

OCTOBER 2024

The background of the entire slide is a collage of various US dollar bills, including \$100 and \$500 bills, some of which are partially obscured by a blue rectangular box containing the title.

IT'S TIME TO REFORM THE JUDGMENT FUND



**The Fund Enables Sue and Settle and
Empowers the Administrative State**

Curtis M. Schube, J.D.

The Fund Enables Sue and Settle and Empowers the Administrative State

I. Introduction

The Judgment Fund is an unlimited appropriation by Congress that can be drawn upon to pay legal liabilities of federal agencies. These payments can include attorney fees, costs, and interest and payments can be made even when agencies settle cases. The original purpose of the Fund was to streamline the government's payment of its legal liabilities to deserving claimants without requiring Congress to spend the time and resources to make an appropriation for each payment.

However, the system has grown into a bloated program that pays out billions of taxpayer dollars annually. As a permanent and indefinite appropriation, the Fund requires no further action by Congress, does not close at the end of any fiscal year, and provides unlimited funds to pay certain judgments against the United States. The risk of abuse is palpable, given that publicly available information about payments is limited, difficult to access, and even harder to analyze.

A long-standing concern about abuse of government payments from the Fund arises in "sue and settle" litigation. As discussed below, sue and settle involves activist groups suing federal agencies, where aligned bureaucrats then settle the suit to advance their own policy goals. Incredibly, in the settlement the agencies agree to pay the activists' costs, fees, and interest incurred in "litigating" the case.

The existence of the Judgment Fund also creates a moral hazard as agency officials can violate the law, and then simply draw upon the blank check that is the

Judgment Fund. There are little or no repercussions for federal agencies and bureaucrats who have little skin in the game.

It makes sense for Congress to delegate decisions to pay individual judgments. But the Judgment Fund should not be a mechanism that enables backdoor settlements with special interests that effectively grants the unelected administrative state an unchecked budget to advance its policy goals.

It follows, then, that the Judgment Fund is in need of greater transparency and accountability. Congress should act now to allow the public to know how this money is being spent, identify bad actors, limit the use of the Fund to bind future policymakers, and impose accountability for agencies that create liabilities.

II. What is the Judgment Fund?

The Judgment fund is a permanent and indefinite appropriation, created by Congress,¹ to pay final money judgment awards, or settlements, against the United States.² As sovereign, the United States has immunity from suit and can only be sued if it has unambiguously waived its liability for specific claims.³ Over time, Congress waived its sovereign immunity and consented to an increasing number of

¹ 31 U.S.C. § 1304.

² Department of the Treasury, “Judgment Fund-Frequently Asked Questions,” accessed July 25, 2024, <https://www.fiscal.treasury.gov/judgment-fund/faqs.html>. (“Treasury FAQs”). In some circumstances, payments from the Judgment Fund can be made even in the absence of a lawsuit. For example, the Department of Justice can settle imminent suits and agencies can resolve certain administrative claims without a lawsuit having been filed. Department of the Treasury Bureau of the Fiscal Service, “Judgment Fund,” accessed August 13, 2024, <https://www.fiscal.treasury.gov/judgment-fund/#:~:text=Federal%20agencies%20may%20ask%20the%20Bureau%20of%20the,at%20the%20administrative%20level%2C%20not%20involving%20a%20lawsuit%29>.

³ See *United States v. Sherwood*, 312 U.S. 584 (1981).

lawsuits.⁴ Because Congress must authorize expenditures to pay for federal liabilities, and money judgments against the government have increased, Congress created the Judgment Fund to avoid making appropriations for each such liability.⁵

Payments from the Judgment Fund, are available when:

1. Awards or settlements are final and no further review or appeal can be sought;
2. Awards or settlements are monetary;
3. Payment of the award or settlement is authorized under 31 U.S.C. 1304(a)(3);
4. Payment cannot be made from any other source.⁶

The amount can vary significantly from year-to-year but, annually, the Treasury disperses billions of dollars from the Judgment Fund.⁷ The Fund pays not only the principal number of judgments and settlements, but may also pay the claiming party's attorney fees, costs, and interest.⁸

The Judgment Fund has no upper limit on how much can be paid for a particular claim.⁹ Remarkably, the federal agencies responsible for the liability are

⁴ Vivian S. Chu and Brian T. Yeh, "The Judgment Fund: History, Administration, and Common Usage," Congressional Research Service, March 7, 2013, 1. <https://sgp.fas.org/crs/misc/R42835.pdf>.

⁵ Ibid 2.

⁶ Treasury FAQs.

⁷ In 2015, that number was \$3 billion. In 2016, that number was \$4 billion. United States Government Accountability Office, "Treasury Judgment Fund-Transparency and Reliability needed in Reporting Fund Balances and Activities," December 2018, 3. <https://www.gao.gov/assets/gao-19-44.pdf>, 4. ("GAO Report").

⁸ 31 U.S.C. §1304(d)(4).

⁹ GAO Report 3.

not required to reimburse the Judgment Fund, absent limited exceptions under the Contract Disputes Act and No Fear Act.¹⁰

III. History of Reform of the Judgment Fund

As originally established in 1956, the Fund was only authorized to pay final judgments from courts.¹¹ But like any longstanding government program, the Judgment Fund has been revised over the decades. In 1961, settlements were included to Judgment Fund eligibility,¹² as were judgments against the United States from state and foreign tribunals.¹³

In the 1970's, the number of large claims rose rapidly, which led congress to lift the Judgment Fund's statutory cap of \$100,000.¹⁴

In 1996, the Government Accountability Office (GAO), which managed the Judgment Fund, was facing a reduction in staff.¹⁵ Additionally, because GAO is an agency within the legislative branch, there was a desire to transition the Judgment Fund to the Executive Branch where the liabilities were incurred.¹⁶ Accordingly, Congress moved administration of the Judgment Fund to the Department of the Treasury.¹⁷

¹⁰ Treasury FAQ 6. The "No FEAR Act" has to do with the Federal Employee Antidiscrimination and Retaliation Act.

¹¹ Department of the Treasury Bureau of the Fiscal Service, "About the Judgment Fund," March 22, 2018. <https://fiscal.treasury.gov/judgment-fund/about.html>.

¹² Ibid.

¹³ Payment of Judgments and Compromise Settlements, Pub. L. No. 87-187, §1, 75 Stat. 415 (August 30, 1961). <https://www.congress.gov/87/statute/STATUTE-75/STATUTE-75-Pg415.pdf>.

¹⁴ Chu and Yeh 4.

¹⁵ Ibid n.36.

¹⁶ Ibid.

¹⁷ Ibid 4.

More recent reform efforts –ultimately stalled – have focused on transparency and improving agency accountability. The Judgment Fund Transparency Act of 2013 would have required the Secretary of the Treasury to make available to the public, on a public website, specified information about payouts from the Judgment Fund.¹⁸ Specifically, the name of the agency giving rise to the liability, the name of the plaintiff or claimant, the counsel for the plaintiff or claimant, the amount paid (including fees, costs, and interest), a description of the facts giving rise to the claim, a copy of the pleadings from the underlying case, a copy of the final action of the court or settlement agreement, and the name of the agency that submitted the claim.¹⁹ The Bill never made it out Committee, however.²⁰

Similarly, the Government Transparency and Recordkeeping Act of 2012 would have required the Secretary of the Treasury to publicly report all Judgment Fund payments since 2003 and all future payments.²¹ The law would have required information pertaining to the entities receiving payment, including a copy of the settlement or judgment, the total amount of payment, and a breakdown of that payment.²²

¹⁸ U.S. Congress, House, *To Amend Title 31, United States Code, to Provide for Transparency of Payments Made from the Judgment Fund*, 113th Congress, 1st sess., introduced in House Jan. 18, 2023, <https://www.congress.gov/113/bills/hr317/BILLS-113hr317ih.pdf>.

¹⁹ *Ibid.*

²⁰ *H.R. 317-Judgment Fund Transparency Act of 2013*, Congress.gov, accessed July 25, 2024, <https://www.congress.gov/bills/113/congress/house-bill/317/all-actions?s=1&r=70>.

²¹ U.S. Congress, Senate, *To Require the Disclosure of All Payments Made Under the Equal Access to Justice Act ("Government Transparency and Recordkeeping Act of 2012)*, 112th Congress, 2d sess. Introduced July 19, 2012. <https://www.congress.gov/112/bills/s3415/BILLS-112s3415is.pdf>.

²² *Ibid.*

In 2017, another attempt at to impose similar reporting requirements to the Judgment Fund Transparency Act was introduced in the Senate.²³ However, again, the Bill did not make it out of Committee.²⁴

Finally, in 2019, Congress successfully imposed some reporting obligations by requiring the Secretary of the Treasury to publish the name of the specific agency or entity whose actions gave rise to the claim or judgment, the name of the plaintiff or claimant, the name of counsel, the amount paid (including attorney fees, costs, and interest), a brief description of the facts, and the name of the agency that submitted the claim.²⁵ However, while this showed progress, noticeably missing in this required information is whether the case was settled.

IV. Potential for Abuse of the Judgment Fund

A. Lack of Transparency

A comparison to typical family budgeting is useful to appreciate the value of transparency. For most Americans, seeking to balance their own budgets and weigh the costs of a particular expense is necessary to properly budget. Individually, an expense—like a settlement—may be justified but should be weighed against competing demands for scarce resources. Indeed, most expenses can be justified in a bubble, but responsible budgeting requires prioritization and tough decisions. The current Judgment Fund reporting system prevents the People from performing this

²³ U.S. Congress, Senate, *To Amend Title 31, United States Code, to Provide for Transparency of Payments Made from the Judgment Fund* (“Judgment Fund Transparency Act of 2017”), 115th Congress, 1st sess., introduced March 8, 2017. <https://www.congress.gov/bill/115th-congress/senate-bill/565/text>.

²⁴ *Ibid.*

²⁵ 31 U.S.C. 1304(d); *John D. Dingell, Jr. Conservation, Management, and Recreation Act*, Public Law 116-9 (2019): 186. <https://www.govinfo.gov/app/details/PLAW-116publ9/related>.

function. Power is handed from the public and their representatives in Congress to unaccountable bureaucrats spread across dozens of federal agencies.

In theory, the public does have a way to look up Judgment Fund payments.²⁶ In practice, the most sophisticated user cannot easily access the information to assess the program's true cost and impact on federal policies.

There is no search function for specified plaintiffs, specified legal counsel, court progress, case descriptions or any other information. There are no accumulated totals. One must either know what they're looking for or spend a substantial amount of time to find this information.

The 2019 Amendment to the Judgment Fund led to a separate webpage with Judgment Fund information, but ultimately is of little help.²⁷ Although bi-weekly reports are provided, as required, the layout is still cumbersome and does not provide macro-data. Moreover, no totals are provided even within the bi-weekly report, much less monthly, quarterly, or annually. Perhaps most importantly, there is no way to determine whether the judgment was the result of a settlement.²⁸

B. Lack of Meaningful Accountability

Another significant problem with the Judgment Fund is that agencies can create liability with virtually no accountability. Indeed, "only two types of Judgment

²⁶ Department of the Treasury, "Judgment Fund Payment Search", accessed August 19, 2024. <https://jfund.fiscal.treasury.gov/jfradSearchWeb/JFPymtSearchAction.do#>.

²⁷ Department of the Treasury-Bureau of the Fiscal Service, "Judgment Fund-Bi-Weekly Payment Report," accessed July 25, 2024. <https://www.fiscal.treasury.gov/judgment-fund/bi-weekly-payment-report.html>.

²⁸ Ibid.

Fund payments must be reimbursed to the Judgment Fund by the responsible agency,”²⁹ while 258 other types of agency liabilities require no reimbursement.³⁰

This latter situation allows agencies to effectively access “free money.” For example, if an agency’s mismanagement of a program results in substantial legal liabilities, the payment of those claims comes from the Judgment Fund, not the agency. The payment has no impact on the agency’s programs or expenditures, nor must the agency justify the cost of paying the claims to Congress.³¹

As it stands, the proper utilization of the Judgment Fund requires good faith efforts on the part of executive agents. “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....”³² But this requires trust in those who are in positions of authority, both the client agencies and the attorneys who represent them. As noted above, “[e]xecutive branch officers with this broad authority over litigation and settlements are in a position from which they might

²⁹ Department of the Treasury, Bureau of the Fiscal Service, “Reimbursing the Judgment Fund,” accessed July 25, 2024, <https://fiscal.treasury.gov/judgment-fund/reimbursing-judgment-fund.html>.

³⁰ The author’s use of the Judgment Fund Payment Search demonstrated a list of 260 various statutes that were eligible for Judgment Fund payouts as of July 25, 2024. However, as of August 19, 2024, that list is now removed from the website. The author is not aware of any other location that maintains such a list.

³¹ Paul F. Figley, *The Judgment Fund: America’s Deepest Pocket & Its Susceptibility to Executive Branch Misuse*, 18 U. Pa. J. Const. L., 145 (2015-2016), 179. <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1580&context=jcl>. Agencies do provide an annual report to Congress about the amount paid out, judgment type, legal representatives, agency, and any associated costs. Department of the Treasury, “Judgment Fund: Annual Report to Congress,” accessed August 19, 2024, <https://fiscaldata.treasury.gov/datasets/judgment-fund-report-to-congress/judgment-fund-annual-report-to-congress>.

³² Ibid 181.

help favored plaintiffs by ignoring statutory limits and defenses, pulling punches in litigation, or settling claims for amounts unwarranted by the law and facts.”³³

C. Use of Sue and Settle Tactics

The lack of transparency and accountability in the administration of the Fund provides perfect cover for potential abuse. Perhaps the most pernicious example is the use of “sue and settle” tactics. Sue and settle tactics involve a special interest group suing a federal agency to block or force the implementation of a law in pursuit of their own policy objectives, outside of the democratic or deliberative process, that may even be at odds with the policy goals of elected officials.³⁴ The agency will, in turn, intentionally relinquish its statutory discretion by settling the case and committing to apply and prioritize laws in a manner that the plaintiff desires. Often, the agencies will even agree to do things they do not otherwise have the authority to do or are prohibited from doing under existing legislation.³⁵

To add additional injury to the taxpaying public, the special interest group that filed the case is further rewarded by including in the settlement payment of its attorney’s fees, litigation costs, and interest, from the Judgment Fund.³⁶ In fiscal year 2016, for example, the Judgment Fund paid over \$3.8 million in attorneys’ fees just for a single subset of environmental litigation.³⁷ Another investigation revealed

³³ Ibid 183.

³⁴ Donald Kochan, “Sue-and-Settle’ Tactics That Circumvent Law Set a Bad Precedent,” Bloomberg Law, Nov. 20, 2023. <https://news.bloomberglaw.com/us-law-week/sue-and-settle-tactics-that-circumvent-law-set-a-bad-precedent>.

³⁵ Ibid.

³⁶ 31 U.S.C. §1304(d)(4).

³⁷ United States Congressman Russ Fulcher, “Rep. Fulcher Supports Interior Action to Shine Light on Attorney’s Fees & Costs,” May 29, 2019. <https://fulcher.house.gov/2019/5/rep-fulcher-supports-interior-action-to-shine-light-on-attorney-s-fees-costs>.

that from 2008-2012, \$53 million was used to pay just environmental lawyers' fees.³⁸ These settlement agreements are negotiated behind closed doors with no participation from the public or third parties who would be impacted.³⁹ Typically, the final terms of settlement even remain sealed from public view. Of course, these kinds of payouts only invite more "litigation" against government agencies.

This backdoor to policy-making and federal appropriations has not gone unnoticed. In fact, it has become big business for special interest groups. The Center for Biological Diversity, with net assets of \$20 million as of 2019, had already sued President Trump's EPA 100 times over the course of just 3 years.⁴⁰ With legal fees totaling as much as \$750 per hour, the taxpayer can be on the hook for millions of dollars of legal fees for a single case.⁴¹

Some have speculated that government agencies actually invite lawsuits against them. Representative Ed Whitfield said in 2011 that "[W]e have reason to believe from discussions with a lot of different groups that EPA is actually out there encouraging these lawsuits."⁴² Considering that agencies can, and do, agree to settle

³⁸ Ibid.

³⁹ United States Chamber of Commerce, "Sue and Settle: Regulating Behind Closed Doors," March 6, 2018. <https://www.uschamber.com/regulations/sue-and-settle-regulating-behind-closed-doors>. ("Chamber of Commerce").

⁴⁰ Fulcher.

⁴¹ U.S. Congress, House, *Endangered Species Litigation Reasonableness Act*, 115th Congress, 2d sess., introduced Feb. 15, 2018, 2. <https://www.govinfo.gov/content/pkg/CRPT-115hrpt563/pdf/CRPT-115hrpt563-pt1.pdf>.

⁴² Figley 174, n. 227, quoting 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.

cases with fees coming from the Judgment Fund,⁴³ there seems to be little downside for unprincipled bureaucrats to solicit this sort of litigation.

According to the Chamber of Commerce, between 2009 and 2012, the EPA chose not to defend itself over 60 times in lawsuits filed by special interest groups.⁴⁴ These “settlements” resulted in the EPA publishing more than 100 new regulations.⁴⁵ This article does not opine on the merits of any given policy result. But clearly, the sue and settle method has been effectively used to change policy and further undermine representative democracy, regardless of the political affiliation of the elected head of the Executive Branch.

Early in President Trump’s administration, the EPA Administer Scott Pruitt attempted to address this growing concern by issuing a directive requiring the agency to publish plaintiffs’ notices of intent to sue, court pleadings, and settlement agreements.⁴⁶ The directive required the EPA to contact interested parties and prevented settlements from including attorney fees and costs. And, it required publication and the opportunity for public comment on any policy changes that resulted from settlement.⁴⁷

Perhaps more tellingly than intended, special interest groups reacted strongly against the new directive. The Sierra Club, for example, put out a comment

⁴³ Ibid 187.

⁴⁴ Chamber of Commerce.

⁴⁵ Ibid.

⁴⁶ United States Environmental Protection Agency, *Administrator Pruitt Issues Directive to End EPA “Sue & Settle”*, news release, Oct. 16, 2017. [https://www.epa.gov/archive/epa/newsreleases/administrator-pruitt-issues-directive-end-epa-sue-settle.html#:~:text=WASHINGTON%20\(October%2016%2C%202017\),providing%20an%20unprecedented%20level%20of](https://www.epa.gov/archive/epa/newsreleases/administrator-pruitt-issues-directive-end-epa-sue-settle.html#:~:text=WASHINGTON%20(October%2016%2C%202017),providing%20an%20unprecedented%20level%20of).

⁴⁷ Ibid.

calling sue and settle a “lie” and that “this is a phony remedy in search of a problem to solve.”⁴⁸ The release, riddled with *ad hominem* attacks on Administrator Pruitt (“polluter cron[y]”) and the Chamber of Commerce (“polluter-backed”), further declared that the Sierra Club “will not be deterred.”⁴⁹

The problem persists today. James Comer, Chairman of the House Committee on Oversight and Accountability, stated in a letter to EPA Administrator Michael Regan that “sue-and-settle abuses appear to have proliferated at the Biden Administration EPA.”⁵⁰ Plainly, Administrator Pruitt’s 2017 effort at providing transparency had been abandoned by the Biden Administration’s EPA Administrator, Michael Regan and as a result, “it remains unclear how many sue-and-settle consent decrees and settlement agreements have been entered into by your agency as well as their costs.”⁵¹

D. Reform Proposals

Based on the foregoing, two generalized goals emerge that should guide reform of the Judgment Fund: transparency and accountability. Ideally, Congress should take action to ensure all executive agencies are transparent and held accountable moving forward. But even if Congress does not act quickly, the President and his political appointees can make these reforms immediately through

⁴⁸ Pat Gallagher, “Scott Pruitt and the Myth of ‘Sue and Settle’,” *Sierra*, Oct. 18, 2017. <https://www.sierraclub.org/sierra/scott-pruitt-and-myth-settle-and-sue>.

⁴⁹ *Ibid.*

⁵⁰ Chairman James Comer and Chairman Pat Fallon to Administrator Michael S. Regan, November 14, 2023. <https://oversight.house.gov/wp-content/uploads/2023/11/Letter-to-EPA-on-Sue-and-Settle-118th.pdf>.

⁵¹ *Ibid.*

the form of an executive order, secretarial order, or an Office of Personnel Management memorandum.⁵²

1. Transparency

First, the public should be capable of reviewing where their taxpayer dollars are spent. Another attempt should be made to pass the reforms contained in the Judgment Fund Transparency Act. These reforms would direct the Department of the Treasury to overhaul its website to ensure that the search database is functional, comprehensive, and easily digestible for all taxpayers.

Moreover, a new Judgment Fund Transparency Act should require the Treasury to tabulate dollar totals, the number of judgments, and perhaps most importantly, the number of settlements for each agency, plaintiff, and counsel. This would help determine whether the agencies are settling too many cases, whether any particular counsel/plaintiff is getting favorable treatment, and help unearth other patterns that may run counter to administration priorities or sound public policy.

Indeed, enabling the people—and Congress for that matter—to search by agency, plaintiff, counsel, type of action, and access key documents giving rise to the liability would undoubtedly help expose waste, abuse, or other patterns that warrant oversight of payments from the Judgment Fund.

⁵² The downside to this strategy is that future presidential administrations may simply undo these policies and return back to the current status quo.

2. Government Accountability

Agencies should not be able to create government liability simply by drawing upon the blank check of the Judgment Fund, and then wash their hands of it. Rather, those who create liability must bear the burden of accountability for the expenditure of public funds, especially as the result of legal liability. This should start with requiring agencies to account for certain liabilities within their existing budgets for certain identified categories of liabilities more prone to abuse by special interests or in need of greater scrutiny.

An additional way to address this problem is to require that any liability created by the agency requires a report by the agency official responsible for the liability (or the official who had immediate authority over the government entity that created the liability) that explains why the liability occurred. When payment is authorized for a settlement, the agency should generate a report detailing all policies implicated, the changes that the settlement would implicate, and reasons why a settlement was reached. These reports should be made available to Congress and the public, along with a submission to the Federal Register, with a period of comment before final approval of a settlement.

Another way to establish accountability would be for Congress to require that the political appointee at the head of the government entity entering into the settlement agreement approve any settlement above a specified dollar amount (indexed to inflation) and post a public notice on a website announcing the settlement and his/her reasons for approving it. Officials capable of creating liability for their agency should be treated more like an officer under the

Constitution rather than a mere civil servant advising agency leadership. Recent scholarship fully confirms this view, finding that the original meaning of “officer” in the Appointments Clause of the Constitution includes all federal officials with a responsibility for an ongoing statutory duty.⁵³

Finally, more oversight is needed. When agencies appear to be failing to make good faith efforts to defend the law and, instead, are changing the law through sue and settle tactics, the offending agencies should be investigated and face consequences. To this end, Congress should charge GAO with the duty to annually audit, investigate and then publicly report on its findings, including abuses of settlement payments that are brought to light.

3. Eligibility

As noted, according to the previous version of the Department of the Treasury’s Judgment Fund Payment Search, there are at least 260 various types of lawsuits that are eligible for Judgment Fund payments.

But some have the potential to be more policy driven or politically motivated than others. For example, a lawsuit that alleges an agency is liable for a traffic incident⁵⁴ is not likely to have been brought to change policy or to advance the goals of politically favored groups.

⁵³ Jennifer L. Mascott, *Who Are “Officers of the United States?”*, 70 Stan. L. Rev. 443, 564 (2018).

⁵⁴ A common claim that shows up on the Judgment Fund Payment Search is traffic claims that are given administrative adjustments under 28 U.S.C. § 2672.

In contrast, other types of lawsuits, such as environmental litigation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), are commonly used by special interest groups to block projects and can result in payments of settlements from the Judgment Fund. Other types of lawsuits, such as a claim for injunctive relief under 42 U.S.C. §1983, may be used to block certain government actions, including the enforcement of a statute or regulation, while also providing payments from the Judgment Fund. These lawsuits can be highly policy-focused or politically motivated.

For these instances where lawsuits can be used to achieve policymaking goals, Congress should create safeguards. Congress should first require the Department of Treasury to identify claims or categories of claims eligible for payment from the Judgment Fund. Then, Congress could determine which claims hold the greatest potential to hinder or impact an agency's policy discretion or directly benefit special interest litigants.

Once those categories of lawsuits have been identified, Congress could prevent those lawsuits from being paid from the Judgment Fund. Alternatively, should Congress not wish to have blanket prohibitions of certain categories of litigation, it could require additional safeguards be met to be eligible for the judgment payout. Fund after a settlement, such as requiring Congressional involvement (e.g., express approval) or use of an independent arbiter.

Conclusion

The solutions described herein likely do not eliminate Judgment Fund abuse. But imposing genuine transparency is often the first step is toward establishing accountability. By creating digestible and accessible data, the public can begin to identify where abuse may exist and to determine the full cost of a program that has exploded taxpayer liabilities while circumventing the congressional appropriations process. By requiring agencies to report basic categories of information, Congress can begin to hold agencies to account and return some of the power of the purse to the Legislative Branch.

The easy and often hidden access to the Judgment Fund has undoubtedly enhanced the power of the administrative state. The cost to taxpayers, although not fully understood, is substantial. In a day when the transfer of power to unelected agency bureaucrats, lawyers, and aggressive special interests is of great concern, broad delegations of authority must be closely scrutinized. Reforming the Judgment Fund may be one of the most underrated and important reforms to returning the power to the people and restoring representative democracy.