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

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# THE JUDGMENT FUND: AMERICA'S DEEPEST POCKET & ITS SUSCEPTIBILITY TO EXECUTIVE BRANCH MISUSE

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TABLE OF CONTENTS



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## 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.

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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[3] is the mechanism Congress established to pay most settlements and judgments against the federal government.[4] 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.[5] It is "a permanent, indefinite appropriation for the satisfaction of judgments, awards, and compromise settlements against the United States."[6] The Judgment Fund is available only under specific circumstances,[7] but when available it makes payments without any review by Congress.[8] The government uses it to pay out billions of dollars every year,[9] yet there is no practical way for Congress or the public to track where Judgment Fund money goes.[10]

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."[11] The first half of Clause 7, the Appropriations Clause, was not much discussed at the Constitutional Convention.[12] The second half of Clause 7, the State-

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3 31 U.S.C. § 1304 (2012).

4 *See* 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-31 to 14-32 (describing the formation of the Judgment Fund); Jeffrey Axelrad, *What is the Judgment Fund?*, 1 Ann.2004 ATLA-CLE 435 (2004).

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.

8 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/OGC-94-33, 3 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 14-64 (2d ed. 1994) [hereinafter 1994 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW], http://www.gao.gov/assets/200/196723.pdf.

9 *See* Jenna Greene, *Feds Spent Billions to Resolve Suits in 2012; The Judgment Fund*, NAT'L L. J. (Apr. 15, 2013), http://www.nationallawjournal.com/id=1202595862822/Inside-the-Judgment-Fund?germane=1202595862822&id=1202595810365 (noting that over $4 billion was paid from the Judgment Fund in 2012).

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.

12 *See* Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207, 1248–52 (2009) (chronicling the history of the Appropriations Clause); Note, *The CIA's Secret Funding and the Constitution*, 84 YALE L.J. 608, 609–11 (1975)

ment and Accounts Clause, was debated; George Mason's proposal to require annual reports of expenditures was opposed by James Madison and rejected.[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.[14] Part IV also includes several proposals to make reimbursement processes and claims payments transparent, retrievable, and public.

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[hereinafter Note, *Secret Funding*] (tracing the history of Article I, Section 9, Clause 7 of the Constitution).

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.

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.[15] The Clause requires that Congress pass an appropriation before funds can be paid out of the Treasury.[16] The Appropriations Clause directly pertains to any claim for money damages from the federal government.[17] It requires a specific funding source for any government payment, including settlements and court-ordered judgments.[18] Agency appropriations cannot be used to pay judgments against the United States or its agencies, absent specific authorizing legislation.[19] Such legislation could be an appropriation for a particular settlement

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15 Am. Fed'n of Gov't Emps., AFL-CIO, Local 1647 v. Fed. Labor Relations Auth., 388 F.3d 405, 408–09 (3d Cir. 2004) (citing Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 425–27 (1990) *and* Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937)); *see also* U.S. Dep't of Navy v. Fed. Labor Relations Auth., 665 F.3d 1339, 1346 (D.C. Cir. 2012) ("The Appropriations Clause . . . protects Congress's 'exclusive power over the federal purse.'" (citing Rochester Pure Waters Dist. v. EPA, 960 F.2d 180, 185 (D.C. Cir. 1992))); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14, at 274–75 (noting the view among many Framers that "the pursestrings should be in the hands of the Representatives of the people"); Figley & Tidmarsh, *supra* note 13, at 1253, 1259 (describing the importance of the legislature having control over the public purse).

16 Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 428 (1990); Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937); Reeside v. Walker, 52 U.S. 272, 291 (1850); *see also* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1357 (1988) (discussing constitutional principles of the public fisc and of appropriations control).

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 . . . .").

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.").

18 *Richmond*, 496 U.S. at 432 ("[F]unds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute."); 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).

19 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-29 to 14-44; *see also* Salazar v. Ramah Navajo Chapter, 132 S. Ct. 2181, 2194 n.9 (2012) (noting that the Appropriations Clause does not bar recovery where a specific statute establishes a right to compensation from the Judgment Fund); Cnty. of Suffolk v. Sebelius, 605 F.3d 135, 143 (2d Cir. 2010) (observing that the legal basis for an award under the Judgment Fund must be found elsewhere in the law).

or judgment, a general appropriation for categories of settlements or judgments, or a statute that authorizes payments from a pre-existing appropriation.[20] If Congress chose not to appropriate money to pay a judgment, the judgment would not be paid.[21] Accordingly, until Congress had enacted an applicable waiver of the United States' sovereign immunity, the federal government could not be sued for damages.[22]

### *A. The Period of Administrative-Legislative Resolution of Claims*

The absence of an applicable waiver of sovereign immunity in the early Republic[23] did not leave citizens without a remedy. The First Amendment gave each citizen the right "to petition the Government for a redress of grievances."[24] Individuals used that right to seek private legislation granting them financial remedies for claims against the government.[25] From the outset, Congress directly resolved individual claims with legislation. The first such bill was passed in September of 1789.[26] More than 700 petitions were presented to the First Congress.[27] Congress organized itself to process such claims.[28] In

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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 Emps.*, 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.

25 *Bills to Provide for the Adjustment of Certain Tort Claims Against the United States: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 24–25 (1942) [hereinafter *Hearings on H.R. 5373 and H.R. 6463*] (statement of Assistant Att'y Gen. Francis M. Shea); *see also* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1889–92 (2010) (discussing the common nature and ease of petitioning for private payments).

26 *See* Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 638 (1985).

27 *Id.*

1794, the House established the Committee on Claims and later established other committees for specific categories of claims.[29] The Senate did likewise.[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.[31] Maintaining a tight rein on the Board and each claim, the Confederation Congress kept control over payments.[32] When the Constitution was ratified in 1789, Congress adopted a similar approach.[33] It established commissions and auditors to evaluate claims, but retained the authority to decide whether and how much to pay.[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.[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.[36] Undisputed claims could be paid promptly.[37] The only recourse for those whose claims were denied was to petition Congress for relief.[38]

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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.

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

30 Wiecek, *supra* note 2, at 392.

31 27 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 469–71 (G. Hunt ed., 1928).

32 *See* Shimomura, *supra* note 26, at 634–35 (describing how the Confederation controlled the Board "at almost every point").

33 *See* 2 WILSON COWEN ET AL., THE UNITED STATES COURT OF CLAIMS: A HISTORY, PART II: ORIGIN, DEVELOPMENT, JURISDICTION, 1855–1978, at 2, 4 (1978).

34 *See* Wiecek, *supra* note 2, at 388 (characterizing this as the "executive-administrative phase"); *see also* Shimomura, *supra* note 26, at 635–37 (noting that this approach was consistent with the prior practice of most colonial legislatures).

35 *See* Act of Sept. 2, 1789, ch. 12, § 5, 1 Stat. 65, 66–67 ("[I]t shall be the duty of the Auditor to receive all public accounts, and after examination to certify the balance, and transmit accounts with the vouchers and certificate to the Comptroller for his decision thereon . . . ."); COWEN, *supra* note 33, at 4 ("The exact role of the Treasury in processing the claims is unclear and was unclear even at the time."); Wiecek, *supra* note 2, at 389 (explaining that section 5 of the act establishing the Treasury Department instructed its Auditor to receive all claims and forward them to the Comptroller); *see also* Act of Mar. 3, 1817, ch. 45, § 2, 3 Stat. 366, 366 (setting forth procedures for the "prompt settlement of public accounts").

36 *See* Shimomura, *supra* note 26, at 644–45 (describing the "two general but separate claims systems" operated by Congress and the Treasury Department).

37 *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…."[39] The statute further provided that if the Secretary suspected a mistake, he was to withhold payment and report the matter to Congress.[40] The question of whether Congress could require judicial officers to make such advisory opinions reached the Supreme Court in *Hayburn's Case*,[41] 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.[42]

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.[43] 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.[44] Congress amended the statute to require review by the Secretary of War for all awards over $200.[45] The problems raised by this profligate commissioner ad-

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established, the accounting officers were daily occupied in paying what the government owed for contracts of all kinds.").

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 ("[W]here 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]

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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.").

53 H.R. REP. NO. 730 (1838).

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."[57] 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."[58] It complained that private claims consumed one third of the time of the House of Representatives.[59]

In the early 1850s, the scent of scandal increased the momentum for change. Claims were jumbled and confused; Congress paid one $7000 claim twice.[60] Congressmen degraded their office by acting as claims representatives.[61] The potential for bribery was real and ever-present.[62] 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."[63]

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57 H.R. REP. NO. 498, at 4 (1848).

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,[64] marking the first step towards a system in which claims would be heard by judges.[65] 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.[66] The statute provided that government attorneys defend the United States and that both parties could cross-examine witnesses.[67] The court lacked authority to enter final judgments; instead, it forwarded reports and draft bills to Congress for enactment.[68] Money to pay claims came from enactment of specific bills.[69]

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.[70] It chose to send them to the committees, effectively treating the new court as an advisory board.[71] This decision destroyed the effectiveness of the Court of Claims and gave new life to the legislative claims system.[72] Claimants who lost in the court ap-

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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.[73] Indeed, Court of Claims judgments from 1855 to 1860 totaled $529,000, but by 1860 Congress had paid only half that amount.[74]

The inequities and delays of the old, legislative system persisted.[75] In 1857, three members of the House were caught up in claims and bribery scandals.[76] The number of claims increased dramatically with the coming of the Civil War.[77] In his first inaugural address, President Abraham Lincoln recognized that the claims system was broken.[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:

> [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.[79]

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

President Lincoln's recommendation that claims be adjudicated by the judiciary[82] was adopted when Congress passed the Amended

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73 *See* Wiecek, *supra* note 2, at 398 ("Adverse decisions of the court were usually accepted by Congress, but favorable decisions were debated.").

74 Shimomura, *supra* note 26, at 653.

75 *See* H.R. REP. NO. 513, at 1–3, 7 (1860) (urging that claims be decided by the district courts); Shimomura, *supra* note 26, at 653 (noting that "all the old problems reappeared"); Wiecek, *supra* note 2, at 398 (discussing deficiencies of the claims system in the 1850s).

76 Wiecek, *supra* note 2, at 398.

77 *See* COWEN, *supra* note 33, at 21 (recognizing the "extraordinarily large number of war claims").

78 President Lincoln said that

> [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.

Wiecek, *supra* note 2, at 398.

79 *Id.* at 398–99.

80 *Id.* at 399; *see also* COWEN, *supra* note 33, at 21 (noting in particular that the "Senate was closely divided on the finality issue").

81 *See* Wiecek, *supra* note 2, at 399 ("Pressures for the establishment of a court mounted as the war claims poured in.").

Court of Claims Act of 1863.[83] This statute gave the Court of Claims authority to enter final judgments, subject to a right of appeal to the Supreme Court.[84] It expanded the court's jurisdiction over claims based on federal laws, regulations, or contracts to also include set-offs and counterclaims.[85] The statute prohibited members of Congress from representing claimants before the court.[86] 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."[87] Accordingly, individual judgments could be paid without the need for a case-specific appropriation.[88] Congress made periodic appropriations to pay those judgments, beginning in 1864.[89]

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

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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.[90] Congress continued to use the legislative claims system to resolve other claims, principally for takings under the Fifth Amendment and torts.[91] 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.[92]

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…."[93] 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…."[94] With its expanded jurisdiction, the Court of Claims had new responsibility for cases arising from admiralty contracts, tax refunds, takings, and pay disputes.[95] Judgments adverse to the United States were reported to Congress[96] which appropriated funds to pay them.[97] Later statutes reinforced the practice of appropriating for specific judgments.[98]

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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.

92 H.R. REP. NO. 49-1077, at 4 (1886).

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

94 *See* 18 CONG. REC. 2678 (1887) (statement of Rep. Tucker).

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

96 Act of Mar. 3, 1887, ch. 359, § 11, 24 Stat. 505, 507.

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-

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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.").

103 *Hearings on H.R. 5373 and H.R. 6463*, *supra* note 25, at 54 (1940 statement of Rep. Vorys).

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. 77-562, 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,[107] 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.[108] Finally, in 1946 Congress passed the Federal Tort Claims Act ("FTCA") as Title IV of the Legislative Reorganization Act of 1946.[109]

The FTCA is a general waiver of the United States' sovereign immunity for suits sounding tort.[110] It gives federal district courts subject matter jurisdiction over tort claims arising from negligent or wrongful acts of federal employees.[111] It is a limited waiver of sovereign immunity, subject to jurisdictional limits and affirmative defenses,[112] but on the whole it succeeds at providing reasonable compensation for persons injured by run-of-the-mill negligence of federal employees.[113] 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.[114]

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

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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.").

109 Fed. Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 812 (1946) (codified in scattered sections of 28 U.S.C.).

110 28 U.S.C. § 1346(b)(1) (2012).

111 *Id.*

112 *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).

113 *See* JAYSON & 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").

114 *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.[115] 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."[116] Congress duly appropriated funds to pay such settlements.[117] 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."[118]

### *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.[119] The delays in awaiting congressional approval of legislation to pay court judgments increased interest charges and caused consternation for successful plaintiffs.[120] To address these problems, in 1953 the General Accounting Office recommended the establishment of a permanent,

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115 Legislative Reorganization Act of 1946, § 411, 60 Stat. at 844; 1994 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 8, at 14-51 to 14-52.

116 Legislative Reorganization Act of 1946, § 403(c), 60 Stat. at 812. At that time $1,000 was the limit of agency authority for administrative settlements under the FTCA. *Id.* § 403(a). That amount was raised to $2,500 in 1959. Act of Sept. 8, 1959, Pub. L. No. 86-238, 73 Stat. 471. Claims in excess of the prescribed amount had to be brought in federal district court. Legislative Reorganization Act of 1946, § 410, 60 Stat. at 812.

117 *See, e.g.*, Treasury and Post Office Dep'ts Appropriation Act, 1948, Pub. L. No. 80-147, ch. 186, 61 Stat. 216 (1947); Navy Dep't Appropriation Act, 1948, Pub. L. No. 202, ch. 268, 61 Stat. 382, 383 (1947); Dep'ts of State, Justice, Commerce, and the Judiciary Appropriation Act, 1948, Pub. L. No. 166, ch. 211, 61 Stat. 279, 289, 294, 302 (1947).

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

119 *See* H.R. REP. NO. 84-2638, ch. 13, at 72 (1956) (recognizing the bill would reduce interest payments); *Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 84th Cong. 884–85, 889 (1956) (noting that processing appropriation requests took unnecessary time from executive and legislative resources, delayed payments, and increased interest costs); 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-31 (elaborating on the burdensome process of allocating resources to process appropriations).

120 *See* H.R. REP. NO. 84-2638, ch. 13, at 72 (1956) (recognizing that creation of the Judgment Fund would simplify payments and reduce interest payments); *Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 84th Cong. 885, 888–89 (1956) (explaining that the delay between the award of a final judgment and congressional enactment of an appropriation bill to pay it caused annoyance to claimants).

indefinite appropriation for the payment of judgments.[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.[122] Congress expected that ninety-eight percent of judgments would fall within that limit.[123] Under the new procedure, judgments for that amount or less were paid automatically, without the need for legislation.[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."[125]

In 1961, in view of the success of the 1956 statute,[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.[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-

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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).

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.

*Id.*

123 H.R. REP. NO. 84-2638, ch. 13, at 72; *Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 84th Cong. 884–88 (1956).

124 *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).

125 S. REP. NO. 87-733, at 2 (1961).

126 *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).

127 Act of Aug. 30, 1961, Pub. L. No. 87-187, § 2, 75 Stat. 415, 416.

lar to judgments in like causes."[128] 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.[129]

The FTCA's specific directive that settlements under its provisions be paid from "appropriations available to such agency,"[130] brought FTCA settlements within the "otherwise provided by law" exception.[131] 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."[132] 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.[133] 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.[134]

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.[135] 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.[136] 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).

129 *Id.*; H.R. REP. NO. 87-428, at 2–3, 5–6 (1961).

130 Act of Sept. 23, 1950, Pub. L. No. 81-830, § 9, 64 Stat. 985, 987.

131 Sidney B. Jacoby, *The 89th Congress and Government Litigation*, 67 COLUM. L. REV. 1212, 1218, 1218 n.37 (1967).

132 H.R. REP. NO. 87-428, at 6 (1961).

133 John G. Laughlin, *The Compromise of Federal Tort Claims Act Litigation*, 1965 A.B.A. SEC. INS. NEGL. & COMP. L. PROC. 551, 553 (1965).

134 Jacoby, *supra* note 131, at 1218 n.37.

135 Act of July 18, 1966, Pub. L. No. 89-506, §§ 2, 4, 7, 80 Stat. 306, 306–07.

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]

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137 *See* S. REP. NO. 89-1327 (1966) (lacking discussion on the issue); H.R. REP. NO. 89-1532 (1966) (same); *Improvement of Procedures in Claims Settlement and Government Litigation: Hearing before the Subcomm. of the H. Comm. on the Judiciary*, 89th Cong. 5 (1966); Jacoby, *supra* note 131, at 1218.

138 Supplemental Appropriations Act of 1977, Pub. L. No. 95-26, ch. 14, 91 Stat. 61, 96–97; S. REP. NO. 95-64, at 173, 204-06 . The statute did require that the Postal Service and specific non-appropriated fund instrumentalities reimburse the United States for any settlement or judgments paid on their account from the Judgment Fund. *See* Supplemental Appropriations Act of 1977, Pub. L. No. 95-26, ch. 14, 91 Stat. at 97 (listing, for example, "the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration").

139 H.R. REP. NO. 95-98, at 184 (1977).

140 *See* Supplemental Appropriations Act, 1978, Pub. L. No. 95-240, § 201, 92 Stat. 107, 116; *see also* S. REP. NO. 95-564, at 76–77 (1977) (identifying the Military Claims Act, the National Guard Claims Act, the National Aeronautics and Space Act of 1958, the Small Claims Act, and the Indian Claims Commission). Congress has seen fit to have some damages settlements paid from agency appropriations. One example is the Attorney General's authority to settle claims for damages caused by law enforcement officers that could not be brought under the FTCA. 31 U.S.C. § 3724 (2012). A 1989 amendment to the statute increased the Attorney General's settlement authority to $50,000 and brought coverage to more Justice Department law enforcement agencies. Act of Dec. 7, 1989, Pub. L. No. 101-203, § 1, 103 Stat. 1805, 1805. The legislative history of that amendment recognized that such settlements are paid from agency appropriations. *See* H.R. REP. NO. 101-46, at 6 (1989).

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.[143] The Judgment Fund is available only for monetary awards,[144] as opposed to injunctive relief that requires the expenditure of funds.[145] It can only make a payment that "is not otherwise provided for,"[146] which is one that cannot be legally paid from another appropriation or fund.[147] 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."[148] Payments can only be made for litigative awards under statutes designated by Congress.[149] A Judgment Fund payment must be certified by the Secretary of the Treasury,[150] but the certifica-

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(1) payment is not otherwise provided for;
(2) payment is certified by the Secretary of the Treasury; and
(3) the judgment, award, or settlement is payable—
(A) under section 2414 ["Payment of judgments and compromise settlements" from District Courts and the Court of International Trade],
2517 [Payment of Judgments from the Court of Federal Claims],
2672 [FTCA agency approved administrative claims], or 2677 [FTCA Attorney General approved settlements] of title 28;
(B) under section 3723 of this title [the "Small Claims Act," allowing agency settlement of small property claims];
(C) under a decision of a board of contract appeals; or
(D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10 [Settlement of specific claims by the military], section 715 of title 32 [same], or section 20113 of title 51 [Specified "Powers of the Administration in performance of functions"].

31 U.S.C. § 1304(a).

143 *Id.*; *see also* Marathon Oil Co. v. United States, 374 F.3d 1123, 1128 (Fed. Cir. 2004) (defining final judgment as "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment" (quoting BLACK'S LAW DICTIONARY 847 (7th ed. 1999) (internal quotation marks omitted)); 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-36 (noting that "a judgment against the United States is final for payment purposes when the appellate process is completed").

144 *See* 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-38 ("Money judgments have 'traditionally taken the form of a lump sum, paid at the conclusion of the litigation.'" (quoting Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 533 (1983))).

145 *See id.* (explaining that injunctions such as those that direct agencies to implement government programs or repair buildings do not meet the Judgment Fund requirement).

146 31 U.S.C. § 1304(a)(1).

147 62 Comp. Gen. 12, 14 (1982); *see also* 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-39 (explaining that payment is "otherwise provided for" when "another appropriation or fund is legally available to satisfy the judgment").

148 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-40 .

149 31 U.S.C. § 1304(a)(3); *see also* 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-32 to 14-34 (addressing the statutes listed in § 1304(a)(3), observing that "Congress sometimes includes a provision in other legislation making particular items payable from the Judgment Fund," and noting that the Judgment Fund was intended to pay matters "under authority of the Justice Department").

150 31 U.S.C. § 1304(a)(2).

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.[151]

The Judgment Fund's chief purpose is to pay settlements and court ordered judgments.[152] It is available to pay judgments awarded by U.S. district courts,[153] the Court of International Trade,[154] and the Court of Federal Claims,[155] administrative claims,[156] and settlements.[157] It is the correct source of payment for most FTCA judgments and settlements for more than $2,500.[158] It is the initial source for payment of monetary awards by boards of contract appeals.[159] Normally agencies are not required to reimburse the Judgment Fund for non-contract claims and judgments,[160] except in limited instances including non-appropriated fund instrumentalities,[161] judgments against the

151 *See* 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-33 ("[C]ertification under section 1304 does not involve reviewing the merits of the awards submitted for payment.").

152 *Id.* at 14-34; *see also Varner*, 400 F.2d at 372 (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"); *Maryland*, 349 F.2d at 695 (observing that the Judgment Fund's goal was to allow claimants to "receive prompt payment without awaiting a special appropriation").

153 31 U.S.C. § 1304(a)(3)(A) (referencing 28 U.S.C. § 2414 (Supp. IV 2011)); *see, e.g.*, Lozada v. United States, 974 F.2d 986, 988 (8th Cir. 1992).

154 31 U.S.C. § 1304(a)(3)(A) (referencing 28 U.S.C. § 2414 (Supp. IV 2011)); *see, e.g.*, Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States, 11 C.I.T. 280, 282 (1987), *aff'd*, 837 F.2d 465 (Fed. Cir. 1988).

155 31 U.S.C. § 1304(a)(3)(A) (referencing 28 U.S.C. § 2517 (2012)); *see, e.g.*, Cardiosom, L.L.C. v. United States, 656 F.3d 1322, 1328 (Fed. Cir. 2011); *Slattery*, 635 F.3d at 1302.

156 31 U.S.C. § 1304(a)(3)(A) (referencing 28 U.S.C. § 2672 (2012)).

157 *Id.*

158 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-48.

159 31 U.S.C. § 1304(a)(3)(C) (2012); 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-48; 41 U.S.C. § 7108(a)–(b) (Supp. IV 2011); Bureau of Land Mgmt.–Reimbursement of Contract Disputes Act Payments, April 24, 1984, 63 Comp. Gen. 308 (1984); *see, e.g.*, The Boeing Co., ASBCA No. 54853, 06-1 BCA ¶ 33270, 2009 WL 4738163 (Apr. 12, 2006); Montage, Inc. v. U.S. Dep't of State, GSBCA No. 16758-ST, 2006 WL 2978322 (Oct. 12, 2006); Appeals of the Miss. Band of Choctaw Indians, IBCA No. 4711, 06-1 BCA ¶ 33253, 2006 WL 6435815 (Apr. 14, 2006); SecTek, Inc. v. U.S. Dep't of Homeland Sec., DOTCAB No. 4516, 05-2 BCA ¶ 33067, 2005 WL 3789969 (Sept. 8, 2005).

160 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-32, 14-32 n.62.

161 *See id.* at 15-266 (noting that non-appropriated fund instrumentalities ("NAFIs") generally must pay judgments from their own funds); *see also* United States v. Hopkins, 427 U.S. 123, 127 (1976) (suggesting that unless it specifically acts, Congress does not intend to assume NAFIs' obligations); Mignogna v. Sair Aviation, Inc., 937 F.2d 37, 42 (2d Cir. 1991) (noting that NAFIs may be subject to claims against them and their non-appropriated assets).

U.S. Postal Service,[162] discrimination or retaliation claims filed by federal employees,[163] and awards to contractors under contract dispute procedures.[164]

### *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.

#### *1. The Contracts Disputes Act*

In 1978, Congress passed the Contract Disputes Act ("CDA")[165] to rationalize the "administrative and judicial procedures for the settlement of claims and disputes relating to Government contracts."[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.[167] The CDA provided that (1) both court judgments and monetary awards from boards of contract appeals would be paid from the Judgment Fund,[168] and (2) agencies would reimburse the Judgment

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

163 Notification and Federal Employee Antidiscrimination and Retaliation (No FEAR) Act, Pub. L. No. 107-174, § 201(b), 116 Stat. 566, 568–69 (2002).

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).

165 Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (1978) [hereinafter "CDA"] (codified at 41 U.S.C. § 7101 *et seq.* (2006)).

166 H.R. REP. NO. 95-1556, at 5 (1978); *see generally* Clarence Kipps, Tom Kindness & Cameron Hamrick, *The Contract Disputes Act: Solid Foundations, Magnificent System*, 28 PUB. CONT. L. J. 585, 585–87 (1999) (comparing CDA with the prior system for resolving federal contract disputes).

167 Major Key, *Reimbursement of the Judgment Fund Under the Contract Disputes Act*, 2000 ARMY LAW. 32, 33 (2000) (citing S. REP. NO. 95-1118, at 33 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5267); *see also* 1994 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 8, at 14-11.

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."[169] Congress included the reimbursement requirement in the CDA to make agencies more accountable and to facilitate compromise.[170] 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.[171] 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.[172] The new procedure also expedited payments when agencies ran out of appropriated funds and reduced government interest costs.[173]

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.[174] On average it took 9.6 months to complete payment on those cases for which the Judgment Fund was fully reimbursed.[175] The repayment rate improved to 45.9% in 2004, 27.8% in 2005, and 27.4% in 2006.[176] 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

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169 *Id.* § 13(c), 92 Stat. at 2389.

170 *See* S. REP. NO. 95-1118, at 33 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5267 (suggesting that reimbursement ensures that agencies pay the actual total costs of programs); H.R. REP. NO. 95-1556, at 31–32 (1978). *See generally* Key, *supra* note 167, at 33 (tracing the history of agencies' payment responsibilities under the CDA).

171 S. REP. NO. 95-1118, at 33, *reprinted in* 1978 U.S.C.C.A.N. at 5267 (observing the perverse incentive not to settle claims).

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))).

174 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-481, JUDGMENT FUND: TREASURY'S ESTIMATES OF CLAIM PAYMENT PROCESSING COSTS UNDER THE NO FEAR ACT AND CONTRACT DISPUTES ACT 4 (2004) [hereinafter GAO-04-481].

175 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-295R, THE JUDGMENT FUND: STATUS OR REIMBURSEMENTS REQUIRED BY THE NO FEAR ACT AND CONTRACT DISPUTES ACT 8 (2008) [hereinafter GAO-08-295R].

176 *Id.* at 9.

amount due";[177] Treasury lacks authority to compel payment.[178] Agencies told Treasury that they deferred making the required payments because doing so would have adversely affected their programs and key activities.[179] 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.[180]

*2. The No FEAR Act*

The 2002 Notification and Federal Employee Antidiscrimination and Retaliation Act ("No FEAR Act")[181] addressed the problem of chronic discrimination and retaliation in the federal workplace.[182] It did so by requiring greater notification to federal employees of their rights,[183] in-depth reporting about cases of agency discrimination,[184] 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.[185]

Requiring agency reimbursement addressed the fact that although discrimination claims were increasing,[186] agencies had little financial motivation to change bad practices because adverse judgments had

177 31 C.F.R. § 256.41 (2013).

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).

181 Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Pub. L. No. 107–174, 116 Stat. 566 (codified at 5 U.S.C. § 2301 (2012)).

182 H.R. REP. NO. 107-101, 2001 WL 670677, 7–9 (2001), *reprinted in* 2002 U.S.C.C.A.N. 419, 419–22; S. REP. NO. 107-143, at 6–7 (2002). The Act grew out of an investigation by the House Science Committee into discrimination at the Environmental Protection Agency. S. REP. NO. 107-143, at 2 (2002); *see generally Intolerance at EPA—Harming People, Harming Science?: Hearing before the H. Comm. on Sci.*, 106th Cong. 91–92 (2000) (discussing the EPA's history of discrimination and retaliation issues); Lindsey Nelson, *Mission Not Accomplished: Missing Billions in Iraq, Enhanced Whistleblower Protections, and A Large Failure in A Small Step*, 38 PUB. CONT. L.J. 277, 291 (2008) (noting three causes of the EPA's problems that led to enactment of the No FEAR Act).

183 Pub. L. No. 107–174, § 202, 116 Stat. at 569.

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

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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.").

188 H.R. REP. NO. 107-101, at 13, *reprinted in* 2002 U.S.C.C.A.N. 419, 425-26; S. REP. NO. 107-143, at 7.

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.

H.R. REP. NO. 107-101, at 13, *reprinted in* 2002 U.S.C.C.A.N. at 426. *See also id.* at 52, 54 (illustrating, in the statement of Rep. Nadler, the use of the term "perverse incentive").

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.

193 *See, e.g.*, VIVIAN S. CHU & BRIAN T. YEH, CONGRESSIONAL RESEARCH SERVICE, THE JUDGMENT FUND: HISTORY, ADMINISTRATION, AND COMMON USAGE 15 (2013) [hereinafter

nearly all No FEAR payments were reimbursed, with the average time of repayment dropping to 2.9 months in 2006.[194] A key reason for this higher reimbursement rate is the smaller relative size of No FEAR payments compared to agency budgets.[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.[196] The statute used the carrot of reimbursing attorneys fees to entities that succeeded against the government[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.[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.[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.[200] Accordingly, the United States is liable for attorney fees under federal fee-shifting statutes and exceptions to the "American Rule" on attorneys' fees.[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

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CRS JUDGMENT FUND], https://www.fas.org/sgp/crs/misc/R42835.pdf (noting statute provides no "definitive period").

194 *See* GAO-08-295R, *supra* note 175, at 5 (noting that of $45.1 million through fiscal year 2006, $44.9 million had been reimbursed by April 2007).

195 *See id.* at 8, 13. For fiscal years 2002–2006 the average CDA payment was $2.1 million; the average No FEAR payment (2004–2006) was $72,064. *Id.* at 5–6.

196 Equal Access to Justice Act, Pub. L. No. 96–481, 94 Stat. 2325 (1980) (codified as amended at 5 U.S.C. § 504; 28 U.S.C. § 2412); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-417R, LIMITED DATA AVAILABLE ON USDA AND INTERIOR ATTORNEY FEE CLAIMS AND PAYMENTS 1 (2012) [hereinafter GAO 12-417R] ("The premise of EAJA was to help ensure that decisions to contest administrative actions are based on the merits and not the cost of litigation . . . ."); Louise L. Hill, *An Analysis and Explanation of the Equal Access to Justice Act*, 19 ARIZ. ST. L.J. 229, 230 (1987) ("The fundamental purpose of the EAJA is to allow certain parties to challenge unreasonable federal government action.").

197 *See* S. REP. NO. 96-253, at 5–6 (1980) (recognizing the civic value of showing government policies are erroneous or inaccurate); H.R. REP. NO. 96-1418, at 10 (1980) (same).

198 H.R. REP. NO. 96-1418, at 17 (noting punitive aspect of reducing agency budgets).

199 Pub. L. No. 96-481, 94 Stat. at 2325, 2327; GAO-12-417R, *supra* note 196, at 7.

200 28 U.S.C. § 2412(b) (2012).

201 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-68, 14-69.

bad faith," in which case they are to be paid from the agency's funds.[202]

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…."[203] 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."[204] 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]."[205]

Agencies have aggressively sought to have the Judgment Fund pay EAJA fees.[206] 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.[207] 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.[208] 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."[209] It did so intending that the award of fees

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202 28 U.S.C. § 2412(c)(2).

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).").

204 5 U.S.C. § 504(a)(1).

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.").

207 6 Op. O.L.C. 204, 210–11 (1982).

208 *Id.* at 210–12.

209 Act of Aug. 5, 1985, Pub. L. No. 99-80, § 1(e), 99 Stat. 183, 184 (amending 5 U.S.C. § 504(d)); *see also id.* at 185 (using nearly identical language to amend 28 U.S.C. § 2412(d)(4)).

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 positions[219] 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

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210 *See* 131 Cong. Rec. S9991-02 (daily ed. July 24, 1985) (statement of Sen. Chuck Grassley) (noting that EAJA's positive effect on agency action will improve "with the passage of this bill, which provides for the fees payment out of the offending agency's budget"); H.R. REPT. 99-120, at 8 (1985) (noting the increase in liability for administrative agencies due to EAJA); H.R. REP. 98-992, at 9 (1984) (clarifying the "substantially justified" standard as including positions taken prior to litigation); S. REP. 98-586, at 19 (1984) (discussing the requirement that fee awards must come from "the offending agency's budget").

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

212 *Id.* at 1324.

213 28 U.S.C. § 2412(d)(4); 31 Op. O.L.C. 229, 233 (2007).

214 31 Op. O.L.C. at 233–34.

215 *Id.* at 234.

216 *Id.*

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

218 *Id.* at 236.

219 131 CONG. REC. S9991-02 (daily ed. July 24, 1985) (statement of Sen. Grassley).

220 Pub. L. No. 96–481, 94 Stat. 2325, 2327, 2329 (1980).

221 Act of Aug. 5, 1985, Pub. L. No. 99-80, 99 Stat. 183, 184–85; 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-70.

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

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223 28 U.S.C. § 2412(b), (c)(2) (2012).

224 28 U.S.C. § 2412(d)(1)(A), (d)(4); 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(c)(1), (d)(3), (d)(4).

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:

> [T]here seems to be a pattern of an activist lawsuit, followed by an EPA settlement, resulting in new EPA regulations to comply with the settlement . . . resulting in policy decisions being made by activists, bureaucrats and lawyers . . . . This so-called "sue and settle" strategy keeps the process in the dark.

Collin C. Peterson, *Peterson Op-Ed: Time to Clean Up the EPA*, 112 H. PRESS RELEASE (Mar. 18, 2011), http://democrats.agriculture.house.gov/press/PRArticle.aspx?NewsID=1101 .

226 *See* Lowell E. Baier, *Reforming the Equal Access to Justice Act*, 38 J. LEGIS. 1, 49–50 (2012) (noting that in the twelve months beginning on September 1, 2009, "twenty frequent environmental litigants" received at least $5.8 million in EAJA payments); *see also* Michael J. Mortimer & Robert W. Malmsheimer, *The Equal Access to Justice Act and US Forest Service Land Management: Incentives to Litigate?*, 109 J. FORESTRY 352, 353–54 (2011) (cataloging studies of EAJA payments in environmental cases).

227 *Regulatory Chaos: Finding Legislative Solutions to Benefit Jobs and the Economy: Hearing Before the Subcomm. on Environment and the Economy of the H. Comm. on Energy and Commerce*, 112th Cong. 77 (2011) (statement of Rep. Whitfield) ("[W]e have reason to believe from discussions with a lot of different groups that EPA is actually out there encouraging these lawsuits . . . ."); *see also id.* at 69 (question by Rep. Shimkus).

of EAJA to account for this "strategy";[228] the other argues for preservation of the statute and its use in environmental litigation.[229]

## 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.[230] The Articles of Confederation had required semi-annual reports.[231] Ultimately Madison's view prevailed, resulting in the Clause's "from time to time"[232] language and leaving Congress with great latitude as to when to publish expenditures.[233] Both sides in the debate agreed that the public had a right to know how the government spent its money.[234]

Congress has very broad authority over public disclosure of expenditures.[235] 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-*

228 *See, e.g.*, Baier, *supra* note 226, at 69–70 (explaining possible methods of reform).

229 *See, e.g.*, Brian Korpics et al., *Shifting the Debate: In Defense of the Equal Access to Justice Act*, 43 ENVTL. L. REP. 10985, 10998 (2013) (concluding there is "no clear economic or policy basis that would support a rewrite of EAJA").

230 *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).

231 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 . . . .").

232 U.S. CONST. art. I, § 9, cl. 7.

233 *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).

234 *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").

235 *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*,[236] a challenge to the practice of making secret appropriations to the CIA.[237] In *Richardson*, the Court found the petitioner lacked standing because his grievance was shared by all members of the public.[238] 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."[239] 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…."[240] *Richardson*'s sweeping language virtually precludes any future disclosure claims under the Statement and Accounts Clause.[241] 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.[242]

### *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.[243]

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236 418 U.S. 166 (1974).

237 *See id.* at 169–70 (noting that the lower court's decision focused on standing).

238 *Id.* at 178.

239 *See id.* at 178 n.11 (suggesting the Court need not decide the precise contours of the clause's requirement of a regular statement or account).

240 *Id.*

241 *See, e.g.*, *Halperin*, 629 F.2d at 152 (citing *Richardson* and dismissing a constitutional challenge under art. I, § 9, cl. 7); *Harrington*, 553 F.2d at 194 n.7 (same).

242 *See, e.g.*, *Harrington*, 553 F.2d at 195 ("Since Congressional power is plenary with respect to the definition of the appropriations process and reporting requirements, the legislature is free to establish exceptions to this general framework . . . ."); Hart's Case, 16 Ct. Cl. 459, 484 (1880) ("The absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people.").

243 *See* 1994 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 8, at 14-10 (describing the multitude of claims that can be brought). There are many different statutes authorizing claims against the government. *See* CRS JUDGMENT FUND, *supra* note 193, at 7 (noting that "nearly 100 statutes . . . impact payment from the Judgment Fund"); 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-21 to 14-23 (listing a "brief sampler" of authorities authorizing administrative settlement of claims); JAYSON & LONGSTRETH, *supra* note 106, § 2.05 (listing twenty-four statues authorizing tort remedies and observing that "[t]here simply was no uniformity, or consistency in, or any relationship between, most of these enactments").

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*[244] called for detailed reports to Congress about wounds and disabilities.[245] The statute for property claims arising from the War of 1812 required that "all adjudications . . . shall be entered . . . in a book…."[246] 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.[247] The same information appears in recent private relief bills.[248]

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.[249] 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.[250] The Tucker Act had a similar requirement for reports to Congress,[251] and Congress frequently appropriated funds to pay specific claims.[252]

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.

246 Act of Apr. 9, 1816, ch. 40, § 14, 3 Stat. 261, 264.

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 Dept. 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").

249 *See* Act of Feb. 24, 1855, ch. 122-23, § 7, 10 Stat. 612, 613–14 (requiring monthly, printed reports).

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."[253] In 1965 Congress repealed this reporting requirement.[254] It did so as part of an effort to reduce needless reports and publications,[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."[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.[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.[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.[259] The report was expected to allow Congress to evaluate EAJA's cost and identify agencies engaged in unreasonable activity.[260] This report requirement was repealed as part of the Federal Reports Elimination and Sunset Act of 1995,[261] legislation enacted to eliminate "unnecessary paperwork" and save staff time.[262]

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

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").

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).

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.*

257 Pub. L. No. 107-174, § 203(a), 116 Stat. 566, 569.

258 *Id.* § 301, 116 Stat. at 573; *id.* § 302, 116 Stat. at 575.

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

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

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

262 *See* S. REP. NO. 103-375, at 2 (1993) (discussing reasons to require fewer reports).

## 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.[263] 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.[264]

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.[265] Congress has provided this coverage to manufacturers and distributors of the vaccine in the National Swine Flu Immunization Program of 1976,[266] cer-

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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).

266 Pub. L. No. 94-380, 90 Stat. 1113 (1976) (codified at 42 U.S.C.A. § 247b(k), subsequently repealed, Health Services and Centers Amendments of 1978, Pub. L. No. 95-626 § 202, 92 Stat. 3574); *see also* U.S. Attorneys' Manual, 4-10.110 Payment of Judgments by the Department of the Treasury and Postal Service, 1997 WL 1944302 (noting special proce-

tain tribal contractors,[267] and nuclear weapons contractors.[268] Because the Judgment Fund works automatically, Congress has no occasion to review and consider payments made on behalf of these entities.[269] Granting FTCA coverage to non-federal government entities may be poor policy,[270] 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-

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dures required when submitting Swine Flu settlements for payment from the Judgment Fund).

267 Congress made the FTCA the exclusive remedy for torts of tribal employees and contractors acting under certain contracts or agreements, giving them the FTCA's "full protection and coverage." Act of Nov. 5, 1990, Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959 (current version at 25 U.S.C. § 450(f) (2012)); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-00-169, FEDERAL TORT CLAIMS ACT—ISSUES AFFECTING COVERAGE FOR TRIBAL SELF-DETERMINATION CONTRACTS 25 fig. 5 (2000) [hereinafter GAO/RCED-00-169] (depicting history of the Self-Determination Act provisions and subsequent amendments in graphic form); Joseph W. Gross, Comment, *Help Me Help You: Why Congress's Attempt to Cover Torts Committed by Indian Tribal Contractors with the FTCA Hurts the Government and the Tribes*, 62 AM. U. L. REV. 383, 393–94 (2012) (discussing Congress's reasons for providing FTCA coverage to tribal contractors).

268 National Defense Authorization Act for Fiscal Year 1991, § 3141 Contractor Liability for Injury or Loss of Property Arising out of Atomic Weapons Testing Programs, Pub. L. No. 101-510, 104 Stat. 1485 (1990) (amended by Pub.L. No. 101-510, Div. C, Title XXXI, § 3141, 104 Stat. 1837 (1990) and Pub. L. No. 113-66, Div. C, Title XXXI, § 3146(i)(2), 127 Stat. 1081 (2013)) (codified at 50 U.S.C. § 2783 (formerly at 42 U.S.C. § 2212)); *see also In re* Consol. U.S. Atmospheric Testing Litig., 820 F.2d at 990–91 (discussing the legislative history of the bill that extended FTCA coverage to nuclear weapons contractors).

Congress provided analogous coverage to community health providers, albeit with a proviso that the Judgment Fund be reimbursed from a special Department of Health and Human Services fund. Federally Supported Health Centers Assistance Act of 1992, Pub. L. No. 102-501, 106 Stat. 3268 (1992); 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 15-266.

269 *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").

270 *See* President George H. W. Bush Statement on Signing Department of the Interior and Related Agencies Appropriations Act, 1991, 2 PUB. 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 400–03 (noting various practical problems of using the FTCA to cover torts of non-federal entities).

mise settlements…."[271] 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.[272] The Department of Justice has presumptive responsibility for all litigation of the United States and its agencies.[273] 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."[274]

The Judgment Fund can pay awards or settlements only if they are "final."[275] A judgment is final for Judgment Fund purposes when the appellate process is finished.[276] 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.[277] Only the Solicitor General has authority to determine "whether, and to what extent, appeals will be taken by the Government" from adverse decisions.[278]

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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[279] and to delegate that settlement authority.[280] 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,"[281] and "to redelegate to subordinate division officials and United States Attorneys" that authority.[282] 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."[283]

The Attorney General also delegated authority to settle administrative tort claims to other Justice Department components[284] and to some agencies that handle numerous claims.[285] 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.[286] All agencies have $25,000 in independent statutory authority under the FTCA to settle administrative claims.[287] 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.[288]

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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.

280 28 U.S.C. § 510.

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).

283 28 C.F.R. Pt. 0, Subpt. Y, App., Civ. Div. Directive, No. 1-10 § 1(b)(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).

285 *See* 28 C.F.R. § 14.

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* JAYSON & LONGSTRETH, *supra* note 196, at § 17.12 (discussing payment of administrative awards).

288 28 C.F.R. § 14.6(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.[289] 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."[290] 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."[291]

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

289 *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").

290 *Id.* at 331.

291 *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. Lanctot, *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-

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292 Peterson, *supra* note 289, at 349.

293 *See, e.g.*, 28 C.F.R. Pt. 0, Subpt. Y, App., Civ. Div. Directive No. 1-10.

294 *See* Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 317–18 (1999) (noting that ethical rules are not always followed).

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).

296 John Lande, *Escaping from Lawyers' Prison of Fear*, 82 UMKC L. REV. 485, 489 (2014); *see also* Richard G. Spier, *Professionalism in Mediation: Avoiding Common Pitfalls*, OR. ST. B. BULL., (Nov. 2013), https://www.osbar.org/publications/bulletin/13nov/professionalism.html (noting that opponents can sense when an attorney fears trial).

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)).

299 *See* Kevin C. McMunigal, *The Cost of Settlement: The Impact of Scarcity of Adjudication on Litigation Lawyers*, 37 UCLA L. REV. 833, 859 (1990) (noting susceptibility of inexperienced lawyers); Sternlight, *supra* note 294, at 317–18 (noting the impact of psychological factors on an attorney's willingness to settle a case).

posed because the attorney wants to avoid going to trial.[300] Documented examples where government attorneys have settled to avoid trial are rare. One such case is *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."[301] This lie was remarkable because it was sure to come to light "[w]hen payment as required under the agreement was not received."[302] It was discovered, a motion to enforce the unapproved settlement was denied,[303] and six months later, summary judgment was granted for the government on liability.[304]

It is easy to be generous with other people's money,[305] a truism that might tempt a government attorney facing a very sympathetic plaintiff apparently barred from suing the government.[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.[307] Despite the ease with which such cases might be settled and the evident "incentive to yield to the perceived special need du jour,"[308] there is very little factual support for the notion that government attorneys inappropriately use the Judgment Fund to settle individual claims or cases.[309] This circumstance is attributable to the pro-

300 *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").

301 *See* White v. U.S. Dep't of Interior, 639 F. Supp. 82, 88–89 (M.D. Pa. 1986), *aff'd*, 815 F.2d 697 (3d Cir. 1987) (quoting settlement conference transcript).

302 *Id.* at 84.

303 *Id.*

304 White v. U.S. Dep't of Interior, 656 F. Supp. 25 (M.D. Pa. 1986), *aff'd*, 815 F.2d 697 (3d Cir. 1987).

305 *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.").

306 *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").

307 *See supra* note 138 and accompanying text; *see also* Axelrad, *supra* note 4.

308 Axelrad, *supra* note 4.

309 *But cf. infra* Part III.2.c (discussing EAJA settlements in "sue and settle" litigation).

Professor Peterson identified as a possible example of executive branch overreach the dispute regarding the return of money Pakistan paid for undelivered F-16 fighters. Peterson, *supra* note 289, at 367–68. Pursuant to a U.S. Government approved contract, in 1989 Pakistan paid General Dynamics $658,000,000 for the fighters; delivery of this

fessionalism of those attorneys,[310] 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[311] and, perhaps, to the difficulty of detecting settlements in which it was done.[312]

### *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.[313] 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."[314] The availability of the Judgment Fund to pay EAJA fees is part of the mix in "sue and settle" environmental litigation.[315]

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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. *Id.* at 368.

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

311 *See, e.g.*, *White*, 639 F. Supp. at 88 (holding that failure to obtain required approvals made a purported settlement invalid and unenforceable); 28 C.F.R. Pt. 0, Subpt. Y, App., Civil Div. Directive No. 1-10 §§ 1, 2 (2014) (delegating settlement authority and requiring settlement memoranda).

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.436 (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).

315 *See e.g.*, *Regulatory Chaos: Finding Legislative Solutions to Benefit Jobs and the Economy: Hearings Before the Subcomm. of the H. Comm. on Energy & Commerce*, 112th Cong. 68 (2011) (statement of William L. Kovacs, Senior Vice President, Environment, Technology and Regulatory Affairs, U.S. Chamber of Commerce) (suggesting that agencies in "sue and settle" litigation agree to pay attorney fees from the Judgment Fund); Jenna Greene, *Feds Paid Billions in Settlements Last Year*, NAT'L L.J., Feb. 6, 2012 at 2 (noting use of Judgment Fund to pay attorneys' fees in "sue and settle" cases); Jillian Kay Melchior, *The Enviro-Fix Is In*, NAT'L REV. ONLINE (May 23, 2013), http://www.nationalreview.com/article/349111/enviro-fix-jillian-kay-melchior (referencing the use of the Judgment Fund to pay attorneys' fees).

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.[316] 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[317] and only if the agency's position was not "substantially justified."[318] 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 statues were closely related and contributed to a successful, significant prosecution.[319] If the claims are unrelated, fees are allotted between agency appropriations and the Judgment Fund.[320]

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.[321] As Bureau of

316 28 U.S.C. § 2412(b), (c)(2).

317 28 U.S.C. § 2412(d)(1)(A), (d)(4) (for cases in litigation); 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(c), (d)(3), (d)(4) (for administrative adjudications).

318 28 U.S.C. § 2412(d)(1)(A), (B), (d)(3).

319 Payment of Attorney's Fees in Litigation Involving Successful Challenges to Federal Agency Action Arising Under the Administrative Procedure Act and the Citizen Suit Provisions of the Endangered Species Act [ESA], 24 Op. O.L.C. 311, 314 (2000).

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. GOV'T 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."[322] Those negotiations typically include plaintiff's counsel and attorneys from both the agency and the Department of Justice.[323] The prevalent expectation is that most environmental fee awards will be paid by the Judgment Fund.[324] The most detailed information available is in a 2011 Government Accountability Office study that examined EAJA payments made in EPA cases.[325] Its included tables show that from December 2005 through September 2010,[326] 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%.[327]

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."[328] 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."[329] Parties cannot properly stipulate or agree to change which government account will pay a settlement.[330] The reason is clear: allowing them to do so "might encourage settlements

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all settlement"); Korpics et al., *supra* note 229, at 10990 (explaining that either a consent decree or judgment is necessary for an award of fees).

322 *See Conserving America's Land and Heritage: Department of the Interior FY 2011 Budget Request: Hearing Before the Subcomm. on Interior, Environment and Related Agencies of the H. Comm. on Appropriations*, pt. 6, 111th Cong. 86 (2010) [hereinafter *Interior FY 2011 Budget Hrg.*], http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg66892/pdf/CHRG-112hhrg66892.pdf (answering the question of whether EAJA fees "come out of your [BLM] budget or . . . out of the Judgment fund . . . ?").

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").

325 *See generally* GAO-11-650, *supra* note 321, at 3–5.

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."[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.[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.[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,[334] the Japanese Latin Americans litigation,[335] and suits brought by Native American farmers, Hispanic farmers, and female farmers.[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.[337] *Pigford I* began in August 1997,

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331 2008 GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 1, at 14-35 (citing 13 Op. O.L.C. 118, 125 (1989)).

332 *See Hearing Before the Subcomm. on Courts, Commercial And Administrative Law of the H. Comm. on The Judiciary on H.R. 1996*, 112th Cong. 8 (2011) (statement of Jeffrey Axelrad, Professorial Lecturer in Law, George Washington University Law School) (noting that an agency involved in EAJA fee settlement has no incentive to reduce payments from the Judgment Fund).

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").

334 *See generally* Peterson, *supra* note 289, at 358–62 (describing the "case famously known as the Black Farmers case").

335 *See generally id.* at 362–66 (discussing the Japanese Latin American case).

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).

337 *See, e.g.*, Pigford v. Glickman, 185 F.R.D. 82, 85–88 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000), *enforcement denied sub nom.*, Pigford v. Schafer, 536 F. Supp. 2d 1 (D.D.C. 2008); TADLOCK COWAN & JODY FEDER, CONG. RESEARCH SERV., RS20430, THE *PIGFORD*

when Timothy Pigford filed suit under the Equal Credit Opportunity Act ("ECOA") seeking class relief.[338] In October 1998, the court certified a class "for purposes of determining liability" and injunctive relief.[339] Although plaintiffs' claims had some apparent merit,[340] many were barred by the ECOA's statute of limitations.[341] The Justice Department Office of Legal Counsel ("OLC") was asked whether the government could waive the limitations defense and settle the claims.[342] 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."[343] 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."[344] 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.[345]

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CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 2 (2013) [hereinafter CRS *PIGFORD* CASES]; *see generally* Sharon LaFraniere, *U.S. Opens Spigot After Farmers Claim Discrimination*, N.Y. Times, Apr. 25, 2013, http://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html (providing a thorough discussion of the litigation and the politics surrounding it).

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

339 Pigford v. Glickman, 182 F.R.D. 341, 351–52 (D.D.C. 1998), *modifying the class in* Pigford v. Glickman, 185 F.R.D. 82, 92 (D.D.C.1999).

340 *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").

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

342 Statute of Limitations & Settlement of Equal Credit Opportunity Act Discrimination Claims Against the Dep't of Agric., 22 Op. O.L.C. 11, 1998 WL 1180049, at *1 (1998).

343 *Id.* at *3.

344 *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).

345 *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[] discrimination at any time during the period beginning on January 1, 1981 and ending December 31, 1996 . . . .").

The newly extended statute of limitations[346] and the 1998 decision that certified plaintiffs' class[347] made a negotiated settlement practicable.[348] 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.[349] The consent decree laid out specific procedures and administrators' responsibilities.[350] It defined what Track A claimants must establish by substantial evidence to an independent adjudicator who would decide on the papers.[351] 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.[352] Either side could petition for reexamination of a decision.[353] Attorneys' fees and expenses were paid under fee shifting statutes rather than from the settlement.[354] 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.[355] The cash settlements, exceeding $770,000,000, were paid from the Judgment Fund.[356]

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346 *Id.*

347 *See* Pigford v. Glickman, 182 F.R.D. 341, 350–52 (D.D.C. 1998) (certifying the class pursuant to Federal Rule of Civil Procedure 23(b)(2)).

348 *See* Stephen Carpenter, *The USDA Discrimination Cases:* Pigford, In Re Black Farmers, Keepseagle, Garcia, *and* Love, 17 DRAKE J. AGRIC. L. 1, 15–16 (2012) (noting the previous problem posed by the statute of limitations).

349 Pigford v. Glickman, 185 F.R.D. 82, 95 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000) *and enforcement denied sub nom.*, Pigford v. Schafer, 536 F. Supp. 2d 1 (D.D.C. 2008).

350 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06469R, PIGFORD SETTLEMENT: THE ROLE OF THE COURT-APPOINTED MONITOR 5–9 (2006) [hereinafter GAO-06469R] (summarizing *Pigford I* consent decree procedures); Carpenter, *supra* note 348, at 18–19 (same).

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.[357] Dissatisfaction with these outcomes led to political efforts to reopen the process.[358] Finally, Congress included in the 2008 Farm Bill a new procedure for those claims to be decided "on the merits."[359] Congress set the maximum amount to be paid under the new statute, and appropriated for that purpose, $100,000,000.[360] The subsequent suits were consolidated in *Pigford II* and the parties agreed to a $1,250,000,000 settlement in February 2010.[361] The claims process established in the *Pigford II* settlement was similar to that in *Pigford I*.[362] It differed in that neither side could appeal and attorneys' fees and expenses came from the settlement's lump sum.[363] Because the Judgment Fund can be used only to make payments "not otherwise provided for"[364] 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.[365] Several attempts to appropriate the $1,150,000,000 needed to complete the settlement failed.[366] 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.[367]

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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").

359 *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012(b), 122 Stat. 1651 ("Any Pigford claimant who has not previously obtained a determination on the merits of a Pigford claim may, in a civil action brought in the United States Distict Court for the District of Columbia, obtain that determination."); CRS *PIGFORD* CASES, *supra* note 337, at 7.

360 *See* Food, Conservation, and Energy Act of 2008 §§ 14012(c)(2), 14012(i)(1).

361 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).

367 Claims Resolution Act of 2010, Pub. L. No. 111-291 § 201, 124 Stat. 3064 (2010); *see also* Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and* Cobell v. Salazar, 46 GONZAGA L. REV. 609, 620–21 (2010/2011) (describing the number and nature of the trust accounts). The *Cobell* litigation had a long, complicated, and contentious history. *See* Cobell v. Salazar, 573 F.3d 808, 810 (D.C. Cir. 2009) (noting the case was then in its thirteenth year with an "increasingly difficult to summarize . . . factual and procedural background"); Merjian, *supra* at 619–54 (providing a thorough summary of the litigation); *see also* Jamin B. Raskin, *Professor Richard J. Pierce's*

The *Pigford* litigation is not an example of executive branch overreach, although a strong political current ran through the settlement negotiations.[368] 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.[369] 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.[370] 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.[371] 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.[372] 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.[373] Plaintiffs sought to make claims under the Civil Liberties Act of 1988,[374] the statute that authorized a formal apology and payment of $20,000 to Japanese Americans who had been interred during the war.[375] 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."[376] Nonetheless, the government agreed to settle each plaintiff's claim for an apology and $5,000,

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*Reign of Error in the Administrative Law Review*, 57 ADMIN. L. REV. 229, 242–43 (2005) (addressing particular actions of the judge initially assigned the case).

368 *See generally* LaFraniere, *supra* note 337 (providing a thorough discussion of the black farmer ligation, its political aspects, and its susceptibility to fraud).

369 *See id.* at 6 (quoting an attorney statement that the settlement "was more a political decision than a litigation decision").

370 *See* Peterson, *supra* note 289, at 362 (noting with approval that this process respected "Congress's appropriation authority").

371 31 U.S.C. § 1304(a)(1); *see also* CRS *PIGFORD* CASES, *supra* note 337, at 7–8 (explaining that the "not otherwise provided for" requirement was not met because in the 2008 farm bill, Congress had made $100 million available for those claims).

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).

374 *See generally* Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 904 (codified at 50 U.S.C. § 1989b).

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.[377] The settlement had political overtones and it may have been entered over the objections of some within the Department of Justice.[378] But, because the Civil Liberties Public Education Fund was depleted, the settlement was funded only when Congress appropriated $4,300,000 to fund it.[379] 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,[380] Hispanic farmers,[381] and women farmers[382] filed class action suits against USDA alleging unlawful discrimination and ECOA claims similar to those raised in the *Pigford* litigation.[383] 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.[384] 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

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377 *Mochizuki*, 41 Fed. Cl. at 56–57; Press Release, U.S. Dept. of Justice, Japanese Latin Americans to Receive Compensation for Internment During World War II (June 12, 1998), http://www.justice.gov/opa/pr/1998/June/276.htm.html. This fund was established by § 104 of the Civil Liberties Act of 1988.

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*).

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

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

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. 923 (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.[385] They sought equitable and monetary relief[386] and incorrectly designated the *Pigford* litigation as a related matter.[387] 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.[388] In 2010, the parties agreed to a $760,000,000 settlement,[389] including $680,000,000 paid from the Judgment Fund.[390]

The *Keepseagle* settlement agreement, a forty-seven page document,[391] established "an administrative claims process" similar to the *Pigford* process.[392] 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.[393] 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.[394] Track B claimants could recover up to $250,000 in an arbitration in which they had a preponderance of the evidence burden of proof.[395] 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.*

387 *See* Keepseagle v. Glickman, 194 F.R.D. 1, 1 (D.D.C. 2000) (rejecting plaintiffs' designation of their case as related to the *Pigford* litigation).

388 Keepseagle v. Veneman, No. Civ.A.9903119EGS1712, 2001 WL 34676944, at *14 (D.D.C. Dec. 12, 2001); *see also* CRS *GARCIA* ANALYSIS, *supra* note 348, at 11 (summarizing the case).

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

390 News Release No. 0539.10, U.S. Dept. of Agric., *Agriculture Secretary Vilsack and Attorney General Holder Announce Settlement Agreement with Native American Farmers Who Claim to Have Faced Discrimination by USDA in Past Decades* (Oct. 19, 2010), http://www.usda.gov/wps/portal/usda/usdamediafb?contentid=2010/10/0539.xml&printable=true&contentidonly=true.

391 Settlement Agreement, Keepseagle v. Vilsack, No. 99-3119 2015 WL 1969814 (D.D.C. May 4, 2015) [hereinafter Keepseagle Settlement Agreement], http://www.indianfarmclass.com/Documents/SettlementAgreement.pdf.

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

393 Keepseagle Settlement Agreement, *supra* note 391, at 9–10, 14–25.

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).

397 *See* Garcia v. Veneman, 224 F.R.D. 8, 16 (D.D.C. 2004), *aff'd and remanded sub nom.* Garcia v. Johanns, 444 F.3d 625 (D.C. Cir. 2006) (noting difficulty of resolving similar ECOA claims even after class certification for liability in the *Pigford* litigation).

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.").

399 *See Keepseagle*, COHEN MILSTEIN, http://www.cohenmilstein.com/cases/95/keepseagle (last visited Aug. 21, 2015) (alluding to plaintiffs' economist's report).

400 Fifth Amended Class Action Complaint at 163 ¶ 143, Keepseagle v. Vilsack, No. 99-CV-03199, 2001 WL 35985330 (D.D.C. June 27, 2001).

401 Plaintiffs' Status Report at 1, Keepseagle v. Vilsack, No. 99-CV-03199 (D.D.C. June 12, 2013) (reporting 4380 Track A and 92 Track B final determinations, 57 untimely claims, and 731 defective or incomplete claims).

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 [$224,187,500], 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.

404 Status Conference at 4, Keepseagle v. Vilsack, No. 99-CV-03199 (D.D.C. Nov. 18, 2013).

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.[407] The significant point from the Judgment Fund perspective is that over $380,000,000 from the Judgment Fund, more than half the settlement amount,[408] will be used for some purpose other than paying class members' claims.[409]

In *Garcia v. Veneman*[410] and *Love v. Veneman,*[411] 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.[412] In both cases, the district courts' decisions to deny class certification were affirmed on appeal.[413] 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.[414] 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.[415]

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407 *See* Keepseagle v. Vilsack, No. 99-CV-03199, 2015 WL 1969814 at *2 (D.D.C. May 4, 2015) (discussing history of the settlement agreement); Keepseagle v. Vilsack, 307 F.R.D. 233, 238 (D.D.C. 2014) (noting disagreement among Native American groups as to how to handle excess funds).

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).

410 211 F.R.D. 15, 17–18 (D.D.C. 2002).

411 224 F.R.D. 240, 241–42 (D.D.C. 2004).

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

413 *See Love*, 224 F.R.D. at 242 (denying class certification for lack of commonality), *aff'd in part, remanded in part sub nom.* Love v. Johanns, 439 F.3d 723 (D.C. Cir. 2006); Garcia v. Veneman, 224 F.R.D. 8, 15–16 (D.D.C. 2004) (denying class certification for lack of commonality), *aff'd and remanded sub nom.* Garcia v. Johanns, 444 F.3d 625, 637 (D.C. Cir. 2006) (affirming because "the failure to investigate a discrimination complaint is not a 'credit transaction' within the meaning of ECOA"). Both cases were remanded for determination of whether a failure to investigate violated the Administrative Procedure Act. *Love*, 439 F.3d at 733; *Garcia*, 444 F.3d at 637. The district court's decisions against plaintiffs on that issue were affirmed in a consolidated appeal. Garcia v. Vilsack, 563 F.3d 519, 521 (D.C. Cir. 2009), *cert. denied*, Garcia v. Vilsack, 558 U.S. 1158 (2010).

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, nonjudicial claims resolution process."[416] On January 25, 2012, the government announced a revised plan.[417] The charter for this system is the "Framework for Hispanic or Female Farmer's Claims" ("Framework").[418] 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."[419] It had two tiers, with awards capped at $50,000 and $250,000.[420] 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.[421] Attorneys' fees were to be paid by the claimant.[422] The Framework provided that "[c]ash awards and tax relief will be paid from the Judgment Fund."[423]

The litigative risk posed by *Garcia* and *Love* hardly justified the government's decision to establish this $1,333,000,000 claims pro-

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ing that because of the denial of class certification "we will not be able to negotiate a class-wide settlement").

416 *Secretary Vilsack's Efforts to Address Discrimination at USDA*, USDA OFFICE OF THE ASST. SECT. FOR CIVIL RIGHTS, http://www.ascr.usda.gov/about_cr_background.html (last visited on May 29, 2015); News Transcript, Release No. 0100.11 USDA Office of Communications, Agriculture Secretary Tom Vilsack and Assistant Attorney General Tony West Announce Process to Resolve Discrimination Claims of Hispanic and Women Farmers (Feb. 25, 2011) http://www.usda.gov/wps/portal/usda/usdahome?contentid=2011/03/0100.xml. (last visited on Aug. 22, 2015).

417 News Release No. 0024.12, USDA Office of Communications, *Agriculture Secretary Vilsack Announces Updated and Improved Process to Resolve Discrimination Claims of Hispanic and Women Farmers* (Jan. 25, 2012), http://www.usda.gov/wps/portal/usda/usdahome?contentid=2012/01/0024.xml (last visited on Aug. 22, 2015).

418 Framework for Hispanic or Female Farmer's Claims, Defendant's Eighth Status Rept., Exh. Garcia v. Vilsack, 1:00-cv-02445 (D.D.C. Jan. 20, 2012), https://www.farmerclaims.gov/Documents/USDA%20Framework%20011312%20Final.pdf (last visited Aug. 2, 2015)); *see also* Cantu v. United States, 565 F. App'x 7, 8–9 (D.C. Cir. 2014) (reversing dismissal of claim of discrimination in making settlement offer).

419 *Id.* at 9.

420 *See* CRS *GARCIA* ANALYSIS, *supra* note 336, at 8.

421 *See* Framework for Hispanic or Female Farmer's Claims Process §§ V. D., IV, VII. C., VII.C. (explaining procedures).

422 *See id.* § XI.

423 *Id.* § I.E. (providing further that USDA would pay administrative costs of the Claims Process).

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"

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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").

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

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

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.[431] Hispanic and female farmers sought treatment "on par with other victims of discrimination."[432] The Hispanic or Female Farmer's Claims Process was reportedly molded at White House meetings[433] over the strong objections of career lawyers who argued, inter alia, "that the legal risks did not justify the costs."[434] 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.[435]

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[436] 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.[437] 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.[438]

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431 Letter from Robert Menendez, Senator, to Barack Obama, President (June 17, 2009), http://www.menendez.senate.gov/newsroom/press/senators-urge-settlement-in-usda-discrimination-lawsuit-by-hispanic-farmers (detailing senators' requests for equal treatment of Hispanic farmers and ranchers).

432 Ben Evans, *USDA Offers $1.3B To Settle Discrimination Complaints from Women, Latino Farmers*, ASSOCIATED PRESS, (May 26, 2010) (quoting attorney for Hispanic farmers), http://business.gaeatimes.com/2010/05/26/ap-source-usda-offers-13b-to-settle-discrimination-complaints-from-women-latino-farmers-64864/.

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, Garcia 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, Garcia 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.[439] The Bureau of Fiscal Services, the component of the Department of the Treasury responsible for the Judgment Fund,[440] 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.[441] That regulation requires that the record "be eliminated no later than the next annual posting" once the agency pays.[442] 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."[443]

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.[444] The information is transient. No records are kept or method provided to track agencies that are frequently late in reimbursing the Fund.[445] Congress is not informed of which agencies fall behind in their CDA payments.[446]

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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.

443 *See* U.S. DEPARTMENT OF TREASURY: BUREAU OF THE FISCAL SERVICE, https://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/noncompliance.htm (last visited Sept. 25, 2015) (illustrating a lack of information on non-compliance). On July 11, 2014, the Treasury's website provided only the Annual Non-Compliant Agency Report for 2012, which stated in its entirety, "No federal agencies were found to be non-compliant as of November 1, 2012."

444 *See No FEAR Act Receivables*, TREASURY DIRECT, http://www.treasurydirect.gov/govt/reports/tma/nofear.htm (providing agency balances); *Contract Disputes Receivables*, TREASURY DIRECT, http://www.treasurydirect.gov/govt/reports/tma/contractdisputes.htm (same).

445 *See* Sarah Wood Borak, Note, *The Legacy of "Deep Throat": The Disclosure Process of the Whistleblower Protection Act Amendments of 1994 and the No FEAR Act of 2002*, 59 U. MIAMI L. REV.

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.[447] 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.[448] 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.[449] Treasury has posted a similar database for years 2003–2013.[450] 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.[451] Treasury's reasoning for withholding names of plaintiffs and some attorneys is reflected in the

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

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

447 Cong. Report, 2012 Judgment Fund Transparency Report to Cong., BUREAU OF THE FISCAL SERVICE [hereinafter 2012 Judgment Fund Report]; Cong. Report, 2011 Judgment Fund Transparency Report to Cong., BUREAU OF THE FISCAL SERVICE, [hereinafter 2011 Judgment Fund Report], http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/congress-reports.htm.

448 *See* CRS JUDGMENT FUND, *supra* note 193, at 15 n.130. The managers directed that

> [u]nless 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.

H.R. REP. NO. 112-136, at 6 (2011). The same language was used the next year regarding the Financial Services and General Government Appropriations Bill, 2013. H.R. REP. NO. 112-550, at 6 (2012); CRS JUDGMENT FUND, *supra* note 193, at 15. Similar language was included in 2013 and 2014, for the Financial Services and General Government Appropriations Bills of 2014 and 2015; H.R. REP. NO. 113-172, at 14–15 (2013); H.R. REP. NO. 113-508, at 14 (2014).

449 *E.g.*, 2011 Judgment Fund Report; 2012 Judgment Fund Report. Other columns include "Attorney's Fees Amount," "Cost Amount," and "Interest Amount." *Id.*

450 *See* JUDGMENT FUND PAYMENT SEARCH PAGE, https://jfund.fms.treas.gov/jfradSearchWeb/JFPymtSearchAction.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.*

451 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."[452] The agency took a similar position "where the attorney is a sole practitioner and the payment is exclusively for attorney fees."[453] 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.[454]

In 1995 Congress repealed the requirement of an annual report on the fees and expenses paid under EAJA.[455] No statute now requires agencies or the executive branch to report EAJA payments made in either administrative or judicial proceedings.[456] Consequently, there is data on the amounts paid under that act from 1982 to 1994,[457] but a remarkable paucity of information about EAJA payments made since then.[458] Reports from different agencies about the same EAJA payments may be conflicting.[459] Even when the GAO performed detailed audits of specific agencies it was unable to ascertain all EAJA fees paid on account of those agencies.[460] Its in-depth report

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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).

458 *See, e.g.*, Admin. Conference of the U.S., Report of the Chairman on Agency and Court Awards in FY 2010 under the Equal Access to Justice Act 5–6 (2013) (noting problems in acquiring useful data); Baier, *supra* note 226, at 43 (same); Korpics et al., *supra* note 229, at 10998 (same).

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 ($7,002,530)).

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."[461] Members of both sides in environmental litigation recognize the need for accurate information about EAJA payments.[462]

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.[463] 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."[464]

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.[465] As a consequence, agencies cannot assess whether proposed compromises are reasonable compared to similar cases.[466] Likewise, the absence of specific information on EAJA payments makes it problematic for Congress to make rational choices about changing that

461 GAO 12-417R at 5; *accord* Paul Verkuil, *Report of the Chairman on Agency and Court Awards in FY 2010 under the Equal Access to Justice Act,* Admin. Conference of the United States 4–6 (Jan. 9, 2013) (noting the extreme difficulty of collecting data on EAJA payments from agencies).

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).

statute,[467] and leaves the public in the dark about the size and frequency of substantial government payments and the patterns in which they are awarded.[468] 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.[469]

On a broader level, maintaining the fog around Judgment Fund payments undercuts the transparency that makes for better government.[470] 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."[471] No strong governmental interest supports keeping Judgment Fund information secret.[472] 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."[473]

The public has a right, grounded in the common law and the First Amendment, to access all final judgments and court decisions.[474] Treasury's practice of withholding case names, claimant's names, and fact summaries from its Judgment Fund databases makes that infor-

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467 *See, e.g.*, *Interior FY 2011 Budget Hrg., supra* note 322, at 363 (noting, according to Rep. Simpson, the inability to find any accounting of payments); Korpics et al., *supra* note 229, at 10998.

468 *See supra* note 462 and accompanying text; *see also* Baier, *supra* note 226, at 35 (noting difficulty of assessing "amounts of EAJA awards or the patterns of EAJA use").

469 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-69R, CIVIL RIGHTS: ADDITIONAL ACTIONS IN *PIGFORD II* CLAIMS PROCESS COULD REDUCE RISK OF IMPROPER DETERMINATION 3 (2012).

470 *See* Ross E. Cheit, *Tort Litigation, Transparency, and the Public Interest*, 13 ROGER WILLIAMS U. L. REV. 232, 239 (2008) ("[Transparency] inhibits corruption, encourages accountability, and instills public confidence.").

471 Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 894 (1986).

472 *See id.* at 895–96 (noting that secrecy is appropriate to protect military plans, facilitate negotiations, facilitate internal government deliberations, avoid interest group pressures, and "encourag[e] communications from others").

473 *See id.* at 896–97 (listing categories of benefits from disclosure).

474 Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 740 (2004) (citing Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978)); *see also* Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 FED. CTS. L. REV. 177, 206 (2009) (noting that that judicial rulings have been open to the public both "at common law, and for most of this nation's history").

mation 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.[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.[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.[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."[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."[479] There is a long history of

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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.

476 *See supra* note 454 and accompanying text.

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.

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))).

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

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not inherently . . . constitute a 'clearly unwarranted' invasion of personal privacy" (citing 5 U.S.C. § 552(b)(6))).

480 *See supra* notes 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.[486] Indeed, congressional attempts to assess whether specific settlements are too high could draw Congress back into the quagmire of the legislative claims system.[487]

The Administration's use of the Judgment Fund to create the Hispanic or Female Farmer's Claims Process without an appropriation[488] and to enter the *Keepseagle* 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?[489] 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?[490] Congress might consider prohibiting such uses of the Judgment Fund.[491] 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[492] and sponsors of the Judgment Fund Transparency Act,[493] Congress should require that

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486 *See* Peterson, *supra* note 289, at 370–71 (explaining that neither congressional committees nor the Government Accountability Office would do so effectively).

487 *See supra* Parts I.A–C.

488 *See* News Transcript, Release No. 0629.10, USDA Office of Communications, Media Conference Call on 2010 Farm Income Forecasts, Trade, Statistics and Final Passage of Pigford II Settlement (Dec. 1, 2010) http://www.usda.gov/wps/portal/usda/usdahome?contentid=2010/12/0629.xml&navid=Recovery_News&edeployment_action=retrievecontent (Sec. Vilsack explained that unlike in *Pigford II*, "we don't have to have an appropriation from Congress for Garcia/Love").

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.

493 *See, e.g.*, Judgment Fund Transparency Act of 2015, S. 350, 114th Cong. (2015); *see also* Government Transparency and Recordkeeping Act of 2012, S. 3415, 112th Congress § 2 (2011–12).

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.[494] This information is readily available; agencies provide it (other than the summary) to Treasury when they submit claims or judgments for payment.[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.[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.[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."[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.[499] Agency heads would be required to provide pertinent information.[500]

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494 *See generally* Judgment Fund Transparency Act of 2015 § 2.

495 *See supra* notes 452, 474 and accompanying text; BUREAU OF THE FISCAL SERV., JUDGMENT FUND CONGRESSIONAL REPORT, http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/congress-reports.htm.

496 *See supra* notes 453–55 and accompanying text.

497 Open Book on Equal Access to Justice Act, H.R. 384, 114th Cong. (2015); *see also* Open Book on Equal Access to Justice Act, H.R. 2919, 113th Cong. (2014); Open EAJA Act of 2010, H.R. 4717, 111th Cong. (2010).

498 H.R. 2919 § 2(a).

499 *Id.* § 2(b).

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.

502 *See supra* notes 441–43 and accompanying text; BUREAU OF THE FISCAL SERV., ANNUAL NON-COMPLIANT AGENCY REPORT, http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/noncompliance.htm.

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.