mass of private claims consumed Congress’s time and attention, meritorious claims were delayed or left unresolved, and little was accomplished.

In 1887, Congress enacted the Tucker Act, which expanded the Court of Claims’s jurisdiction to also include “claims founded upon the Constitution . . . or for damages . . . in [non-tort] cases . . . [for] which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable . . . ”  

A key purpose of the act was to remove congressional responsibility for deciding “a large mass of private claims which were encumbering our business and preventing our discharging our duties . . . ”  

With its expanded jurisdiction, the Court of Claims had new responsibility for cases arising from admiralty contracts, tax refunds, takings, and pay disputes.  

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.

---

90 See Shimomura, supra note 26, at 663 (discussing statutes that fine-tuned the jurisdiction of the Court of Claims).

91 Id. The Takings Clause of the Fifth Amendment states that private property shall not “be taken for public use, without just compensation.” U.S. CONST. amend. V.


93 Act of Mar. 3, 1887, ch. 359, §1, 24 Stat. 505, 505.


95 See COWEN, supra note 33, at 43–51 (listing and describing these new areas of jurisdiction).


97 See Shimomura, supra note 26, at 661 (noting that from 1876 to 1894, Congress typically appropriated funds to pay specific judgments).

98 1994 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 8, at 14-6. A 1904 statute required all judgments against the United States to be “transmitted to Congress through the Treasury Department” in the same fashion as other estimates for appropriation. Act of Apr. 27, 1904, Pub. L. No. 58-189, 33 Stat. 394, 422. In 1950, this provision was repealed as part of the Budget and Accounting Procedures Act of 1950, Pub. L. No. 81-784, § 301(3), 64 Stat. 832, 839. Because the new statute required the president to submit a budget to Congress, it did not alter the requirement that Congress appropriate funds to pay judgments. 1994 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 8, at 14-6.
C. The Federal Tort Claims Act

One large category of claims remained largely in congressional hands for another six decades—tort claims against the government.\(^99\) Using the legislative claims system to decide individual tort claims involved the same problems that arose with contract and taking claims.\(^100\) The procedures were unfair.\(^101\) The legislative branch remained unsuited for deciding individual claims.\(^102\) As one congressman observed, the legislative claims system “ma[d]e justice for the individual a matter of political favor instead of independent right.”\(^103\) The process wasted a great deal of congressional time for very poor results.\(^104\) Only a small proportion of the claims were successful: in the 68th Congress, 250 of 2,200 private bills became law; in the 76th Congress, 315 of 1,763 did.\(^105\)

For decades Congress debated various proposals for a broad tort claims act.\(^106\) Echoing President Lincoln’s call for Congress to rid it-

---

99 Prior to passing the Federal Tort Claims Act in 1946, Congress had enacted several statutes to allow tort suits against the government in specific situations, such as admiralty disputes and Post Office negligence. See Hearings on H.R. 5373 and H.R. 6463, supra note 25, at 25, 38–39, 47–48 (listing statutes).

100 See id. at 49–55 (collecting comments dating from 1832 to 1940 by congressmen criticizing the legislative system for deciding tort claims against the government).

101 Id. In 1926, Massachusetts Congressman Charles L. Underhill explained, “The power vested in the chairman of the Committee on Claims is tremendous and absolutely wrong. I can either refuse arbitrarily to consider your claim or I can take up each and every one of your claims to suit my convenience.” Id. at 52; accord id. at 54 (noting, in a 1940 statement made by Rep. Robinson, the waste of time and inequity caused by the procedures for bringing a claim against the government).

102 See id. at 37 (noting that “the judgment of the past two decades has shown [the legislative claims procedures] to be inadequate, burdensome, and unproductive of substantial justice in many cases”); see also H.R. Rep. No. 79-1287, at 2 (1945) (“[I]t does not afford a well-defined continually operating machinery for the consideration of such claims.”).


104 See, e.g., S. Rep. No. 79-1400, at 30–31 (1946) (discussing the tediousness of sorting through individual claims and the small likelihood of success for such claims); H.R. Rep. No. 79-1287, at 2 (1945) (describing the criticism of the claims system as “being unduly burdensome to the Congress” and “unjust to the claimants”); Hearings on H.R. 5373 and H.R. 6463, supra note 25, at 49–55 (compiling criticisms by congressmen of the existing procedures to obtain relief for private claims).

105 Hearings on H.R. 5373 and H.R. 6463, supra note 25, at 56; see also H.R. Doc. No. 77-502, at 1 (1942) (noting, in a message from President Roosevelt, that less than 20% of private claims bills in the 74th, 75th, and 76th Congresses became law); H.R. Rep. No. 79-1287, at 2 (1945) (listing the proportion of successful private claims bills in various congresses).

106 See generally Hearings on H.R. 5373 and H.R. 6463, supra note 25, at 40–41 (discussing the introduction of various legislative remedies in previous decades); Lester S. Jayson & Robert C. Longstreth, Handling Federal Tort Claims §§ 2.09–2.10 (2013) (describing tort recovery options and limitations before and after the enactment of the FTCA).

Congress had previously passed a myriad of statutes that provided remedies for torts arising in particular circumstances. See id. § 2.05 (describing twenty-four such statutes).
self of private claims so it could deal with “great national questions” pertaining to the Civil War, when the United States entered World War II, President Franklin D. Roosevelt urged passage of a general tort claims act so that Congress and the executive branch would not be diverted from more important matters that confronted the nation. Finally, in 1946 Congress passed the Federal Tort Claims Act (“FTCA”) as Title IV of the Legislative Reorganization Act of 1946.

The FTCA is a general waiver of the United States’ sovereign immunity for suits sounding tort. It gives federal district courts subject matter jurisdiction over tort claims arising from negligent or wrongful acts of federal employees. It is a limited waiver of sovereign immunity, subject to jurisdictional limits and affirmative defenses, but on the whole it succeeds at providing reasonable compensation for persons injured by run-of-the-mill negligence of federal employees. Title I of the Legislative Reorganization Act of 1946 prohibited private relief bills for claims that might be brought under the FTCA, effectively relieving Congress of its legislative claims system.

As originally passed, the FTCA provided that its judgments be paid under the same procedure as the Tucker Act, by enactment of a

---

These ranged from statutes of very limited scope, such as protecting oyster growers (Act of Aug. 30, 1935, ch. 831, 49 Stat. 1028, 1049) or persons damaged by Lighthouse Service vessels (Act of June 17, 1910, ch. 301, 36 Stat. 534, 537), to those of broad application, such as the Federal Employees Compensation Act (Act of Sept. 7, 1916, ch. 458, 39 Stat. 742) and the Suits in Admiralty Act (Act of Mar. 9, 1920, ch. 95, 41 Stat. 525).

---

107 Wiecek, supra note 2, at 399 (citing MESSAGES AND PAPERS OF THE PRESIDENTS (James D. Richardson ed., 1902)); see also supra note 78 and accompanying text (recognizing problems with the claims system in place at the time).

108 See H.R. DOC. NO. 77-562, at 1 (1942) (“In these critical days of our national-defense effort, I feel there should be a joint endeavor on the part of the Congress and . . . the executive branch . . . to divest our minds as far as possible of matters of lesser importance which consume considerable time and effort.”).


110 Id.

111 See, e.g., id. (granting subject matter jurisdiction in limited circumstances); id. § 2675(a) (establishing the administrative claims procedure); id. § 2680 (listing exceptions to the FTCA’s general waiver of sovereign immunity).

112 See JAYNOR & LONGSTRETH, supra note 106, § 3.01 (noting that a primary purpose of the FTCA was “to do justice to those who had suffered injuries or losses through the wrongs of government employees”).

113 See Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 131, 60 Stat. 831 (“No private bill . . . for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act . . . shall be received or considered in either the Senate or the House of Representatives.”).
specific appropriation. A different procedure was used for payments of settlements. 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.” 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."

D. Creation of 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. The delays in awaiting congressional approval of legislation to pay court judgments increased interest charges and caused consternation for 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.\textsuperscript{121} 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.\textsuperscript{122} Congress expected that ninety-eight percent of judgments would fall within that limit.\textsuperscript{123} Under the new procedure, judgments for that amount or less were paid automatically, without the need for legislation.\textsuperscript{124} Use of the Judgment Fund successfully reduced the administrative burden, interest charges on judgments against the government, and “the irritations inevitably associated with the delays occasioned by the former method of payment.”\textsuperscript{125}

In 1961, in view of the success of the 1956 statute,\textsuperscript{126} 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.\textsuperscript{127} The revised statute stated, “[e]xcept as otherwise provided by law, compromise settlements . . . made by the Attorney General [or his designee] . . . shall be settled and paid in a manner simi-

\textsuperscript{121} See H. REP. NO. 84-2638, ch. 13, at 72; Hearings Before the Subcomm. of the H. Comm. on Appropriations, 84th Cong. 883–88 (1956) (discussing the Administration’s “Proposal to Expedite the Payment of Judgments against the United States”); 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14-31 (providing background to the decision to establish a permanent fund for payment of judgments). The 1953 proposal was rejected because it provided for the Comptroller General to identify for Congress specific judgments that should not be paid. See Hearings Before the Subcomm. of the H. Comm. on Appropriations, 84th Cong. 885, 888 (1956).

\textsuperscript{122} Supplemental Appropriation Act of 1957, Pub. L. No. 84-814, § 1302, 70 Stat. 678, 694–95 (1956). The statute provided, inter alia: There are appropriated, out of any money in the Treasury not otherwise appropriated, and out of the postal revenues, respectively, such sums as may hereafter be necessary for the payment, not otherwise provide for, as certified by the Comptroller General, of judgments (not in excess of $100,000 in any one case) rendered by the district courts and the Court of Claims against the United States which have become final, together with such interest and costs as may be specified in such judgments or otherwise authorized by law.

\textsuperscript{123} Id.


\textsuperscript{125} See S. REP. NO. 87-733, at 2439 (1961) (noting that before 1956, a “large percentage of the judgments rendered against the United States were payable only upon enactment of specific appropriations legislation”); H.R. REP. NO. 87-428, at 3 (1961) (explaining how this method of payment would help the United States with both foreign policy and interest charges).

\textsuperscript{126} S. REP. NO. 87-733, at 2 (1961).

\textsuperscript{127} Id. at 2–4, 9 (describing the benefits received by the United States from the enactment of the 1956 statute); H.R. REP. NO. 87-428, at 2, 4 (1961).

lar to judgments in like causes.” Accordingly, settlements that did not exceed $100,000 could be paid from the Judgment Fund if a judgment on that claim would have been paid from the Fund and no other source was mandated by law to pay such settlements.

The FTCA’s specific directive that settlements under its provisions be paid from “appropriations available to such agency,” brought FTCA settlements within the “otherwise provided by law” exception. In his letter supporting the 1961 legislation, Attorney General Robert Kennedy pointedly noted that, “The draft proposal does not disturb the procedure presently followed with respect to the payment of compromises effected in suits in the U.S. district courts under the Federal Tort Claims Act, such settlements being payable solely from agency appropriations.”

The fact that FTCA settlements were paid from agency appropriations was one reason Department of Justice policy called for the solicitation and consideration of agency views on proposed settlements. Because of the statutory mandate that FTCA settlements be paid from agency funds, the Department of Justice settled FTCA cases with out-of-court stipulations instead of consent judgments that would have been paid from the Judgment Fund.

In 1966, Congress substantially revised FTCA procedures, mandating the use of the administrative process for all claims regardless of amount, altering the FTCA’s rule for attorney’s fees, and revising its statutes of limitations. The 1966 amendments also directed that the Judgment Fund be used to pay all litigative settlements under $100,000 and any administrative settlement between $2,500 and $100,000.

Neither the committee reports nor the one witness who appeared at the hearing on the proposed changes (the Civil Divi-

---

128 Id. The statute also broadened coverage to include judgments from state and foreign courts. See id. § 1 (authorizing the United States to pay final judgments of foreign courts, provided the Attorney General determines that it is in the interest of the United States to do so).
134 Jacoby, supra note 131, at 1218 n.37.
136 Id. §§ 1(c), 6, 80 Stat. at 306–07.
sion’s Assistant Attorney General) addressed why FTCA settlements were to be paid from the Judgment Fund.137

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 $2,500.138 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.”139 In 1978, it adopted the same, open-ended use of the Judgment Fund for several other statutes that had required congressional appropriations for payments.140

The Judgment Fund pays settlements and court-ordered judgments,141 but it is available only under very specific circumstances.142

---


141 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14-34; see also United States v. Varner, 400 F.2d 369, 372 (5th Cir. 1968) (reading the legislative history of the Judgment Fund and noting the Fund’s primary purpose was “to provide for the prompt payment of judgments and thereby to eliminate or reduce the costs of interest”); United States v. Maryland, 349 F.2d 693, 695 (D.C. Cir. 1965) (observing that the Judgment Fund’s goal was to allow claimants to “receive prompt payment without awaiting a special appropriation”).

142 Its key provisions 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—
It can pay awards or settlements 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.” 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 certifica-
tion requirement is ministerial in nature, requiring an evaluation of whether the restrictions and limits on the Judgment Fund are met, as opposed to assessing the merits of a settlement or judgment.\textsuperscript{151}

The Judgment Fund’s chief purpose is to pay settlements and court ordered judgments.\textsuperscript{152} It is available to pay judgments awarded by U.S. district courts,\textsuperscript{153} the Court of International Trade,\textsuperscript{154} and the Court of Federal Claims,\textsuperscript{155} administrative claims,\textsuperscript{156} and settlements.\textsuperscript{157} It is the correct source of payment for most FTCA judgments and settlements for more than $2,500.\textsuperscript{158} It is the initial source for payment of monetary awards by boards of contract appeals.\textsuperscript{159} Normally agencies are not required to reimburse the Judgment Fund for non-contract claims and judgments,\textsuperscript{160} except in limited instances including non-appropriated fund instrumentalities,\textsuperscript{161}\textsuperscript{n.62} judgments against the
U.S. Postal Service, \textsuperscript{162} discrimination or retaliation claims filed by federal employees, \textsuperscript{163} and awards to contractors under contract dispute procedures. \textsuperscript{164}

\textbf{E. Normalizing Use of the Judgment Fund}

Federal agencies have sought through procedural devices to have the Judgment Fund pay expenses that would otherwise come from appropriated funds. In some circumstances, Congress has addressed this problem by requiring agencies to reimburse the Judgment Fund. Efforts to contain such raids on the Judgment Fund have had mixed results.

\textit{1. The Contracts Disputes Act}

In 1978, Congress passed the Contract Disputes Act (“CDA”) \textsuperscript{165} to rationalize the “administrative and judicial procedures for the settlement of claims and disputes relating to Government contracts.” \textsuperscript{166} Among other changes, the CDA modified the method by which judicial judgments and awards from boards of contract appeals are paid. Prior to the CDA, judicial judgments were paid from the Judgment Fund and board of contract appeal awards were paid from agency funds. \textsuperscript{167} The CDA provided that (1) both court judgments and monetary awards from boards of contract appeals would be paid from the Judgment Fund, \textsuperscript{168} and (2) agencies would reimburse the Judgment Fund.

\textsuperscript{162} See 39 U.S.C. § 409(h) (2012) (requiring the Postal Service to pay judgments against it from its own funds).


\textsuperscript{164} 41 U.S.C. § 7108(c) (Supp. IV 2011). The Judgment Fund statute addresses two other issues that are only tangentially relevant to the topic under discussion. They are the payment of interest, 31 U.S.C. § 1304(b), and the payment of judgments and settlements arising from contracts of military exchanges. 31 U.S.C. § 1304(c).


\textsuperscript{168} CDA, Pub. L. No. 95-563, § 13, 92 Stat. 2383, 2389 (1978). An exception was made for judgments and awards against the Tennessee Valley Authority. Id. § 13(d), 92 Stat. at 2389.
Fund for those payments from “available funds or by obtaining additional appropriations for such purposes.” Congress included the reimbursement requirement in the CDA to make agencies more accountable and to facilitate compromise. Before the CDA, agencies had an incentive to prolong litigation and force a final judgment in court because those judgments were paid from the Judgment Fund rather than from agency funds. This practice hid the true costs of programs by allowing agencies to avoid either paying all program costs from appropriated funds or having to seek new appropriations from Congress. The new procedure also expedited payments when agencies ran out of appropriated funds and reduced government interest costs.

The system did not work as planned because agencies frequently failed to reimburse the Judgment Fund for CDA payments made from it on their behalf. For fiscal years 2001–2003, less than twenty percent of CDA money paid from the Judgment Fund was reimbursed. On average it took 9.6 months to complete payment on those cases for which the Judgment Fund was fully reimbursed. The repayment rate improved to 45.9% in 2004, 27.8% in 2005, and 27.4% in 2006. Although the CDA does not specify when agencies must reimburse the Judgment Fund, Treasury regulations suggest repayment should be made “promptly upon notification... of the

---

168 JOURNAL OF CONSTITUTIONAL LAW [Vol. 18:1

169 Id. § 13(c), 92 Stat. at 2389.


172 Id.; accord H.R. REP. NO. 95-1556, at 86 (1978); see also Letter from Elmer B. Staats, Comptroller Gen. of the United States, to Rep. Peter W. Rodino, Chairman, H. Comm. on the Judiciary (Aug. 17, 1977) (noting that the CDA’s reimbursement provision would eliminate “the existing incentive” agencies had to avoid settlements, and would provide greater transparency of the actual “economic cost of procurement programs”).

173 H.R. REP. NO. 95-1556, at 31–32; see also Bell BCI Co. v. United States, 91 Fed. Cl. 664, 668 (2010) (suggesting that the purpose of the new procedure was to save on the cost of interest to the government (citing Bath Iron Works Corp. v. United States, 20 F.3d 1567, 1583 (Fed. Cir. 1994))).


176 Id. at 9.
amount due”, Treasury lacks authority to compel payment. Agencies told Treasury that they deferred making the required payments because doing so would have adversely affected their programs and key activities. In 2007, Treasury’s Financial Management Service initiated actions to improve agency responsiveness, including the posting on its website of outstanding balances owed to the Judgment Fund.

2. The No FEAR Act

The 2002 Notification and Federal Employee Antidiscrimination and Retaliation Act (“No FEAR Act”) addressed the problem of chronic discrimination and retaliation in the federal workplace. It did so by requiring greater notification to federal employees of their rights, in-depth reporting about cases of agency discrimination, and, similar to the CDA’s payment scheme, agency reimbursement of the Judgment Fund for payments made from it for “judgments, awards, and compromise settlements” arising from discriminatory conduct directed at federal employees or applicants. Requiring agency reimbursement addressed the fact that although discrimination claims were increasing, agencies had little financial motivation to change bad practices because adverse judgments had

178 See GAO-08-295R, supra note 175, at 9.
179 See GAO-04-481, supra note 174, at 4.
180 See GAO-08-295R, supra note 175, at 10–11 (listing actions such as using billing letters, phone calls and emails, and increasing agency awareness); see also 5 C.F.R. § 724.101 et seq. (2005) (establishing similar provisions for the No FEAR Act).
184 Id. § 203, 116 Stat. at 569.
185 Id. § 201, 116 Stat. at 568.
186 See Notification and Federal Employee Antidiscrimination and Retaliation Act of 2001: Hearing on H.R. 169 Before the H. Comm. on the Judiciary, 107th Cong. 6 (2001) (statement of Kweisi Mfume, President and CEO, NAACP) (decrying the increase in discrimination claims within the federal government and suggesting that bringing a formal claim is “often tantamount to a death sentence for a person’s career within the federal government”).
no effect on their bottom line.¹⁸⁷ Prior to enactment of the No FEAR Act, payment of damages arising from federal employment discrimination claims was handled in a two-tier system: claims that were resolved on the administrative level were paid from agency funds, while claims resolved in the courts were paid from the Judgment Fund.¹⁸⁸ This circumstance provided a “perverse incentive” for agencies to resist settlement of discrimination claims at the administrative level.¹⁸⁹ As the Senate Report explained, use of the Judgment Fund “discourages accountability by being a disincentive to agencies to resolve matters promptly in the administrative processes; by not pursuing resolution, an agency could shift the cost of resolution from its budget to the Judgment Fund and escape the scrutiny that would accompany a request for a supplemental appropriation.”¹⁹⁰ The No FEAR Act removed that disincentive by requiring federal agencies to reimburse the Judgment Fund for payments made on discrimination and retaliation claims.¹⁹¹

Reimbursement rates were much higher for No FEAR payments than for CDA payments,¹⁹² although the No FEAR Act similarly did not set a deadline for reimbursements.¹⁹³ For fiscal years 2004–2006

¹⁸⁷ See S. REP. NO. 107-143, at 3 (observing that, in fiscal year 2000, agencies were relieved of paying almost $43 million in discrimination claims because of the Judgment Fund); 147 CONG. REC. 778 (Jan. 29, 2001) (statement of Sen. John Warner) (“I firmly believe that because there is no financial consequence to their actions, Federal agencies are essentially able to escape responsibility when they fail to comply with the law and are unresponsive to their employees’ concerns.”).
¹⁸⁹ The Committee on the Judiciary used the term “perverse incentive” in the House Report:

The Committee finds that allowing Federal agencies to use the general treasury as a slush fund to pay court judgments and settlements for discriminating and retaliating, has created:

(1) a lack of accountability among some of the Federal agencies; and
(2) a perverse incentive for agencies to prolong the cases until they reach court.

¹⁹⁰ S. REP. NO. 107-143, at 3 (quoting J. Christopher Mihm, General Accounting Office, Testimony Before the Committee on the Judiciary, House of Representatives, May 9, 2001, p. 8).
¹⁹¹ Pub. L. No. 107-174, § 201, 116 Stat. at 568; see also S. REP. NO. 107-143, at 3 (observing that agencies will still use the Judgment Fund to initially pay the discrimination claims to prevent large settlements or judgments from disrupting agency operations in the short term); H.R. REP. NO. 107-101, pt. 1, at 13, reprinted in 2002 U.S.C.C.A.N. 419, 427 (observing that smaller agencies can spread Judgment Fund reimbursement payments over several years, as the No FEAR Act only requires payment within a reasonable amount of time).
¹⁹² GAO-08-295R, supra note 175, at 8.
nearly all No FEAR payments were reimbursed, with the average time of repayment dropping to 2.9 months in 2006.\textsuperscript{194} A key reason for this higher reimbursement rate is the smaller relative size of No FEAR payments compared to agency budgets.\textsuperscript{195}

3. The Equal Access to Justice Act

Congress enacted the Equal Access to Justice Act ("EAJA") in 1980 to help smaller entities protect their rights and seek review of government conduct without being deterred by litigation expenses.\textsuperscript{196} The statute used the carrot of reimbursing attorneys fees to entities that succeeded against the government\textsuperscript{197} and the stick of subtracting those fees from appropriated funds of agencies that acted in bad faith or took positions that were not substantially justified.\textsuperscript{198} 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.\textsuperscript{199} 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 the common law or under the terms of any statute which specifically provides for such an award” unless another statute prohibits such an award.\textsuperscript{200} Accordingly, the United States is liable for attorney fees under federal fee-shifting statutes and exceptions to the “American Rule” on attorneys’ fees.\textsuperscript{201} 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.  

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 certain judicial proceedings “unless the court finds [its] position . . . was substantially justified . . . .” The administrative adjudications mandate, 5 U.S.C. § 504, awards fees when a losing agency’s position is not found by the adjudicative officer to be “substantially justified.” The 1980 statute provided that fees and expenses under both provisions “may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid [from the Judgment Fund].”

Agencies have aggressively sought to have the Judgment Fund pay EAJA fees. In 1982 the Department of Transportation argued that the use of “may” in these provisions meant that agencies had discretion to pay an EAJA award from agency funds, or not; if the agency did not choose to pay the bill the Judgment Fund would. The Department of Justice Office of Legal Counsel (“OLC”) rejected this position as inconsistent with EAJA’s legislative history and concluded that at least some fees must be paid from agency appropriations. In 1985, Congress amended EAJA and eliminated any agency discretion by rescinding the “may be paid” language and directing that “Fees and other expenses awarded under this subsection shall be paid by any agency . . . from any funds made available to the agency by appropriation or otherwise.” It did so intending that the award of fees

203 28 U.S.C. § 2412(d)(1)(A) (“Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort).”).
205 Pub. L. No. 96-481, 94 Stat. at 2327, 2329 (emphasis added).
206 See, e.g., CRS JUDGMENT FUND, supra note 193, at 12 (“Since the passage of EAJA, agencies have disputed whether payments under the act must be made out of their appropriations or whether attorneys’ fees may be charged to the Judgment Fund.”).
208 Id. at 210–12.
from agency funds provide agencies a strong disincentive against taking unreasonable positions.210

A similar EAJA payment issue arose in the aftermath of the Federal Circuit’s decision in Cienega Gardens v. United States,211 which found for plaintiffs in a suit regarding amendments to a Department of Housing and Urban Development (“HUD”) program.212 Even though EAJA squarely provided for payment of this award from agency appropriations,213 HUD urged that payment should come from the Judgment Fund because the plaintiffs had sued the United States and not the agency.214 The Treasury Department argued that because the party won in an action over an agency, HUD was responsible for the payment.215 Resolving the dispute, the OLC determined that HUD had to pay.216 OLC clarified that “HUD constitutes the agency over which the party prevailed” as determined by EAJA.217 Further, OLC concluded that “[t]he Judgment Fund is available to pay a [§ 2412(d)(4)] fee award only if there is no agency over which the plaintiffs can be said to have prevailed under EAJA.”218

The legislative goal to have the threat of awarding fees from agency funds serve as a deterrent to unreasonable agency positions219 and the change of statutory language from agencies “may”220 pay to “shall”221 pay fees and expenses granted by EAJA, suggest that Congress intended for many EAJA payments to come from agency appropriations.222 This is not necessarily what happens. There is tension

---


211 331 F.3d 1319 (Fed. Cir. 2003).

212 Id. at 1324.


215 Id. at 234.

216 Id.

217 Id. (internal quotation marks omitted); see also id. at 242 (stating the same).

218 Id. at 256.


222 See CRS JUDGMENT FUND, supra note 193, at 13 (“The opinion did not leave open the possibility that agencies could be reimbursed for awards made pursuant to EAJA from the Judgment Fund and strongly suggested they would have to use their own appropriations.”).
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”), \(^{223}\) 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”). \(^{224}\)

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 litigation.

Discussion about the scope and nature of EAJA payments is particularly heated in environmental matters involving the EPA, the Department of the Interior, and the Department of Agriculture. Critics suggest that environmental organizations use a “sue and settle” strategy to bypass the normal administrative process when they sue an agency, the agency settles, and the resulting consent decree effectively becomes a binding regulation. \(^{225}\) Use of EAJA is seen as part of that strategy and as an incentive for environmental organizations to bring suit. \(^{226}\) Some have questioned whether agencies actively invite such litigation. \(^{227}\) One side in this debate has called for wholesale reform.

---


\(^{225}\) See 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); Temple Stoellinger, Seeing Through the Regional Haze, 37 WYO. LAW 34, 37 (2014) (explaining that “where environmental groups sue the EPA, the EPA then agrees to settle the lawsuits through a binding decree which dictates rules for EPA’s action, thereby eliminating that state’s ability to engage in negotiations with EPA”). House Agriculture Committee Ranking Member Collin C. Peterson explained this viewpoint in an Op-Ed piece:

[\text{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.]


of EAJA to account for this “strategy”; the other argues for preservation of the statute and its use in environmental litigation.

II. A BRIEF HISTORY OF THE PUBLIC DISCLOSURE OF CLAIMS PAYMENTS

A. The Statements and Accounts Clause

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. The Articles of Confederation had required semiannual reports. Ultimately Madison’s view prevailed, resulting in the Clause’s “from time to time” language and leaving Congress with great latitude as to when to publish expenditures. Both sides in the debate agreed that the public had a right to know how the government spent its money.

Congress has very broad authority over public disclosure of expenditures. Only a handful of cases have been brought under the Statement and Accounts Clause seeking disclosure of government spending; none have succeeded. The most prominent treatment of the issue was the Supreme Court’s decision in United States v. Richard-

\[\text{\textsuperscript{228}} \text{See, e.g., Baier, supra note 226, at 69–70 (explaining possible methods of reform).}\]
\[\text{\textsuperscript{229}} \text{See, e.g., Brian Korpics et al., Shifting the Debate: In Defense of the Equal Access to Justice Act, 43 ENVT. L. REP. 10985, 10998 (2013) (concluding there is “no clear economic or policy basis that would support a rewrite of EAJA”).}\]
\[\text{\textsuperscript{230}} \text{See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 14, at 618–19; Note, Secret Funding, supra note 13, at 609–11 (noting Madison’s concerns that annual reports would prove to be functionally useless and impractical).}\]
\[\text{\textsuperscript{231}} \text{ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5 (“The United States in Congress assembled shall have authority . . . to borrow money, or emit bills on the credit of the United States, transmitting every half-year to the respective States an account of the sums of money so borrowed or emitted . . . .”).}\]
\[\text{\textsuperscript{232}} \text{U.S. CONST. art. I, § 9, cl. 7.}\]
\[\text{\textsuperscript{233}} \text{See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 14, at 619; see also Note, Secret Funding, supra note 13, at 609–11 (observing that even though Madison’s view prevailed, concerns that the language would produce reports that were extremely infrequent surfaced at the New York state ratifying convention).}\]
\[\text{\textsuperscript{234}} \text{See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 14, at 619 (arguing the debate really focused on how to best get the information to the people rather than on whether the people should have the information); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 149–50 (Max Farrand ed., rev. ed. 1966) (stating that “the People who give their Money ought to know in what manner it is expended”).}\]
\[\text{\textsuperscript{235}} \text{See Harrington v. Bush, 553 F.2d 190, 194 (D.C. Cir. 1977) (noting that the Statement and Accounts Clause “is not self-defining and Congress has plenary power to give meaning to the provision”).}\]
son, a challenge to the practice of making secret appropriations to the CIA. In Richardson, the Court found the petitioner lacked standing because his grievance was shared by all members of the public. Even though the Court did not reach the merits of the case, it commented that, “Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest.” The Court noted that for almost 200 years the Statement and Accounts Clause had been read to give “Congress plenary power to spell out the details of precisely when and with what specificity Executive agencies must report the expenditure of appropriated funds.” Richardson’s sweeping language virtually precludes any future disclosure claims under the Statement and Accounts Clause. Although the meaning of the clause’s “from time to time” phrase is imprecise, courts have consistently interpreted it as giving Congress complete discretion over what information to provide about appropriations and when to provide it.

B. Statutory Disclosure of Payments

The history of congressional requirements for public reporting of government 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.
In the early Republic, Congress kept close tabs on the payment of claims. For example, the statute regarding Revolutionary War pensions that gave rise to Hayburn’s Case called for detailed reports to Congress about wounds and disabilities. The statute for property claims arising from the War of 1812 required that “all adjudications . . . shall be entered . . . in a book.” Of course, when Congress passed a private law granting a remedy, the bill stated the claimant’s name, the amount of the payment or means of assessing it, and typically the nature of the claim. The same information appears in recent private relief bills.

When Congress established the Court of Claims in 1855, it initially 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 for reports to Congress, and Congress frequently appropriated funds to pay specific claims.

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

244 See supra note 41 and accompanying text.
245 Act of Mar. 23, 1792, ch. 11, §§ 2–4, 1 Stat. 243, 244.
247 See, e.g., An Act For the relief of Vern M. Stanchfield, ch. 100, 58 Stat. 960 (1944) (awarding $75 for loss of horse that was injured while being used by a Dep't of the Interior employee); An act for the relief of John L. T. Jones, of Montgomery County, Maryland, for rent and damage sustained by the destruction of a dwelling house by accidental fire while the same was being occupied by United States troops for quarters [in 1862], ch. 437, 18 Stat. 76 (1874) (awarding $4,000); An Act to increase the pension of William Munday, ch. 48, 6 Stat. 161 (1815) (awarding twenty dollar per month pension to a serviceman “who lost both his arms in an attack on the enemy, at St. Leonard’s creek”).
248 See, e.g., An Act For the relief of retired Sergeant First Class James D. Benoit and Wan Sook, Benoit, 116 Stat. 3119 (2002) (awarding $415,000 to compensate for death and wrongful retention of remains of David Benoit “resulting from a fall . . . from an upper level window while occupying military family housing supplied by the Army in Seoul, Korea”).
250 See Act of 1863, Ch. 92, § 7, 12 Stat. 765, 766 (requiring report “of all sums paid at the treasury on such judgments, together with the names of the parties in whose favor the same were allowed”).
251 See Act of Mar. 3, 1887, ch. 359, § 11, 24 Stat. 505, 507 (requiring the Attorney General to report each final judgment of the Court of Claims).
252 See, e.g., Shimomura, supra note 26, at 661 (discussing appropriations for claims payments in the 1870s).
amount awarded, and a brief description of the claim.”\textsuperscript{255} In 1965 Congress repealed this reporting requirement.\textsuperscript{254} It did so as part of an effort to reduce needless reports and publications,\textsuperscript{255} reasoning that information about claims settled for $2,500 or less was of “no value to preparing agencies and no known use to Congress.”\textsuperscript{256}

The No FEAR Act mandated that each agency file an annual report identifying, inter alia, the number of cases alleging discrimination, the status of each, and the amount of money paid on each claim and in the aggregate.\textsuperscript{257} It also required that each agency post on its public website detailed statistical information about the status of discrimination complaints filed with the agency (but not including money paid), and that the Equal Employment Opportunity Commission post a summary of this statistical data on its website.\textsuperscript{258}

When it enacted the EAJA in 1980, Congress required an annual report on the fees and expenses awarded under the act, identifying “the number, nature, and amount of the awards[,]” and other relevant information.\textsuperscript{259} The report was expected to allow Congress to evaluate EAJA’s cost and identify agencies engaged in unreasonable activity.\textsuperscript{260} This report requirement was repealed as part of the Federal Reports Elimination and Sunset Act of 1995,\textsuperscript{261} legislation enacted to eliminate “unnecessary paperwork” and save staff time.\textsuperscript{262}


\textsuperscript{254} See Act of Nov. 8, 1965, Pub. L. No. 89-348, § 1, 79 Stat. 1310, 1310 (repealing “The annual report to Congress of the administrative adjustment of tort claims of $2,500 or less”).

\textsuperscript{255} S. REP. NO. 89-545, at 2 (1965); see also H. REP. NO. 89-1169, at 3–5 (1965) (discussing the potential savings from reducing reporting requirements).

\textsuperscript{256} S. REP. NO. 89-545, at 3 (1965). In 1966, Congress amended the FTCA to provide that agency appropriations be used for FTCA settlements less than $2,500, the Judgment Fund pay settlements between $2,500 and $100,000, and agencies could enter settlements of administrative claims up to $25,000 without approval of the Attorney General. Act of July 18, 1966, Pub. L. No. 89-506, § 1(a), (c), 80 Stat. 306. The statute did not address the reporting requirement. Id.


\textsuperscript{258} Id. § 301, 116 Stat. at 573; id. § 302, 116 Stat. at 575.


III. ASSESSING JUDGMENT FUND PRACTICES

A. Raids on the Judgment Fund

1. Legislative Branch Encroachment

From the defendants’ side of the ledger, the Judgment Fund—this permanent, indefinite appropriation—is a tempting target to agencies and entities seeking protection because it exists outside the normal appropriation process. For claims arising under statutes that do not require reimbursement the Judgment Fund provides “free money” to agencies whose actions gave rise to the claims. For example, if an agency program causes substantial claims under the FTCA, those claims will be paid without any reduction in the agency’s programs or requirement that the agency justify the cost of the claims to an appropriations committee. Congress has authority to alter these rules, as it did when it mandated that the newly created Postal Service reimburse the Judgment Fund for payments made arising from its activities.

Entities outside the federal government have sought legislation treating them as part of the government for FTCA purposes. When granted, this status makes the Judgment Fund responsible for their torts, absolves them of any financial responsibility, and renders the FTCA’s defenses applicable to claims against them. Congress has provided this coverage to manufacturers and distributors of the vaccine in the National Swine Flu Immunization Program of 1976, cert.

---

263 See 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14-29 to 14-44 (discussing requirements that must be met to have payment made from the Judgment Fund).

264 39 U.S.C. § 409(h); 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14-41.

Non-appropriated fund instrumentalities (NAFIs) also generally pay their own judgments and settlements. 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14-42 to 14-43; see also Hopkins, 427 U.S. at 127 (suggesting that unless it specifically acts, Congress does not intend to assume NAFIs’ obligations); Mignogna, 937 F.2d at 42 (noting that NAFIs may be subject to claims against them and their non-appropriated assets).

265 See, e.g., Gonzalez v. United States, 284 F.3d 281, 287 (1st Cir. 2002) (noting that the FTCA "provide[d] the basis for the cause of action" against a community health center); In re Consol. U.S. Atmospheric Testing Litig., 820 F.2d 982, 992 (9th Cir. 1987) (noting that the FTCA sometimes applies to nuclear weapons contractors).

tain tribal contractors, and nuclear weapons contractors. Because the Judgment Fund works automatically, Congress has no occasion to review and consider payments made on behalf of these entities. Granting FTCA coverage to non-federal government entities may be poor policy, but it is a political decision appropriately made by Congress under its power of appropriation.

2. Executive Branch Encroachment

a. Executive Branch Authority over the Judgment Fund

The integrity of the Judgment Fund is dependent on the good faith of executive branch officers. The key Judgment Fund provision appropriates money “to pay final judgments, awards, [and] compro-

---


270 See, e.g., Gross, supra note 267, at 443 (noting that the “funds to pay tort judgments against tribal contractors” are “given out automatically through the Judgment Fund”).

See President George H. W. Bush Statement on Signing Department of the Interior and Related Agencies Appropriations Act, 1991, 2 PUBL. PAPERS 1558, 1559 (Nov. 5, 1990) (noting that use of the FTCA is inconsistent with tribal autonomy and Indian self determination); see also GAO/RCED-00-169, supra note 267, 36 app. IV (Dept. of Interior comments) (noting that FTCA coverage removes tribes’ incentive to reduce claims and that sometimes tribes or their employees do not cooperate in defending claims); Gross, supra note 267, at 400-05 (noting various practical problems of using the FTCA to cover torts of non-federal entities).
mise settlements….”

Decisions regarding how to litigate, whether to appeal, and when to settle are made by executive branch officials, usually the Attorney General or officials under his direction or to whom he has delegated authority. A lack of due care on their part could lead to payments from the Judgment Fund that are outside the parameters set by Congress.

The Judgment Fund can pay only litigative awards—those that were or might be made in court. The Department of Justice has presumptive responsibility for all litigation of the United States and its agencies. Its statutory grant of authority states, “[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General.”

The Judgment Fund can pay awards or settlements only if they are “final.” A judgment is final for Judgment Fund purposes when the appellate process is finished. This happens when there is a final decision by a court of last resort, the time for filing an appeal expires, or the parties decide not to seek review. Only the Solicitor General has authority to determine “whether, and to what extent, appeals will be taken by the Government” from adverse decisions.

---

271 See 31 U.S.C. § 1304(a) (explaining that the statute applies only when payment is not authorized from another source, the Secretary of the Treasury certifies it, and “the judgment, award or settlement is payable” under a statute designated by Congress); see also supra notes 12–18 and accompanying text.

272 See, e.g., 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14-34 (noting that the Judgment Fund was enacted primarily to pay “court judgments and settlements negotiated under authority of the Justice Department”); CRS JUDGMENT FUND, supra note 193, at 6 –7 (distinguishing administrative awards “which are provided for by statute and paid from the agency’s appropriation”).

273 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 15-222 to 15-223.

274 28 U.S.C. § 516; see also 28 U.S.C. § 519 (authorizing the Attorney General to “supervise all litigation to which the United States, an agency, or officer thereof is a party”); 5 U.S.C. § 3106 (requiring agencies to consult with the Department of Justice and restricting hiring of private attorneys). The term “agency” includes “any corporation in which the United States has a proprietary interest....” 28 U.S.C. § 451. The Department of Justice vigorously guards this authority. 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 15-222 to 15-223.

275 31 U.S.C. § 1304(a); see also 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14-36 (discussing the “finality” requirement).

276 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14-36.

277 Id. (citing 73 Comp. Gen. 46 (1993)).

278 28 C.F.R. § 0.20(b) (2013); see also United States v. Hare, 269 F.3d 859, 861 (7th Cir. 2001) (noting that only the Solicitor General has the “right to control appeals of the United States”).
The Attorney General has broad authority to settle litigation under his supervision and to delegate that settlement authority. He has delegated to Assistant Attorneys General the authority to “[a]ccept offers in compromise of, or settle administratively, claims against the United States in all cases in which the principal amount of the proposed settlement does not exceed $2,000,000,” and “to redelegate to subordinate division officials and United States Attorneys” that authority. For example, U.S. Attorneys can redelegate their authority to “Assistant United States Attorneys who supervise other Assistant United States Attorneys who handle civil litigation.”

The Attorney General also delegated authority to settle administrative tort claims to other Justice Department components and to some agencies that handle numerous claims. Thus, the Postal Service and the Departments of Defense and Veterans Affairs have authority up to $300,000, while the Departments of Health and Human Services, Transportation, and Homeland Security have authority up to $200,000, $100,000, and $50,000, respectively. All agencies have $25,000 in independent statutory authority under the FTCA to settle administrative claims. In practice, agencies can settle FTCA claims for an amount up to their authority, absent some complicating factor such as a new precedent or potential third party claim.

---

279 28 U.S.C. § 2414 (2011) 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.


281 28 C.F.R. § 0.160(a)(2).

282 28 C.F.R. § 0.168(a). The redelegation of authority to U.S. Attorneys to accept offers in compromise is limited to “cases in which the principal amount of the proposed settlement does not exceed $1,000,000.” 28 C.F.R. § 0.168(d)(2).


284 See, e.g., 28 C.F.R. § 0.172(a) (authorizing directors of the Federal Bureau of Investigation, the Drug Enforcement Administration, the Bureau of Prisons, Federal Prison Industries, the United States Marshals Service, and the Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives to settle tort claims up to $50,000).


286 Id.

287 28 U.S.C. § 2672. The Judgment Fund pays administrative settlements that exceed $2,500; settlements for $2,500 or less are paid from agency funds. Id.; see also Janson & Longstreth, supra note 196, at § 17.12 (discussing payment of administrative awards).

288 28 C.F.R. § 14.61(d). FTCA administrative settlements that exceed the agency’s authorization and FTCA lawsuit settlements that exceed a Justice Department attorney’s authority
Executive branch officers with this broad authority over litigation and settlements are in a position from which they might help favored plaintiffs by ignoring statutory limits and defenses, pulling punches in litigation, or settling claims for amounts unwarranted by the law and facts. Narratives about whether government attorneys might abuse that authority to benefit political allies vary with the writer and the focus. Professor Todd David Peterson has forcefully suggested “there is no reason to believe that a Department that is committed to an advocacy model in advising the President on his constitutional authority would shrink from a settlement policy that permitted political judgments to displace litigation risk assessments.” Jeffrey Axelrad, the former head of the Torts Branch in the Justice Department’s Civil Division, expressed a different view: “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 have been the hallmark of the Justice Department’s exercise of this responsibility.”

must be formally approved by the Department of Justice officer with authority for that amount. 28 C.F.R. § 14.6(c); JASON & LONGSTRETH, supra note 196, at § 15.05(1).

See Todd David Peterson, Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice, 2009 BYU L. REV. 327, 331 (2009) (noting the secret nature of government settlement analysis); see also id. at 349 (explaining that the Department of Justice “has the power to compromise and settle these claims for amounts that may not reflect their legal merit but rather the desire of the executive branch to compensate plaintiffs whom they deem worthy”).

Id. at 331.

See Axelrad, supra note 4.

Certainly political pressure from within the executive branch has been applied with the intent of opening the Judgment Fund. The previously discussed attempts of the Department of Transportation and the Department of Housing and Urban Development to use the Judgment Fund to make EAJA payments had a political aspect. See supra 206–218 and accompanying text. So did efforts of the Department of Energy to help nuclear weapons contractors secure FTCA coverage for their actions. See, e.g., H.R. REP. NO. 98-124, pt. 2, at 14–17 (1983) (letter from Dep’t of Energy General Counsel supporting contractors’ proposal). Executive branch officials in non-Justice agencies have done things for political reasons that seemingly undermine the government’s position in pending tort litigation. See Paul Figley, Ethical Intersections & the Federal Tort Claims Act: An Approach for Government Attorneys, 8 ST. THOMAS U. L.J. 347, 368–70 (2011) (discussing actions of Secretary of Energy Hazel O’Leary during trial of FTCA suit brought by Nevada Test Site workers alleging exposure to radiation). These sorts of things are different in kind from Professor Peterson’s concern that Justice Department attorneys “may wish to compensate plaintiffs for political reasons or because the administration favors the plaintiff’s cause, even though the plaintiff’s legal claim is weak.” Peterson, supra note 289, at 331; see also Catherine J. Lancot, The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions, 64 S. CAL. L. REV. 951, 984–86 (1991) (discussing ethical obligations of civil government attorneys to raise all applicable defenses).
b. Single Event Settlements

Government attorneys handling high profile cases, run-of-the-mill litigation, and administrative claims have the authority to settle those matters with Judgment Fund money.\(^{292}\) Department of Justice regulations require documentation and approval of such settlements.\(^{293}\)

It is no secret that some private attorneys, acting to the detriment of their clients, settle cases for more (or less) than is warranted by the facts and the law.\(^{294}\) Their reasons range from fear of losing or being embarrassed,\(^{295}\) to hope of hiding their poor preparation or lack of qualifications,\(^{296}\) to desire to accommodate those with whom they will have future dealings such as local lawyers or a judge who demands settlement.\(^{297}\) There is also simple laziness and the wish to avoid the work, time, and stress that a trial requires.\(^{298}\) Lawyers may unconsciously merge their self-interest into their analysis of whether a case should be tried.\(^{299}\)

Some government attorneys may wish to settle cases for similar reasons. Two primary questions the Civil Division considers in determining whether to approve a proposed settlement are whether the case is adequately prepared and whether settlement has been pro-

\(^{292}\) Peterson, supra note 289, at 349.


\(^{295}\) See Tom Galbraith, Lawyer Behavior for Survival and Elegance, 33 LITIGATION 8, 13 (2006) (noting that some attorneys “can always find a rationale for settling a case he is afraid to lose at trial”); Sternlight, supra note 294, at 317–18 (explaining that psychological factors can impact an attorney’s motivation for settling a case).


\(^{297}\) See Sternlight, supra note 294, at 328 (noting that attorneys may settle to foster amicable relationships with opposing counsel or opposing parties); see also Patrick E. Longan, Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates As Mediators, 73 NEB. L. REV. 712, 736 (1994) (recognizing that a “judge can play on the fears of the lawyers who have other cases to come before that judge”).

\(^{298}\) Sternlight, supra note 294, at 328; see also LLOYD PAUL STRYKER, THE ART OF ADVOCACY 291 (1954) (noting that settlement is an option for attorney who “for personal reasons . . . would a little rather not submit to ordeal by combat”) (cited in Glenn E. Bradford, Losing, 58 J. Mo. B. 208, 209 (2002)).

posed because the attorney wants to avoid going to trial.\textsuperscript{300} Documented examples where government attorneys have settled to avoid trial are rare. One such case is \textit{White v. U.S. Department of the Interior}, in which an Assistant U.S. Attorney avoided an imminent trial by lying to the judge, deceitfully stating that a $2,000,020 wrongful death settlement had been approved by his “superiors in Washington.”\textsuperscript{301} This lie was remarkable because it was sure to come to light “[w]hen payment as required under the agreement was not received.”\textsuperscript{302} It was discovered, a motion to enforce the unapproved settlement was denied,\textsuperscript{303} and six months later, summary judgment was granted for the government on liability.\textsuperscript{304}

It is easy to be generous with other people’s money,\textsuperscript{305} a truism that might tempt a government attorney facing a very sympathetic plaintiff apparently barred from suing the government.\textsuperscript{306} In the normal situation, a client’s interest in a favorable settlement would counterbalance its attorney’s desire to settle for more (or less) than the litigative value of the case. That is not the case when Judgment Fund money is sought under a statute that does not require reimbursement because the client agency has no financial interest in the outcome.\textsuperscript{307} Despite the ease with which such cases might be settled and the evident “incentive to yield to the perceived special need du jour,”\textsuperscript{308} there is very little factual support for the notion that government attorneys inappropriately use the Judgment Fund to settle individual claims or cases.\textsuperscript{309} This circumstance is attributable to the pro-

\begin{footnotes}
\item[300] \textit{See generally} 28 C.F.R. Pt. 0, Subpt. Y, App., Civil Div. Directive No. 1-10 § 2(b) (requiring a “a detailed description of the matter, the United States Attorney’s recommendation, the agency’s recommendation where applicable, and a full statement of the reasons therefor”).
\item[302] \textit{Id.}
\item[303] \textit{Id.}
\item[305] \textit{Cf. In re Erewhon, Inc.}, 21 B.R. 79, 81 (Bankr. D. Mass. 1982) (“When dealing with other people’s money, there is apt to be less regard for exercising the same scrutiny of charges that one might render when dealing purely with one’s own expenses.”).
\item[306] \textit{See generally Peterson, supra note} 289, at 348 (discussing how “the worthiness of the cause is not always congruent with the meritoriousness of the claim”).
\item[307] \textit{See supra note} 138 and accompanying text; \textit{see also} Axelrad, supra note 4.
\item[308] Axelrad, supra note 4.
\item[309] \textit{But cf. infra} Part III.2.c (discussing EAJA settlements in “sue and settle” litigation).
\end{footnotes}
fessionalism of those attorneys, to the safeguards built into the system that require detailed written explanations of settlements and approval of larger settlements by attorneys not directly involved in the litigation and, perhaps, to the difficulty of detecting settlements in which it was done.

c. “Sue & Settle” Environmental Litigation

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 consequences of their misconduct (i.e., EAJA liability) and burdening the Federal budget unnecessarily.” The availability of the Judgment Fund to pay EAJA fees is part of the mix in “sue and settle” environmental litigation.

military hardware was barred by statute when the President was “unable to certify that Pakistan had not developed nuclear weapons,” but the money was not returned. Id. at 367. In 1998, prior to suit being filed, the Clinton Administration agreed to pay $324,600,000 from the Judgment Fund to settle Pakistan’s claim; Pakistan also received $142,300,000 from other sources. Id. The lack of specific information about the legal arguments makes it difficult to analyze the merits of the decision to settle with Judgment Fund money.

310 See Axelrad, supra note 4 (describing the role of Department of Justice attorneys in guarding against misuse of Judgment Fund money).


312 See Peterson, supra note 289, at 369–73 (explaining why the judicial and legislative branches are poorly situated to monitor for such settlements).

313 See Baier, supra note 226, at 35 n.265, 63 n.456 (noting that EAJA fees are not always paid as the statute requires).

314 See H.R. 2282, § 2(a)(6), 108th Cong. (2003), quoted in Baier, supra note 226, at 61–63 n.433 (noting that a nearly identical bill was introduced in 2005).

For an agency entering a “sue and settle” settlement, a key issue is whether plaintiff’s expenses and attorneys’ fees will be paid from the Judgment Fund or agency appropriations. Under EAJA, if a fee-shifting statute or the common law creates a right to such fees from the United States, those fees would be paid from the Judgment Fund unless the basis of the award is that the agency acted in “bad faith,” in which case they would be paid from agency funds. If no such fee-shifting statute or common law right applies, EAJA fees can be paid to a prevailing party, but only from agency appropriations and only if the agency’s position was not “substantially justified.” When a suit involves both statutes that authorize attorneys’ fees and those that do not, the Office of Legal Counsel determined that all fees should be allotted to the statute authorizing fees (and be paid from the Judgment Fund) if claims under the statutes were closely related and contributed to a successful, significant prosecution. If the claims are unrelated, fees are allotted between agency appropriations and the Judgment Fund.

In analyzing whether the Judgment Fund has been misused, the interesting question is how the source of funding decision is made when the answer is not obvious: how is it decided whether fees will be paid from the Judgment Fund or agency appropriations when a settlement involves claims involving different facts and statutes such that work on one issue did not impact the other, or when there is some indication that the agency acted in “bad faith” or was “substantially justified” in its position? It appears that this decision is typically made when the parties negotiate the settlement. As Bureau of

---

316 28 U.S.C. § 2412(b), (c)(2).
320 See id. at 321 (“Under this approach, hours and costs necessary to both counts should be assigned to the [agency appropriation] for attorneys’ fees purposes, leaving only the hours and costs necessary only to the APA claim to be paid [from the Judgment Fund].”); see also Payment of Attorney’s Fees and Cost in Jean M. Kovalich v. Defense Investigative Service, B-231771, (Comp. Gen. Dec. 7, 1988) (concluding that EAJA settlement of attorneys’ fees must be paid from agency appropriation although related back-pay award was paid from the Judgment Fund).
321 See e.g., U.S. GOVT ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME 22 (2011) [hereinafter GAO-11-650] (noting that “[a]s part of the payment process, Justice negotiated payment amounts with prevailing parties”); Baier, supra note 226, at 46 (noting EAJA fees are frequently settled in an addendum to a stipulation identifying a prevailing party “or as part of the over-
Land Management Director Robert Abbey explained, in practice “[the money] can come out of either fund. . . . It is part of the negotiations, it is part of the settlement discussion.” Those negotiations typically include plaintiff’s counsel and attorneys from both the agency and the Department of Justice. The prevalent expectation is that most environmental fee awards will be paid by the Judgment Fund. The most detailed information available is in a 2011 Government Accountability Office study that examined EAJA payments made in EPA cases. Its included tables show that from December 2005 through September 2010, the Judgment Fund paid $8,379,302.63, or 86% of the total awarded in those cases, while EPA appropriations paid $1,371,228, amounting to 14%.

Deciding the source of payment decision in settlement negotiations is troublesome unless the government attorneys are scrupulous in assessing which statute properly authorizes the payment. The Judgment Fund statute is limited to paying awards “not otherwise provided for.” A key principal of appropriations law is that “[t]here is only one proper source of funds in any given case. There is no election to be made.” Parties cannot properly stipulate or agree to change which government account will pay a settlement. The reason is clear: allowing them to do so “might encourage settlements

323 See id. at 87 (statement of Director Abbey regarding BLM settlements); see also GAO-11-650, supra note 321, at 25 (noting that the Justice Department frequently attempts to negotiate attorneys’ fees rather than litigate them).
324 See GAO-11-650, supra note 321, at 22 (agreeing as to “most claims”); Korpics et al., supra note 229, at 10996 (agreeing as to “virtually all fee awards”).
326 See id. at 40–49 (referencing ten pages of tables listing, inter alia, case names, plaintiffs, and amounts paid); see also id. at 4 (noting that the report covered the period for which relevant EPA payment data were available).
327 See id. at 40–49 (calculating the sums by adding payments); see also Ron Arnold, How Washington Pays Big Green to Sue the Government, WASH. EXAMINER, Aug. 23, 2011, http://washingtonexaminer.com/how-washington-pays-big-green-to-sue-the-government/article/40827 (using the tables in the GAO report to calculate that 82% of the money paid went to environmental organizations).
328 31 U.S.C. § 1304(a) (1).
329 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14-40.
330 CRS JUDGMENT FUND, supra note 193, at 10.
Driven by source-of-funds considerations rather than the best interests of the United States.\footnote{331} Government attorneys negotiating EAJA settlements must balance fealty to the Judgment Fund and the agency’s interest in preserving program funds. In a three-attorney conversation, agency counsel and plaintiff’s attorney may have common ground to advocate for payment from the Judgment Fund; that would conserve agency appropriations and meet plaintiff’s desire for fees.\footnote{332} Indeed, in a slightly different field a respected treatise advises that to preserve access to the Judgment Fund consent decrees should avoid mentioning EAJA.\footnote{333} The available information does not show how conscientious the Justice Department has been in considering and protecting the Judgment Fund when it enters or approves fee settlements with environmental organizations.

d. Class Settlements & Program Creation

On occasion, issues involving “creative” use of the Judgment Fund have arisen in a class action context. Examples of such litigation where political concerns may have tempered the government’s defense include the Pigford black farmer litigation,\footnote{334} the Japanese Latin Americans litigation,\footnote{335} and suits brought by Native American farmers, Hispanic farmers, and female farmers.\footnote{336}

The Pigford black farmer litigation had two discrete phases, both arising from allegations that black farmers were treated unfairly in USDA programs for loans, crop payments, disaster payments, and in investigations of those allegations.\footnote{337} Pigford I began in August 1997, 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, supra note 1, at 14:35 (citing 13 Op. O.L.C. 118, 125 (1989)).


\footnote{333} See RONALD A. KIENLEN, GOVERNMENT CONTRACT DISPUTES § 9:9 Consent Judgments (2013 ed.) (explaining that for consent judgments “to avoid difficulties with payments from the judgment fund . . . it is best to avoid reference to [EAJA] fees and interest”).

\footnote{334} See generally Peterson, supra note 289, at 358–62 (describing the “case famously known as the Black Farmers case”).

\footnote{335} See generally id. at 362–66 (discussing the Japanese Latin American case).

\footnote{336} See generally JODY FEDER & TADLOCK COWAN, CONG. RESEARCH SERV., R40988, GARCIA V. VILSACK: A POLICY AND LEGAL ANALYSIS OF A USDA DISCRIMINATION CASE 1 (2013) [hereinafter CRS GARCIA ANALYSIS] (describing the minority and female farmer litigation against the USDA).

when Timothy Pigford filed suit under the Equal Credit Opportunity Act (“ECOA”) seeking class relief. In October 1998, the court certified a class “for purposes of determining liability” and injunctive relief. Although plaintiffs’ claims had some apparent merit, many were barred by the ECOA’s statute of limitations. The Justice Department Office of Legal Counsel (“OLC”) was asked whether the government could waive the limitations defense and settle the claims. 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.” 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.” Congress resolved this jurisdictional problem by including a targeted waiver of the statute of limitations in an appropriations bill that became law on October 21, 1998, effectively authorizing plaintiffs’ claims.

---

See CRS PIGFORD CASES, supra note 337, at 2 (noting that a similar suit was later filed by Cecil Brewington).

See CRS PIGFORD CASES, supra note 337, at 2 (noting that the discrimination claims were corroborated by a 1994 USDA-commissioned study). But cf. LaFraniere, supra note 337, at 5 (noting that two 1997 government reports did not find “evidence of ongoing, systemic discrimination”).

See 15 U.S.C. § 1691e(f) (stating that the statute of limitations is five years with some exceptions).


Id. at *3.

Id. at *15. OLC also concluded that the statute of limitations was not subject to equitable tolling. Id. at *14. This conclusion was affirmed in a subsequent OLC opinion. See generally Waiver of Statutes of Limitations in Connection with Claims Against the Dep’t of Agric., 22 Op. O.L.C. 127 (1998).

See Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 741, 112 Stat. 2681 (waiving the statute of limitations); id. at § 741(e) (indicating that the waiver applied only to “nonemployment related complaint[s] that w[ere] filed with the Department of Agriculture before July 1, 1997 and allege[d] discrimination at any time during the period beginning on January 1, 1981 and ending December 31, 1996 . . . .”).
The newly extended statute of limitations and the 1998 decision that certified plaintiffs’ class made a negotiated settlement practicable. In April of 1999, the court approved a consent decree establishing a multi-track claims process that gave Track A plaintiffs who had “little or no documentary evidence . . . a virtually automatic cash payment of $50,000,” and allowed those with better evidence to recover in Track B whatever damages they could establish. The consent decree laid out specific procedures and administrators’ responsibilities. It defined what Track A claimants must establish by substantial evidence to an independent adjudicator who would decide on the papers. Track B claimants had to show discrimination by a preponderance of the evidence; they could present evidence and the government could cross-examine and argue. Either side could petition for reexamination of a decision. Attorneys’ fees and expenses were paid under fee shifting statutes rather than from the settlement. Claimants were to submit claims by October 12, 1999, with provision for late-filing claimants to file by September 15, 2000, upon a showing that “extraordinary circumstances” caused the late submission. The cash settlements, exceeding $770,000,000, were paid from the Judgment Fund.

---

346 Id.
351 See Carpenter, supra note 348, at 18–19 (explaining that an independent adjudicator would decide claims based on a determination that the claimant’s paper record met a substantial evidence burden).
352 See GAO-06469R, supra note 350, at 9 (explaining the burden claimants must meet in a Track B claim and the ways in which the government can challenge these claims).
353 See id. (explaining the process for challenging an adjudication by filing a petition with a monitor).
354 See Carpenter, supra note 348, at 20 (explaining that fees for the class counsel were determined by fee shifting statutes, rather than by taking a percentage of the payment made to the class).
355 See CRS PIGFORD CASES, supra note 337, at 4.
356 See id. at 3, 6 (indicating that the settlement was paid from the Judgment Fund). Total benefits exceeded $1,000,000,000. Id. at 7. Track B claimants recovered between $52,000 and $1,500,000. See GAO-06469R, supra note 350, at 9.
A large number of the late claims were not resolved on their merits; only 2,116 of 73,800 late claims were allowed to proceed. Dissatisfaction with these outcomes led to political efforts to reopen the process. Finally, Congress included in the 2008 Farm Bill a new procedure for those claims to be decided “on the merits.” Congress set the maximum amount to be paid under the new statute, and appropriated for that purpose, $100,000,000. The subsequent suits were consolidated in Pigford II and the parties agreed to a $1,250,000,000 settlement in February 2010. The claims process established in the Pigford II settlement was similar to that in Pigford I. It differed in that neither side could appeal and attorneys’ fees and expenses came from the settlement’s lump sum. 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. Several attempts to appropriate the $1,150,000,000 needed to complete the settlement failed. In late 2010, Congress enacted the Claims Resolution Act of 2010 that appropriated the money for Pigford II and authorized payment of $2,000,000,000 from the Judgment Fund for the Cobell v. Salazar class action settlement regarding government mismanagement of hundreds of thousands of Individual Indian Money trust accounts.

357 See CRS PIGFORD CASES, supra note 337, at 5 (noting that 66,000 late claims were submitted by the September 15 deadline).
358 See LaFraniere, supra note 337, at 11 (noting nine years of “concerted effort”).
360 See Food, Conservation, and Energy Act of 2008 §§ 14012(c)(2), 14012(i)(1).
361 See CRS PIGFORD CASES, supra note 337, at 7.
362 See Carpenter, supra note 348, at 29–31 (describing the Pigford II claims process).
363 See id. at 31 (noting authority for a court-appointed ombudsman).
364 31 U.S.C. § 1304(a)(1); see supra notes 141–42 and accompanying text.
365 See CRS PIGFORD CASES, supra note 337, at 7–8 (noting that Congress had appropriated $100,000,000 for Pigford II claims in the 2008 Farm Bill).
366 See id. at 10–11 (discussing unsuccessful legislative efforts).
The *Pigford* litigation is not an example of executive branch overreach, although a strong political current ran through the settlement negotiations. President Bill Clinton and President Barack Obama favored the farmers’ claims, and their political appointees actively supported the settlements over the objections of some career officials. But the payments were made in a manner that respected the Judgment Fund. The settlement in *Pigford I* was appropriately paid from the Judgment Fund because Congress allowed the suit when it extended the ECOA statute of limitations. In contrast, the *Pigford II* settlement was not paid from the Judgment Fund because the statute’s “not otherwise provided for” requirement was not met. Congress appropriated money for the *Pigford II* settlement with full knowledge of the terms of the agreement.

The same analysis applies to another case where political concerns may have influenced the Department of Justice’s settlement position, that of the Japanese Latin Americans. The plaintiffs were people of Japanese ancestry living in Latin America who were interred during World War II in the United States at its request. Plaintiffs sought to make claims under the Civil Liberties Act of 1988, the statute that authorized a formal apology and payment of $20,000 to Japanese Americans who had been interred during the war. The government had a strong defense to claims of the Japanese Latin Americans because the statute authorized compensation only to “a United States citizen or a permanent resident alien.” Nonetheless, the government agreed to settle each plaintiff’s claim for an apology and $5,000,

---

369 See generally *LaFraniere, supra* note 337 (providing a thorough discussion of the black farmer litigation, its political aspects, and its susceptibility to fraud).
370 See *id.* at 6 (quoting an attorney statement that the settlement “was more a political decision than a litigation decision”).
371 See *Peterson, supra* note 289, at 362 (noting with approval that this process respected “Congress’s appropriation authority”).
372 See *Peterson, supra* note 289, at 362–66 (citing *Mochizuki v. United States*, 41 Fed. Cl. 54 (1998)).
373 See *id.* at 362–63 (describing the removal of Japanese Latin Americans to the United States).
375 *Id.; Peterson, supra* note 289, at 365–66.
376 Civil Liberties Act of 1988 § 108(2)(A); *see Peterson, supra* note 289, at 366 (explaining further that the Japanese-Latin Americans were not eligible for redress payments under that provision).
to be paid from the Civil Liberties Public Education Fund. The settlement had political overtones and it may have been entered over the objections of some within the Department of Justice. But, because the Civil Liberties Public Education Fund was depleted, the settlement was funded only when Congress appropriated $4,300,000 to fund it. Accordingly, like the Pigford and Cobell litigation, in the end the executive branch paid only money Congress had appropriated for that purpose.

The Obama Administration followed a different path in other cases. Native-American farmers, Hispanic farmers, and women farmers filed class action suits against USDA alleging unlawful discrimination and ECOA claims similar to those raised in the Pigford litigation. In the context of settling those cases the Administration used Judgment Fund money to fully fund claims processes that were similar to those established in the Pigford litigation. As explained below, the amounts paid from the Judgment Fund for these programs seem out of proportion to the government’s litigative risk.

In the Keepseagle litigation, Native Americans brought a class action suit alleging USDA discrimination in reviewing applications for

---


378 See Peterson, supra note 289, at 366 (quoting the Justice Management Division General Counsel, who wrote that he saw “virtually no litigative risk” regarding the situation with the Japanese-Latin Americans).

379 See 1999 Emergency Supplemental Appropriations Act, Pub. L. No. 106-31, 113 Stat. 57, 100 § 3021; Peterson, supra note 289, at 366 n.194 (suggesting that Congress “had little choice but to [appropriate the money]”).

380 See Keepseagle v. Glickman, 194 F.R.D. 1, 3 (D.D.C. 2000) (denying a motion to assign case to the judge who had approved the consent decree in Pigford I).


383 See In re Veneman, 309 F.3d 789, 791–92 (D.C. Cir. 2002) (noting similarity of the four cases); CRS GARCIA ANALYSIS, supra note 336, at 1 (acknowledging allegations of discrimination by these groups). All three groups were specifically identified in a non-binding “sense of Congress” provision in the 2008 Farm Bill which urged “an expeditious and just” resolution of pending farmer discrimination claims against USDA. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14011, 122 Stat. 925 (identifying “Native American, Hispanic, and female farmers or ranchers, based on racial, ethnic, or gender discrimination in farm program participation”); CRS GARCIA ANALYSIS, supra note 336, at 12–13.

384 See Carpenter, supra note 348, at 13–32 (discussing similarities and differences in claims procedures).
farm loans or benefits programs and in investigating complaints of discrimination. They sought equitable and monetary relief and incorrectly designated the *Pigford* litigation as a related matter. In 2001, Judge Emmett G. Sullivan “certifie[d] plaintiffs’ class only as to plaintiffs’ claims for declaratory and injunctive relief” and deferred the question of certifying a class seeking monetary relief. In 2010, the parties agreed to a $760,000,000 settlement, including $680,000,000 paid from the Judgment Fund.

The *Keepseagle* settlement agreement, a forty-seven page document, established “an administrative claims process” similar to the *Pigford* process. It spelled out procedures for a two-tier, non-judicial process that included requirements for class membership, facts a claimant must establish to recover under Track A or B, and directives for how to evaluate each claim. 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. The settlement also required USDA

---

385 See *In re Veneman*, 309 F.3d at 791 (noting plaintiffs had proceeded under ECOA, Title VI of the Civil Rights Act of 1964, and the Administrative Procedures Act).

386 *Id.*


389 CRS *GARCIA ANALYSIS*, supra note 348, at 11.


392 See *Love v. Vilsack*, 908 F. Supp. 2d 139, 142–43 (D.D.C. 2012) (noting the process was "similar, though not identical").


394 *Id.* at 7, 21–23.

395 *Id.* at 7, 23.
to undertake a number of steps to improve services to and communications with Native American farmers. 396

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. 397 Such a failed class action would typically have very little settlement value. 398 Nonetheless, the government settled for $760,000,000 (including a Settlement Fund of $680,000,000) which, according to plaintiffs’ attorneys, gave plaintiffs “about 98% of what [they] could possibly have won at trial…” 399 This proved to be a vast overpayment. Although the complaint had predicted at least 19,000 claimants, 400 only 4,472 farmers perfected their claims. 401 A total of $299,999,288 was paid from the Settlement Fund that had been established with Judgment Fund money, 402 leaving $380,000,712 403 at the end of the claims process. 404 The parties had expected the remainder to be only “a couple of million.” 405 Because no provision had been included in the settlement agreement for reversion of excess money to the United States 406 and the remainder was

396 See id. at 33–38 (enhancing existing programs and creating a Council for Native American Farming, a USDA ombudsman for Native American and other socially disadvantaged farmers, and new reporting requirements).


398 See Scott E. Gant, The Law of Unintended Consequences: Supreme Court Jurisdiction Over Interlocutory Class Certification Rulings, 6 J. APP. PRAC. & PROCESS 249, 249 (2004) (noting that “denial of certification often means the end of the case”); Barry Sullivan & Amy Kobelski Trueblood, Rule 23(f): A Note on Law and Discretion in the Courts of Appeals, 246 F.R.D. 277, 279 (2008) (“[C]lass certification decisions may make or break a case: Where a class is not certified, the plaintiffs (and their lawyer) may not have the will—or the resources—to continue with a litigation that [may] yield only a small recovery and little basis for an award of substantial attorneys’ fees.”).


402 Plaintiffs’ Status Report at 2–3, Keepseagle v. Vilsack, No. 99-CV-03199 (D.D.C. Aug. 30, 2013) (reporting 3587 Track A claims [$824,187,500], 14 Track B claims [$3,364,647], service awards to named plaintiffs [$950,000], and attorneys’ fees and costs [$60,800,000]).

403 Id. at 3.


405 Id. (comment of plaintiffs’ counsel).

406 Id. at 16 (comment of plaintiffs’ counsel).
so large, the parties faced a conundrum with how to dispose of it. 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.

In *Garcia v. Veneman* and *Love v. Veneman*, class action suits similar to *Pigford* and *Keepseagle* were filed by Hispanic farmers and woman farmers, respectively. *Garcia* and *Love*, both alleging discrimination in farm loans and benefits programs and in investigation of complaints of discrimination, were assigned to the same judge and followed a similar path. In both cases, the district courts’ decisions to deny class certification were affirmed on appeal. With the January 19, 2010 Supreme Court denial of certiorari on those decisions, the only means left for a *Garcia* or *Love* plaintiff to pursue an ECOA claim would have been to litigate each claim individually. For the next year, the Department of Justice declined to settle *Garcia* or *Love* on a class-wide basis but expressed willingness to settle individual claims.

---


408 See Status Conference at 29, *Keepseagle v. Vilsack*, No. 99-CV-03199 (D.D.C. Nov. 18, 2013) (noting that fact and commenting that it “was shocking . . . [that the projected settlement amount] happens to be off $380 million dollars”).

409 As Judge Sullivan observed in denying a motion to modify the settlement, “[a]lthough 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.” *Keepseagle v. Vilsack*, No. CV 99-3119 (EGS), 2015 WL 4510837, at *3 (D.D.C. July 24, 2015).


412 See CRS GARCIA ANALYSIS, supra note 336, at 11 (noting cases’ common history).


414 CRS GARCIA ANALYSIS, supra note 336, at 8.

415 Id. at 6; see also Timothy J. Burger, *DOJ and Agriculture Spar Over Hispanic Farmers Settlement*, MAIN JUSTICE (May 3, 2010), http://www.mainjustice.com/2010/05/03/doj-and-agriculture-spar-over-hispanic-farmers-settlement/ (quoting Justice spokesperson as say-
On February 25, 2011, USDA and the Department of Justice unilaterally announced a claims program for Hispanic farmers and female 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.” On January 25, 2012, the government announced a revised plan. The charter for this system is the “Framework for Hispanic or Female Farmer’s Claims” (“Framework”). The Framework was similar to the Pigford and Keepseagle processes but “differed in several respects, including the absence of judicial supervision or class counsel, less monetary relief, a more onerous burden of proof, and relief for a more limited category of claims.” It had two tiers, with awards capped at $50,000 and $250,000. The Framework is nineteen pages long and provided, inter alia, for: voluntary participation by claimants who may choose to instead pursue a judicial remedy; an independent adjudicator to decide claims on a written record; written responses by the agency; and no right to appeal. Attorneys’ fees were to be paid by the claimant. The Framework provided that “[c]ash awards and tax relief will be paid from the Judgment Fund.”

The litigative risk posed by Garcia and Love hardly justified the government’s decision to establish this $1,333,000,000 claims pro-
gram: the number of claimants was not known and a substantial final payout in the cases was unlikely. First, when Secretary Tom Vilsack announced the Hispanic and women farmers’ settlement process 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 16,000.424 In September 2010, the government still did not have that information. 425 Second, no class was certified. In Pigford, class certification had been a key factor in the government’s decision to settle that lawsuit.426 By contrast, in both Garcia and Love certification was denied, making the prospect of sizeable adverse judgments remote.427 The government’s interest in voluntarily settling thousands of claims was not anticipated by the court, “given the history of the case.”428 Nevertheless, in 2010 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.429

From all appearances, politics provided a key motivation for creation of the Hispanic or Female 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.430 Eight senators sent President Obama a letter noting that “approximately $2.25 billion” had been allotted to “resolve USDA discrimination against black farmers”

424 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”).
425 Def. Status Rept. at 2, Garcia v. Veneman, 1:00-cv-02445 (D.D.C. Sept. 27, 2010) (noting that plaintiffs’ counsel had identified only the eighty-one plaintiffs named in the Complaint).
426 CRS GARCIA ANALYSIS, supra note 336, at 6 (noting that “approval of class certification . . . appears to have been a critical factor in the decision” to settle); see Carpenter, supra note 348, at 15–16 (describing class certification as an “important development” that “paved the way” for the settlement).
427 See Gant, supra note 398, at 249 (noting that in class action litigation “denial of certification often means the end of the case”).
430 See Burger, supra note 415 (illustrating political pressure on Congress and Secretary Vilsack); LaFraniere, supra note 337 (same).
and calling for equal treatment for Hispanic farmers and ranchers.  

Hispanic and female farmers sought treatment “on par with other victims of discrimination.” The Hispanic or Female 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.” The creation of the Claims Process and the Keepseagle settlement were seen by people in the Administration as “providing ‘a way to neutralize the argument that the government favors black farmers over Hispanic, Native American or women farmers’” and to court key constituencies.

The Hispanic or Female Farmer’s Claims Process was created by the executive branch without legislative input or judicial supervision. The Process is a new federal administrative claims program that gives federal cash benefits to particular individuals. While the President can create commissions to hear claims and disburse money, that money cannot come from the Judgment Fund unless its statutory requirements are met. It is a close question whether funding the Hispanic or Female Farmer’s Claims Process meets the Judgment Fund’s statutory requirements, given the government’s small litigative risk and the Process’s inclusion of claimants who had made no claims and were not in touch with the Garcia or Love attorneys.

---


433 See generally LaFraniere, supra note 337 (describing the White House’s involvement in shaping the claims process); see also Burger, supra note 415, (quoting an Obama administration official who described the White House as playing a “coordinating role”).

434 See LaFraniere, supra note 337, at 3 (noting lawyers’ objection to the process).

435 See id. (quoting an administration official).

436 The parties clearly understood that USDA had created a new program. See e.g., Status Conf. at 3, 5, 10, 11, 14, García v. Veneman, 1:00-cv-02445 (D.D.C. Feb. 23, 2012) (colloquy among court and counsel for both sides); Status Conf. at 10–12, García v. Veneman, 1:00-cv-02445 (D.D.C. Aug. 24, 2012) (government counsel using term “Administrative Claims Program”).

437 See, e.g., Eric A. Posner & Adrian Vermeule, The Credible Executive, 74 U. CHI. L. REV. 865, 908 (2007) (explaining that restrictions on use of the Judgment Fund would undercut any presidentially created causes of action, as “there might be no pot of money from which to fund damages”).

438 See supra notes 141–49, 424–29 and accompanying text.
B. Lack of Transparency

There is little public information about payments from the Judgment Fund or reimbursements to it. There is no readily available way to find what Judgment Fund payments have been made to a particular claimant or because of a specific incident. The Bureau of Fiscal Services, the component of the Department of the Treasury responsible for the Judgment Fund, does provide three categories of information, but each has limited usefulness.

First, pursuant to an Office of Personnel Management regulation, Fiscal Services publishes an annual No FEAR Non-Compliant Agency Report identifying agencies that failed to timely reimburse the Judgment Fund for No FEAR Act payments. That regulation requires that the record “be eliminated no later than the next annual posting” once the agency pays. Little substantive information is provided; the Annual Non-Compliant Agency Report available in May, 2015, stated in its entirety, “No federal agencies were found to be non-compliant as of November 1, 2014.”

Second, Fiscal Services also posts on its website the balances currently owed by various agencies to the Judgment Fund for No FEAR Act and Contract Disputes Act reimbursements. The information is transient. No records are kept or method provided to track agencies that are frequently late in reimbursing the Fund. Congress is not informed of which agencies fall behind in their CDA payments.

---

439 See Greene, supra note 9 (noting lack of transparency).
440 This function was formerly handled by Treasury’s Financial Management Service (FMS).
441 See Office of Pers. Mgmt. Reimbursement of Judgment Fund, 5 C.F.R. § 724.105 (providing that “[a]n agency’s failure to reimburse the Judgment Fund . . . will be recorded on an annual basis and posted on the FMS Web site.”); see also 5 C.F.R. § 724.104(b) (providing that agencies are to reimburse the Judgment Fund or “make arrangements in writing for reimbursement” within forty-five days of receiving notice from FMS). The No FEAR Non-Compliant Agency Report can be found at http://www.fms.treas.gov/judgefund/noncompliance.htm.
442 5 C.F.R. § 724.105.
Finally, Treasury has posted on its website databases containing some information about Judgment Fund payments. It posted Judgment Fund Transparency Reports to Congress for 2009 through 2014. It did so in response to the House managers of the Financial Services and General Government Appropriations Act of 2012 who sought public disclosure of information about Judgment Fund payments, including plaintiffs’ names, attorneys’ names, and the facts giving rise to each claim. These Treasury reports are spreadsheets showing payments made from the Judgment Fund from October 1 to September 30 of the year of the report, with columns identifying the defendant agency, “Plaintiff’s Counsel,” “Payment Amount,” and the principal statutory basis for the claim. Treasury has posted a similar database for years 2003–2013. The Judgment Fund Transparency Reports do not include all the information requested by the House managers, such as the identity of plaintiffs, the facts regarding any claim or, in some instances, the attorneys. Treasury’s reasoning for withholding names of plaintiffs and some attorneys is reflected in the

617, 654 (2005) (noting that “the [No FEAR] reimbursement process may extend over several years”).

See GAO-08-295R, supra note 175, at 11 (showing a lack of agency specific information requirement).


See CRS JUDGMENT FUND, supra note 193, at 15 n.130. The managers directed that unless the disclosure of such information is otherwise prohibited by law or court order, the report shall consist of: (1) the name of the plaintiff or claimant; (2) the name of the counsel for the plaintiff or claimant; (3) the name of the agency that submitted the claim; (4) a brief description of the facts that gave rise to the claim; and (5) the amount paid representing principal, attorney fees, and interest, if applicable.


See JUDGMENT FUND PAYMENT SEARCH PAGE, https://jfund.fms.treas.gov/jfradSearchWeb/JFpmSearchAction.do (providing a database of Judgment Fund payments). The Treasury provides the information explicitly “for the purpose of tracking the status of approved Judgment Fund payments only.” Id. This database lacks a “Plaintiff’s Counsel” column. Id.

2011 and 2012 Judgment Fund Reports. But see CRS JUDGMENT FUND, supra note 193, at 15 (stating incorrectly that the reports contained all information requested by the House managers other than fact summaries).
agency’s denial of a Freedom of Information Act (“FOIA”) appeal seeking that information. The agency concluded that “disclosing the names of individuals who received payments from the Judgment Fund would constitute a clearly unwarranted invasion of personal privacy.” The agency took a similar position “where the attorney is a sole practitioner and the payment is exclusively for attorney fees.” In FOIA responses the agency disclosed documents that identified courts, docket numbers, underlying facts, the names of plaintiffs who were not individuals, and the law firms and lawyers who were not sole practitioners.

In 1995 Congress repealed the requirement of an annual report on the fees and expenses paid under EAJA. No statute now requires agencies or the executive branch to report EAJA payments made in either administrative or judicial proceedings. Consequently, there is data on the amounts paid under that act from 1982 to 1994, but a remarkable paucity of information about EAJA payments made since then. Reports from different agencies about the same EAJA payments may be conflicting. Even when the GAO performed detailed audits of specific agencies it was unable to ascertain all EAJA fees paid on account of those agencies. Its in-depth report

---

452 See Letter from Bureau of the Fiscal Service, to Paul Figley, Associate Director, Legal Rhetoric Program, Washington College of Law (June 18, 2014), 2 (on file with the author) (demonstrating the agency’s refusal to disclose individual payment recipients).

453 See id. at 3.

454 See documents released by the Dep’t of Treasury in response to FOIA # 2014-03-086 and FOIA # 2013-10-20 (on file with the author).

455 See supra notes 261–62.

456 See GAO-11-650, supra note 321, at 12 n.21.

457 See U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-98-68R, EQUAL ACCESS TO JUSTICE ACT 11–13 (1998) [hereinafter GAO/HEHS 98-68R] (noting that during fiscal years 1982–1994 there were approximately 8,400 EAJA applications of which 6,200 were granted at a cost of about $34 million). But see id. at 2 (noting that data from fiscal years 1982–94 could not be verified because government-wide EAJA data was no longer collected and agency recordkeeping had been lax).


459 See Mortimer & Malmsheimer, supra note 226, at 353–54 (noting disparities in amounts of reported Forest Service EAJA fees from 1999–2005 in information provided by the Forest Service ($6,137,583), the Department of Justice ($3,526,632), and the Secretary of Agriculture ($7,092,530)).

460 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 USDA agencies did not track and could not provide relevant data); GAO-11-650 at 2–3, 33 (noting incomplete nature of EPA, Treasury, and DOJ records on costs associated with environmental litigation).
on USDA and Interior agencies concluded that they had “no way to readily determine who made claims, the total amount each department paid or awarded in attorney fees, who received the payments, or the statutes under which the cases were brought for the claims.”

Members of both sides in environmental litigation recognize the need for accurate information about EAJA payments.

There is very little public information about outcomes of the Hispanic or Female Farmer’s Claims Process. Unlike Pigford I, Pigford II, and Keepseagle, no information is available about the number of claims filed; the total amounts paid on claims, costs, or attorneys’ fees; or how much money remains in the Settlement Fund. The deadline for filing claims passed on May 1, 2013. While the Framework required the Adjudicator to “[i]ssue periodic reports to USDA on the progress of the Claims Process and the results of adjudications,” it did not mandate public reports. None have been made by the Adjudicator or USDA. USDA has said only that, “As of September 2015, the Claims Administrator has scheduled payments to more than 2,500 claimants.”

Keeping Judgment Fund payments secret has adverse consequences. Treasury’s Judgment Fund data cannot be matched with other agencies’ data because it does not include common identifiers. As a consequence, agencies cannot assess whether proposed compromises are reasonable compared to similar cases. Likewise, the absence of specific information on EAJA payments makes it problematic for Congress to make rational choices about changing that

---

462 See Baier, supra note 226, at 35, 43 (noting problems caused by termination of reporting); Korpics et al., supra note 229, at 10998 (recognizing that some environmentalists would support restoration of EAJA reporting requirements).
463 Framework for Hispanic or Female Farmer’s Claims Process, supra note 421, Sec. IV.
464 Hispanic and Women Farmers and Ranchers Claims Resolution Process, Home, Update, https://www.farmerclaims.gov/Default.aspx. If each of the 2,500 claimants received the maximum $250,000 award, total payments would be $625,000,000. See supra note 419 and accompanying text. To finance the program, $1,330,000,000 was taken from the Judgment Fund. See supra note 415 and accompanying text. Subtracting the payments from the corpus leaves at least $705,000,000 of Judgment Fund money unaccounted for. As with the Keepseagle settlement, less than half the money has gone to pay claims. See supra note 408 and accompanying text.
465 See GAO-14-458T, supra note 460, at 10 n.23 (noting problem).
466 See id. at 9–10 (discussing awards for attorneys’ fees and costs).
and leaves the public in the dark about the size and frequency of substantial government payments and the patterns in which they are awarded. The lack of an accessible database of Judgment Fund payments and their recipients makes it difficult to check whether claimants have previously recovered for the same injuries.

On a broader level, maintaining the fog around Judgment Fund payments undercuts the transparency that makes for better government. As Professor Cass Sunstein observed, “[i]f information is kept secret, public deliberation cannot occur; the risks of self-interested representation and factional tyranny increase dramatically.” No strong governmental interest supports keeping Judgment Fund information secret. Routine disclosure of Judgment Fund payments would have the benefits of facilitating fact-based "citizen deliberation" and review of government expenditures; furthering "checks and balances" by providing specific, detailed information by which Congress and the public could assess executive branch settlements and judicial branch judgments; and using the disinfecting sunlight of disclosure to discourage payments grounded in "illegitimate or irrelevant considerations."

The public has a right, grounded in the common law and the First Amendment, to access all final judgments and court decisions. Treasury’s practice of withholding case names, claimant’s names, and fact summaries from its Judgment Fund databases makes that infor-
information difficult to collect in the aggregate, although that information is readily retrievable on a case by case basis for matters in litigation via PACER by anyone who knows the parties’ names or the docket number.\textsuperscript{475} Indeed, in response to FOIA requests for information about particular items in the annual Judgment Fund databases, Treasury discloses transmittal documents and court pleadings that contain docket numbers from which names and details can be obtained with a few mouse clicks.\textsuperscript{476} Requiring the public to file a FOIA request to get a docket number to use in PACER to find a plaintiff’s name or complaint is akin to making records available only in one remote government file room.\textsuperscript{477} 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.”\textsuperscript{478}

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.”\textsuperscript{479} There is a long history of

\textsuperscript{475} Public Access to Court Electronic Records (“PACER”) is the federal judiciary’s online public access system and is available at https://www.pacer.gov. Information pertaining to administrative settlements is similarly available to the public only when settlements fall within a judicial process such as court approval of a minor’s settlement.

\textsuperscript{476} See supra note 454 and accompanying text.

\textsuperscript{477} See Adam Candeub, Transparency in the Administrative State, 51 Hous. L. Rev. 385, 387 (2013) (“‘Transparency’ or ‘access’ does not really exist if obtaining and securing information is costly in either time or effort.”). Professor Candeub notes that the 2013 amendment of the Stop Trading on Congressional Knowledge Act of 2012 changed the requirement that information about securities transactions of federal officials be posted online to a requirement that it be “available on paper but only in the basement of the Cannon House Office Building.” Id. at 391–92.

\textsuperscript{478} 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), http://www.treasury.gov/open/Documents/m10-06.pdf; see also Candeub, supra note 477, at 407 (discussing Administrator of the Office of Information and Regulatory Affairs Cass Sunstein’s call for “agencies to provide information ‘in an open format that enables the public to download, analyze, and visualize any information and data.’” (citing Memorandum for the Heads of Executive Dep’ts and Agencies from Cass Sunstein, Adm’r, Office of Mgmt. and Budget 1 (Apr. 25, 2011))).

\textsuperscript{479} U.S. CONST. art. I, § 9, cl. 7. While some courts have held that names of claimants may be protected from disclosure under FOIA, they have done so without addressing the Statement and Account Clause. See, e.g., News-Press v. U.S. Dep’t of Homeland Sec., 489 F.3d 1173, 1189, 1196–97, 1199, 1205 (11th Cir. 2007) (holding names of individuals who received disaster assistance could be withheld under FOIA but their addresses must be disclosed, and noting “the release of a list of names and other identifying information does
disclosure of names and amounts paid to those who sought private bills from Congress. 480 As a matter of policy the Department of Justice will not agree to settlements or consent decrees that contain confidentiality provisions. 481 While that policy allows rare exceptions, they “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.” 482 There is little reason to keep successful claimants from being identified as successful claimants. As Judge Joseph F. 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.” 483

IV. POSSIBLE IMPROVEMENTS IN JUDGMENT FUND PRACTICES

A. LIMIT EXECUTIVE BRANCH USE OF THE JUDGMENT FUND TO CREATE NEW CLAIMS PROGRAMS & PROCESSES

The current Judgment Fund regime has worked fairly well. Congress has given the executive branch broad discretion to decide how to litigate claims, when to appeal, and whether to settle. When cases or settlements are final, payments are promptly made. There have been very few controversies.

As a practical matter, there is no effective way for anyone outside the executive branch to monitor specific litigation decisions or settlements for impropriety or political favoritism. 484 Such matters are necessarily complex and confidential. Judges are hardly in a position to evaluate and report on whether government attorneys are too soft in negotiating a particular settlement or arguing a case. 485 Nor is the legislative branch well suited to investigate such matters in individual

480 See supranotes 244–48 and accompanying text.
481 28 C.F.R. § 50.23 (“This policy flows from the principle of openness in government . . . .”); see also 28 C.F.R. § 50.9 (“Policy with regard to open judicial proceedings.”).
482 28 C.F.R. § 50.23; see also Cheit, supra note 468, at 264–65 (noting the need for transparency in government tort settlements).
483 Anderson, supra note 474, at 740.
484 See Peterson, supra note 289, at 368 (noting that the Department of Justice “is the only effective check on itself”).
485 Id. at 369. But see Cantu, 565 F. App’x at 9–10 (directing court to review whether a settlement offer was tainted by discrimination).
cases. Indeed, congressional attempts to assess whether specific settlements are too high could draw Congress back into the quagmire of the legislative claims system. The Administration’s use of the Judgment Fund to create the Hispanic or Female Farmer’s Claims Process without an appropriation and to enter the *Keepsagle* settlement does raise other issues. Should the Judgment Fund be available to fund new administrative claims programs created by the executive branch without legislation, judicial supervision, or congressional supervision? Should it be used to endow huge class settlement systems that may spend more than half the allotted money on purposes other than compensation of claimants? Congress might consider prohibiting such uses of the Judgment Fund. If Congress fails to act, it is likely that another administration will create comparable claims programs or enter similar, open-ended class settlements; it is easier for the executive branch to act within its arguable discretion than to persuade Congress to appropriate money.

**B. Increase Transparency**

1. *Publish Judgment Fund Payments*

Congress should require public disclosure of detailed information on all Judgment Fund payments. As suggested by the House managers of the Financial Services and General Government Appropriations Acts of 2012, 2013, 2014, and 2015 and sponsors of the Judgment Fund Transparency Act, Congress should require that

---


487 See *supra* Parts IA–C.


489 See *supra* notes 424–35 and accompanying text.

490 See *supra* notes 402–08 and accompanying text.

491 Such a limit might provide a new subsection (a)(4) to 31 U.S.C. § 1304, stating, “but, no payment shall be made on a settlement exceeding $500,000,000 that does not arise from a single event.”

492 See *supra* note 447 and accompanying text.

Treasury post annual reports on the internet detailing information about each Judgment Fund payment. The posted information should include for each payment the agency involved; the names of the claimants or plaintiffs and their attorneys; the amount paid, separately listing attorneys’ fees, costs, and interest; a summary of the facts; and, if the matter was in litigation, the case name, docket number, and court.\textsuperscript{494} This information is readily available; agencies provide it (other than the summary) to Treasury when they submit claims or judgments for payment.\textsuperscript{495} A one-sentence fact summary could easily be included in the agency submission. Any legislation should provide that “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.” Such a provision is necessary to insure that Treasury does not withhold this information under FOIA precedents.\textsuperscript{496}

2. Restore EAJA Reporting Requirements

Congress should restore the EAJA reporting requirements as suggested in the Open Book on Equal Access to Justice Act.\textsuperscript{497} This would require the Chairman of the Administrative Conference of the United States to make an annual report to Congress on EAJA payments and to post online a database containing for each administrative award case names, agencies involved, a description of the claim, the name of the party who received the award, the amount paid, and “[t]he basis for the finding that the position of the agency concerned was not substantially justified.”\textsuperscript{498} For awards made in litigation the bill requires posting of similar information and disclosure of amounts paid from the Judgment Fund, the amount of attorney fees, and the statute under which suit was filed.\textsuperscript{499} Agency heads would be required to provide pertinent information.\textsuperscript{500}

\textsuperscript{494} See generally Judgment Fund Transparency Act of 2015 § 2.


\textsuperscript{496} See supra notes 453–55 and accompanying text.


\textsuperscript{498} H.R. 2919 § 2(a).

\textsuperscript{499} Id. § 2(b).

\textsuperscript{500} Id. § 2(a)–(b).
3. Publish Reports on CDA and No FEAR Reimbursements

Congress should require annual reports from Treasury that identify month by month information on which agencies were behind on CDA and No FEAR Act Judgment Fund reimbursement obligations. The practice of posting current balances is of no use in assessing which agencies have repeatedly missed 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.\(^{501}\) The now-required No FEAR Annual Non-Compliant Agency Report provides little information when posted and disappears shortly thereafter.\(^{502}\)

CONCLUSION

Congress’s power of the purse gives it primary authority over the payment of claims against the government, but a legislative body is ill-suited to decide individual claims. Congress learned that its attempts to resolve such claims yielded bad results and required more time and attention than could be rationally spent on the process. Over the years it made a number of decisions to have claims decided by the other, better-suited branches of government and to reduce the administrative and procedural burdens of approving, funding, and recording those payments. The cumulative effect of those decisions is that Congress has lost both control over the payment of claims and the ability to ascertain what claims have been paid or their source of payment.

The Judgment Fund functions as Congress intended on individual judgments and settlements, promptly paying them without unnecessary paperwork or processes. Congressional trust in executive branch attorneys to protect the Fund seems to be well-founded. The Obama Administration’s use of the Judgment Fund to finance a new claims program created without congressional approval or oversight, however, opens a different chapter. If Congress does not act to limit such uses, it is fair to anticipate that similar claims programs will be created without congressional input and funded by the Judgment Fund.

Congressional decisions to cut back on requirements for reports and publication of government payments were made before wide-

\(^{501}\) See GAO-08-295R, supra note 175, at 11.

spread use of the internet. Online publication of readily available information about Judgment Fund payments would be relatively simple and inexpensive. That publication would serve the public interest by increasing the transparency of government payments to particular claimants and by providing information that Congress and the public could use to assess if the claims system is working as it should, and whether legislative changes should be made.