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It's time for Congress to check the Judgment Fund's pockets

Proposed reforms

1. **Enhance transparency of proposed and actual Judgment Fund payments by expanding and conducting oversight of the existing disclosure requirements.**

In May, the Department of Justice (DOJ) announced that it would transfer nearly $1.8 billion of taxpayer money from the Treasury Department's Judgment Fund to what the DOJ referred to as an "Anti-Weaponization Fund." President Trump had publicly longed for this Fund, stating more than a year earlier that there should be a compensation fund for the hundreds of January 6th defendants he had pardoned. But Congress did not create one, so he tried to do so himself.

The Fund was established as part of the purported "settlement agreement" in *Trump v. IRS*, a collusive lawsuit that the president filed against federal agencies that he controls. But as a result of broad and immediate outrage against and efforts to prevent the creation of the Fund, it has not come to fruition. As soon as the DOJ published the so-called settlement documents, members of the public, Congress and civil society organizations took action:

- In response to a lawsuit by a fired January 6th prosecutor, a professor arrested while protesting an immigration raid, a so-called "sanctuary" jurisdiction and two nonprofits, one court temporarily blocked the government's plan. The court overseeing CREW's separate challenge to the fund took the DOJ at its word that the Fund was "not moving forward," but sternly warned the government against "play[ing] possum" with the court. And other individuals, including former police officers who helped defend the Capitol on January 6th, also sued over the creation of the Fund.
- Legislators from both sides of the aisle launched harsh criticisms of the Fund, and members of Congress requested an inspector general investigation, filed an amicus brief outlining the Fund's illegality, tried to prevent Judgment Fund payouts to January 6th insurrectionists and stalled the vote for Todd Blanche's nomination for Attorney General until he attempted—lawfully or not—to unilaterally rescind the order establishing the Fund.
- 35 former judges asked the *Trump v. IRS* court to reopen the case and consider whether the president and his administration had perpetrated a fraud on the court. The court determined that the underlying lawsuit that served as the basis for the purported settlement was illegitimate, explaining that the president controlled both sides of the lawsuit and had pursued the case for an improper purpose—"to gain the

imprimatur of judicial legitimacy for a 'settlement' that had no viable basis in law or fact"—and sanctioned the president's attorneys.

In short, public disclosure of the collusive "settlement agreement" allowed for quick and widespread engagement and accountability. Transparency worked the way it should.

Early and robust disclosures—particularly of unusual, high-risk or high-dollar settlement payment proposals—are crucial to any effort to prevent Judgment Fund payments that violate the law. Congress should clarify and expand the type of information disclosed for Judgment Fund payments, and also should require disclosure of this information *before* Treasury makes a payment.

Conduct oversight of the Judgment Fund's existing public disclosure requirements. In 2019, a bipartisan group of legislators introduced, and Congress later signed into law, transparency requirements for Judgment Fund payments. By law, the Secretary of the Treasury now must report, as soon as practicable (but not later than 30 days) after making a payment:

- The name of the agency whose actions gave rise to the claim or judgment;
- The name of the plaintiff or claimant;
- The name of the plaintiff's or claimant's counsel;
- The amounts paid;
- A brief description of the relevant facts; and
- The name of the agency that submitted the claim.

These disclosure requirements apply "unless the disclosure of such information is otherwise prohibited by law or a court order." The Treasury Department, however, has taken the legally dubious position that another statute, the Privacy Act, prohibits the publication of individual plaintiff, claimant or counsel names and the brief description of relevant facts from the public database in all cases. But the Privacy Act does not justify Treasury's categorical noncompliance with this law.

Congress passed the Privacy Act to respond to a critical concern: that agencies were "accumulating an ever-expanding stockpile of information about private individuals that was readily susceptible to . . . inaccuracies that the citizen would never know of, let alone have an opportunity to rebut or correct." To that end, the Act controls the collection, management and dissemination of individually identifiable records and prevents the government from "put[ting] together anything resembling a '1984' personal dossier on a citizen"—an ever important purpose as executive branch agencies attempt to consolidate sensitive personal information to unlawfully open investigations and purge voter rolls.

But in the context of Judgment Fund payments, the Privacy Act may not apply to certain claims at all. For example, the Privacy Act does not prohibit the disclosure of information already made publicly available; it does not apply to foreign persons or deceased individuals; it does not prohibit disclosure of information required to be released under FOIA; and it applies only to information that is both retrievable by personal identifier and actually retrieved by such an identifier. Thus, determining whether the Privacy Act actually prohibits disclosure of Judgment Fund payment information depends on the facts of each case.

Yet rather than engaging in a case-by-case assessment and withholding only information that is actually protected under the Privacy Act, Treasury has implemented a blanket policy of withholding individual names and the entire brief description of facts in all cases. CREW has filed a lawsuit challenging this unlawful, across-the-board policy of noncompliance with the Judgment Fund statute's disclosure provisions. Treasury's blanket noncompliance can seriously impair the public's ability to scrutinize federal spending and identify potential abuse of the settlement process. For potential payments to individuals who expressed interest in seeking a payout from the *Trump v. IRS* slush fund, for example, the public would be unable to search Treasury's payment reports by the names of convicted January 6th defendants or their counsel, to search the names of high-profile political allies of President Trump who have publicly announced a desire to acquire federal payouts or to review the factual bases for Judgment Fund payments to identify potential abuses of the claims settlement process. Treasury's policy thus obscures the manner in which the current administration is spending appropriated funds, heightening the likelihood for misuse of the Judgment Fund.

Given these concerns, Congress should conduct oversight of Treasury's broad policy of noncompliance with the Judgment Fund's disclosure requirements. And if the Privacy Act does protect certain payment information from public disclosure, Congress should require Treasury to at least provide the underlying information and an explanation for the nondisclosure to Congress on request.

Require the disclosure of additional information to identify potential conflicts of interest. As demonstrated by the president's lawsuit against his own administration in *Trump v. IRS*, payments from settlements that raise conflict of interest or corruption concerns deserve higher scrutiny. To that end, Congress should require that Treasury include in the Judgment Fund payment data:

- The date the claimant filed the claim;
- Whether the claimant was an elected official at the time of, or in the six years preceding, the alleged injury, filing or settlement, and, if so, their title;
- Whether the claimant was a federal judge at the time of, or in the six years preceding, the alleged injury, filing or settlement, and, if so, their title;

- Whether the claimant was a political appointee at the time of, or in the six years preceding, the alleged injury, filing or settlement and, if so, their title and agency and the name, title and agency of the individual who appointed them;
- Whether the claimant was a relative of an individual who was an elected official, federal judge, or political appointee at the time of, or in the six years preceding, the alleged injury, filing or settlement, and, if so, the information about the individual's position;
- Whether the claimant had received a reprieve or pardon from the president in office at the time of the alleged injury, filing or settlement;
- Whether the payment results from a judgment, award or settlement, and the name, court and docket number for the associated case, if filed;
- For any payment that exceeds a certain dollar threshold or raises a potential conflict of interest (such as payments to the elected officials or appointees identified above), confirmation that the employee approving the claim has certified, to the best of their knowledge and belief, that their involvement in the matter would not cause a reasonable person to question their impartiality; and
- A link to any 60-day notice of settlement, described below.

To minimize the burden on the government, Congress may authorize Treasury to standardize the collection of this information, such as by requiring that the claimant include this information in the standard claims form. And because an official may be elected or appointed or a president may grant an individual clemency while their claim is pending, Treasury should also establish a process for a claimant to update their submission or request the correction of that information as necessary.

Require disclosures before payment. Finally, Congress should require that Treasury publish this information—that is, the information already required to be disclosed for Judgment Fund payments and the additional information focused on conflicts of interest—for *proposed* payments from the Judgment Fund. By requiring the disclosure of this information at least 60 days in advance, both Congress and the public will have an opportunity to scrutinize potential conflicts before the government makes a payment and, as outlined below, facilitate meaningful intervention for payments that contravene the law or the public interest.

2. **Limit agency authority to settle certain claims involving Judgment Fund payments over $1 million or to certain claimants.**

Given the sheer volume of claims against the government, it would not be possible for Congress or the courts to review every settlement involving the Judgment Fund. And it would not serve taxpayers or the administration of justice for them to do so: the Judgment Fund and the laws that allow individuals to sue the federal government help ensure efficient claims adjudication, processing and payment to individuals who have suffered because of government actions. Requiring yet another review of each claim brought against the government—including thousands of routine traffic or medical malpractice claims, for example—would serve little purpose other than to delay many relatively small or uncontroversial payments to harmed individuals.

But certain types of payments may warrant more searching review, such as those that exceed a certain dollar threshold or raise a potential conflict of interest (such as payments to elected officials or political appointees). And although the administrative claims process can save both agencies and plaintiffs time, money and resources, the process is largely a black box. Indeed, after a court halted the president's collusive slush fund, January 6th insurrectionists who stood to benefit from the Fund talked publicly about other options for receiving taxpayer dollars, suggesting that the government could "just settle the tort claims and lawsuits. That has no judicial review or congressional oversight. And it would mean a lot more money in compensation." In *Trump v. IRS*, the president's attorneys argued that they could have done just that: that is, settled with the president's administration without filing a lawsuit.

With this lack of transparency in mind, Congress should prohibit agencies from administratively settling certain claims—excluding those for solely routine or noncontroversial matters such as the traffic accident or medical malpractice claims mentioned above—that involve high-dollar payments from the Judgment Fund, such as payments over $1 million and those that raise a potential conflict because the claimant is or was an elected official, federal judge, political appointee or their relative, or received a pardon from the president whose administration will adjudicate their claim. By prohibiting agencies from settling these claims without court approval and removing any administrative exhaustion requirements for these claimants, affected individuals who allege harm can (and must) proceed directly to court. These changes would prohibit the government from secretly settling certain high-value or potentially collusive claims without oversight, while also allowing claimants to immediately seek relief through a public process.

Moreover, by requiring that certain claimants or types of claims be filed in court before a compromise settlement can be reached, those cases will have a built-in constitutional check at the outset of the case. As demonstrated by the district court's decision in *Trump v. IRS*, the Constitution prohibits collusive lawsuits: among other threshold showings to satisfy Article III's case or controversy requirement, the litigants must be adverse. In other words, as in the president's suit against his own administration, a court does not have jurisdiction when one party to the suit—there, the president—controls both sides of the litigation.

Finally, as explained below, even if the litigants clear this initial jurisdictional hurdle, requiring independent court review of certain settlements involving Judgment Fund payments would ensure that the government cannot use the Judgment Fund to bankroll unethical, collusive or otherwise illegitimate settlements.

3. Require court review of settlements involving certain Judgment Fund payments.

Review of settlements is already required in other contexts. Two types of cases in which Congress or the courts have required court review of consent judgments or settlements—antitrust enforcement and class actions—demonstrate the importance of independent scrutiny in actions with potential effects on third parties or that otherwise implicate the public interest.

The Tunney Act, for example, provides for public scrutiny and judicial review of the consent judgments the DOJ enters into in antitrust actions. Congress passed this law after a 1970s political scandal in which President Nixon's DOJ settled an antitrust suit brought against a private company, but only *after* the company offered to help pay for the Republican National Convention. As Senator Tunney explained, this behind-closed-doors campaign demonstrated the DOJ's susceptibility to "corporate pressures" and the need for preventive legislation.

Through the Tunney Act, Congress sought to facilitate public engagement and judicial review in antitrust actions. The law requires the DOJ to file with the district court and in the Federal Register the proposed consent judgment and a "competitive impact statement," which includes relevant explanations of the proceeding and the proposed judgment. For 60 days, the public can comment on the proposal, and the DOJ must file responses to comments with the court and in the Federal Register.

Following that process, the court may consider the comments, take evidence, appoint a special master or outside consultants and authorize amici or intervenors to participate in the case. Ultimately, the court must determine whether the agreement is "in the public interest."

As another example, since 1938 the federal rules have required court approval for class actions. Over time the Judicial Conference has engaged in comprehensive and collaborative comment processes to recommend amendments to the court approval requirement, balancing the desirability of settlements against the importance of judicial review. Today, the rule provides that, before a court approves a binding class action settlement, it must hold a hearing, determine whether the settlement is fair, reasonable and adequate and, as of 2018, consider in that analysis a list of factors, including whether the proposal was negotiated at "arm's length."

To facilitate additional transparency, public engagement and independent review, a court's evaluation of certain settlements that involve Judgment Fund payments should incorporate aspects of these processes, but fix the deficiencies presented by each. Public interest review under the Tunney Act, for example, has largely become a rubber stamp as courts apply a highly deferential standard. Even a former top DOJ antitrust division official stated that the Tunney Act "has rarely served its intended purpose."

And despite the 2018 addition of a discrete list of core factors for courts to consider in reviewing class action settlements, this modest reform has not resulted in a uniform standard across circuits. The rule also does not instruct courts to make findings on each factor, instead requiring only that the court "consider" them in separately finding that the proposed settlement is fair, reasonable and adequate. This permissive standard has again led courts to impose different levels of scrutiny for the additional factors and could lead to forum-shopping by plaintiffs.

Congress should establish a process for searching court review of settlements involving certain Judgment Fund payments. Through statute or an amendment to the federal rules, Congress or the courts should incorporate, but improve upon, the aspects of antitrust and class action review that facilitate public engagement and ensure courts have sufficient information to evaluate certain proposed settlements before dismissal of a case.

To that end, for any settlement involving a Judgment Fund payment that is for a non-routine claim (that is, excluding claims such as traffic or medical malpractice claims) and is (1) over $1 million, (2) to an individual who was an elected official, federal judge, political appointee or their relative at the time of, or in the six years preceding, the filing or settlement, or (3) to an individual who received clemency from the president serving at the time of the filing or settlement, the process should require court approval of any stipulation of dismissal based on such settlement. This process should provide that:

- The agency must file with the court a notice of settlement that includes a copy of the proposed settlement; the information required to be provided for proposed Judgment Fund payments; and a statement explaining (1) the nature and purpose of the proceeding, (2) the proposed settlement, including any unusual circumstances giving rise to the settlement, any of its provisions or the proposed relief, (3) the justification for the settlement, including how the settlement is reasonably tailored to the allegations in the complaint, (4) whether the agreement was negotiated at arm's length, (5) the availability of the Judgment Fund for the payment, (6) any other relevant legal requirements, and (7) whether the settlement complies with those legal requirements (60-day notice of settlement).
- The agency also must file that information in the Federal Register.
- For at least 60 days, the agency must receive written public comments on the proposed settlement.
- During or after the 60-day period, the agency must consider the public comments and file its responses with the court and in the Federal Register.
- Throughout the process, the court may take testimony, appoint a special master, outside consultants or expert witnesses, appoint amicus curiae or allow their

participation, along with other interested parties, review public comments or take other actions necessary to fulfill the court's duties.

- The court must make specific factual findings on whether (1) the agency complied with the required process, (2) the settlement is reasonable, following consideration of, at minimum, the amount of the settlement, the strength of the claims, whether the settlement is reasonably tailored to the allegations in the complaint and the relevant litigation history, (3) the settlement was negotiated at arm's length, (4) the Judgment Fund is available for the payment, (5) the settlement complies with other relevant legal requirements and (6) the settlement adversely affects the public interest, following consideration, at minimum, of any effect of the settlement on non-parties, any other likely public consequences, the transparency and openness of the settlement, and the purpose and structure of the underlying cause of action.
- Only then may the court approve the stipulation of dismissal and may the agency submit the request for payment to Treasury.

This process—which applies to only a discrete set of settlements involving payments for significant amounts of money or that implicate potential conflicts of interest—would ensure that the government can continue to process and make payments on settlements for routine and lower value claims, while giving the public an opportunity to meaningfully engage in the court's independent review of other, potentially controversial settlements on the front end.