

# JUDGMENT FUND TRANSPARENCY ACT OF 2017

OCTOBER 16, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,  
submitted the following

## R E P O R T

together with

## DISSENTING VIEWS

[To accompany H.R. 1096]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1096) to amend title 31, United States Code, to provide for transparency of payments made from the Judgment Fund, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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## The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

### SECTION 1. SHORT TITLE.

This Act may be cited as the “Judgment Fund Transparency Act of 2017”.

### SEC. 2. JUDGMENT FUND TRANSPARENCY.

(a) TRANSPARENCY REQUIREMENT.—Section 1304 of title 31, United States Code, is amended by adding at the end the following:

“(d)(1) Unless the disclosure of such information is otherwise prohibited by law or court order, the Secretary of the Treasury shall make available to the public on a website, as soon as practicable, but not later than 30 days after the date on which a payment under this section is tendered on or after January 1, 2016, the following information with regard to that payment:

“(A) The name of the specific agency or entity whose actions gave rise to the claim or judgment.

“(B) The name of the plaintiff or claimant.

“(C) The name of counsel for the plaintiff or claimant.

“(D) The amount paid representing principal liability, and any amounts paid representing any ancillary liability, including attorney fees, costs, and interest.

“(E) A brief description of the facts that gave rise to the claim.

“(F) The name of the agency that submitted the claim.

“(G) Any information available on reports generated by the Judgment Fund Payment Search administered by the Treasury Department.

“(2) In addition to the information described in paragraph (1), if a payment under this section is made to a foreign state on or after January 1, 2016, the Secretary of the Treasury shall make available to the public in accordance with paragraph (1), the following information with regard to that payment:

“(A) A description of the method of payment.

“(B) A description of the currency denominations used for the payment.

“(C) The name and location of each financial institution owned or controlled, directly or indirectly, by a foreign state or an agent of a foreign state through which the payment passed or from which the payment was withdrawn, including any financial institution owned or controlled, directly or indirectly, by a foreign state or an agent of a foreign state that is holding the payment as of the date on which the information is made available.

“(3) Not later than January 1, 2018, and annually thereafter, the Secretary of the Treasury shall make available to the public on the website described in paragraph (1)—

“(A) the total amount paid under this section during the year preceding the date of the report; and

“(B) the amount paid under this section during the year preceding the date of the report—

“(i) for attorney fees;

“(ii) for interest; and

“(iii) for all other payments.

“(4) In this subsection, the term ‘foreign state’ has the meaning given the term in section 1603 of title 28.

“(e) 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.

“(f) No payment may be made under this section to a state sponsor of terrorism, as defined in section 1605A(h) of title 28, or to an organization that has been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189).”.

(b) IMPLEMENTATION.—The Secretary of the Treasury shall carry out the amendment made by this section by not later than 60 days after the date of enactment of this Act.

## Purpose and Summary

To increase government transparency of American taxpayer dollars, this bill requires the Department of the Treasury to disclose details after payments are made from the Judgment Fund. Unless the disclosure is prohibited by law or a court order, Treasury must disclose to the public on a website: the agency or entity whose ac-

tions gave rise to the claim or judgment; the plaintiff or claimant; the counsel for the plaintiff or claimant; the amount paid; a description of the facts that gave rise to the claim; the agency that submitted the claim; and any information available on reports generated by the Judgment Fund Payment Search administered by Treasury. If the payment is made to a foreign state, Treasury must also disclose the following information: the method of payment; the currency denomination used for the payment; and the name and location of each financial institution owned or controlled by a foreign state or an agent of a foreign state through which the payment passed, from which the payment was withdrawn, or that is holding the payment. The bill will also make public the total annual amount paid for attorney fees, interest, and all other amounts for all payments made from the Judgment Fund. In addition to the transparency requirements, this bill prohibits Judgment Fund payments to a state sponsor of terrorism or to a foreign terrorist organization.

## Background and Need for the Legislation

### I. INTRODUCTION

Article I, Section 9, Clause 7 of the United States Constitution states: “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.”<sup>1</sup> This clause, known as the Appropriations Clause, establishes Congress’s authority to spend public funds by requiring that Congress pass an appropriation before funds are paid out of the Treasury. The second part of the Appropriations Clause, known as the “Statement and Account” provision, provides Congress with “plenary power to exact any reporting and accounting it considers appropriate in the public interest.”<sup>2</sup>

Like other public expenditures, the Appropriations Clause applies to the payment of settlements and court-ordered judgments against the United States.<sup>3</sup> Prior to the creation of the Judgment Fund, the payment of judgments against the United States, as well as settlements by the United States, required specific appropriations. In 1956, however, Congress passed the Judgment Fund statute following a recommendation from the General Accounting Office (“GAO”),<sup>4</sup> which sought to prevent problems related to delayed payment of court judgments that included increased interest charges and frustrated plaintiffs who had won an award, but were awaiting payment.<sup>5</sup> As enacted, this law provided an “open-ended, permanent appropriation for the payment of judgments of district courts and the Court of Claims that did not exceed \$100,000.”<sup>6</sup> Congress over time amended the statute several times to cover more claims and to remove the statutory monetary cap.<sup>7</sup>

<sup>1</sup> U.S. CONST. art. I, §9, cl. 7.

<sup>2</sup> See *United States v. Richardson*, 418 U.S. 166, 678 (1974).

<sup>3</sup> Paul F. Figley, *The Judgment Fund: America’s Deepest Pocket & Its Susceptibility to Executive Branch Misuse*, 18 U. Pa. J. Const. L. 145, 164 (2015).

<sup>4</sup> The General Accounting Office was later renamed the General Accountability Office.

<sup>5</sup> Figley, *supra* note 3, at 161.

<sup>6</sup> *Id.* at 162.

<sup>7</sup> For an account of the Judgment Fund’s legislative history, see *id.*, at 161–175.

Today, the Judgment Fund “constitutes an appropriation of amounts sufficient to pay ‘final judgments awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law’ when (1) payment is ‘not otherwise provided for’; (2) payment is certified by the Secretary of the Treasury; and (3) the judgment, award, or settlement is payable” under the specified authorities under 31 U.S.C. 1304(a).<sup>8</sup> According to the GAO, the Judgment Fund is a “permanent, indefinite appropriation” available for the payment of “court judgments and compromise settlements negotiated under authority of the Justice Department.”<sup>9</sup>

## II. PUBLIC DISCLOSURE OF JUDGMENT FUND PAYMENTS

### A. General Disclosure of Information

The Judgment Fund Section, which is a part of the United States Department of the Treasury, Bureau of the Fiscal Service, voluntarily maintains a publicly available database of approved Judgment Fund payments called the Judgment Fund Payment Search. This database provides the following data fields: Defendant Agency Name; Docket #; Jurisdiction; Court Jurisdiction; Defendant Agency File #; Submitting Agency File #; Control #; Payment ID #; Payment Sent Date; Principal Amount; Principal Citation Code; Principal Citation Code Description; Attorney Fees Amount; Attorney Fees Citation Code; Attorney Fees Citation Code Description; Cost Amount; Cost Citation Code; Cost Citation Code Description; Interest Amount; Interest Citation Code; Interest Citation Code Description; Confirmed Payment Amount; and Reimbursable.<sup>10</sup>

A user wishing to conduct a payment search using the Judgment Fund Payment Search is required to enter a date range and select from a list of agencies. In addition, the user is provided with three optional search fields. A user may select one of the following four Citation Code and Description Types: Principal; Attorney’s Fees; Costs; and Interest. Once a selection is made, the user may also select from a list of U.S. Code citations that correspond to the selection type.

The last optional search field allows a user to search for payment by amounts equal to, less than, or greater than a user-provided amount, or from a user-provided payment range. Under this option, the user is prompted to enter payment amounts in the following format: “###,###.##.”<sup>11</sup> No maximum searchable amount is provided on the webpage. However, a sample search of payment amounts less than \$999,999,999.99 produced an error message.

The information displayed on the Judgment Fund Payment Search, according to the Judgment Fund Section’s website, “is for the purpose of tracking the status of approved Judgment Fund payments only.”<sup>12</sup> The website expressly advises that it should not be used by federal agencies for “accounting and auditing purposes.” Moreover, the Judgment Fund Section maintains a separate ad-

<sup>8</sup>U.S. Gov’t Accountability Office, GAO-08-978SP, 3 Principles Of Federal Appropriations Law 14-34 (3d Ed. 2008).

<sup>9</sup>*Id.*

<sup>10</sup>*See id.*

<sup>11</sup>Judgment Fund Payment Search, available at <https://jfund.fms.treas.gov/jfradSearchWeb/JFPymtSearchAction.do> (lasted visited Oct. 11, 2017).

<sup>12</sup>*Id.*

ministrative process called the Judgment Fund Internet Claims System (JFICS) for federal agencies submitting requests for payments from the Judgment Fund electronically.<sup>13</sup> Access to JFICS requires a username and passcode.

At the request of the House and Senate Committees on Appropriations, the Judgment Fund Section also produces annual congressional reports.<sup>14</sup> These reports are organized alphabetically by the agency name, and contain the following fields: Defendant Agency Name; Submitting Agency Name; Control Number; Plaintiff's Counsel; Payment ID; Payment Sent Date; Confirmed Payment Amount; Principal Amount; Principal Citation Code; Principal Citation Code Description; Attorney Fees Amount; Attorney Fees Citation Code; Attorney Fees Citation Code Description; Cost Amount; Cost Citation Code; Cost Citation Code Description; Interest Amount; Interest Citation Code; and Interest Citation Code Description.

However, not all relevant information is made publicly available by the Department of the Treasury. Specifically, the Judgment Fund Section website states that the Plaintiff's Counsel field is "optional and is not always provided by the submitting agency in part because not every claimant has legal representation."<sup>15</sup> Moreover, the names of plaintiffs or claimants are not publicly disclosed.

#### *B. Recipient Names and Individual Attorneys*

As articulated in the testimony of Professor Paul Figley in a hearing held by the Subcommittee on the Constitution and Civil Justice on September 7, 2016, the exclusion of recipient names and individual attorneys decreases the transparency of specific payments. In response to a question submitted for the hearing record, Professor Figley stated:

The Department of the Treasury has been aggressive in withholding names of people and individual attorneys who receive Judgment Fund payments. Those names are not published on Treasury's on-line spreadsheets. The Bureau of Fiscal Services' annual "Judgment Fund Transparency Report[s] to Congress" spreadsheets . . . contain a column for "Plaintiff's Counsel," but not "Plaintiffs"; many entries under "Plaintiff's Counsel" are blank or contain "(REDACTED FOR PRIVACY)." The Bureau of Fiscal Services' "Judgment Fund Payment Search" on-line spreadsheet . . . does not contain columns for "Plaintiffs" or "Plaintiff's Counsel."

When Treasury produces Judgment Fund transmittal documents in response to Freedom of Information Act requests, it provides copies of court documents that show each case's docket number and court. Treasury deletes from those court documents the names of individuals and individual attorneys . . .

In his written testimony, Professor Figley argues that the Department of Treasury's practice of withholding case names, claim-

<sup>13</sup>Available at [https://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/judgementFund\\_home.htm](https://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/judgementFund_home.htm) (last visited Oct. 11, 2017).

<sup>14</sup>Available at <https://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/congress-reports.htm> (last visited Oct. 11, 2017).

<sup>15</sup>*Id.*

ant names, and fact summaries from the Judgment Fund databases produces irregularities in aggregating claims given that information about some claims, particularly matters in litigation, are publicly available on a case by case basis to anyone who knows the parties' names or the docket number.<sup>16</sup> Indeed, the Judgment Fund Payment Search includes a "Docket #" field. With the docket number alone, a person seeking information about a specific case would likely have access to all the information the Department of the Treasury is withholding under its current policy.

### C. *The Iran Settlement*

In January 2016, it was reported that the United States agreed to pay \$1.7 billion to Iran, a designated state sponsor of terrorism since 1984, as a result of a settlement arising from the sale of military equipment prior to the 1979 Iranian revolution.<sup>17</sup> In August 2016, the *Wall Street Journal* reported that \$400 million of the \$1.7 billion total was secretly paid in cash.<sup>18</sup> This report and other inquiries raised questions about the source from which the remaining \$1.3 billion was paid as well as the method and manner in which it was transferred to Iran.

On August 22, 2016, the *N.Y. Sun* reported that while conducting a query, but fruitless, search of "Iran" on the Treasury database since January 2016, a search of the "Department of State" as a defendant agency had turned up 13 payments totaling \$1,299,999,999.87, an amount thirteen cents less than \$1.3 billion, as well as an additional payment of just over \$10 million.<sup>19</sup> These payments, according to the *N.Y. Sun*, "were all made on the same day, all sharing the same file and control reference numbers, all certified by the U.S. Attorney General, but each assigned a different identification number."

The *N.Y. Sun*, however, could not confirm that these payments were related to the Iran Settlement. More than eight months after the settlement was announced, additional details, such as the date in which the funds were dispersed, how the funds were transferred, and in what form the funds had reached Iran, were still unknown. According to *N.Y. Sun*, the State Department "refused to disclose even such basic information as the date on which Iran took receipt of the \$1.3 billion. As recently as August 4[, 2016], a State spokesman told the press: 'I don't have a date of when that took place.'"

After increased public scrutiny, these thirteen payments were later confirmed to be part of the Iran Settlement. Nevertheless, hearing testimony submitted by the Honorable Eric Thorson, Inspector General of the Department of the Treasury, in March 2017, revealed that these payments recorded in the Judgment Fund Payment Search did not reflect how the payments were disbursed. Indeed, according to Inspector General Eric Thorson, the Department of the Treasury:

<sup>16</sup>*Id.* at 18–19.

<sup>17</sup>Laura Koran, *U.S. to pay Iran \$1.7 billion in legal settlement*, CNN (Jan. 17, 2016), <http://www.cnn.com/2016/01/17/politics/us-pays-iran-1-7-billion/>.

<sup>18</sup>Jay Solomon, *U.S. Sent Cash to Iran as Americans Were Freed*, Wall St. J. (Aug. 3, 2016), <https://www.wsj.com/articles/u-s-sent-cash-to-iran-as-americans-were-freed-1470181874>.

<sup>19</sup>Claudia Rosett, *Riddle of \$1.3 Billion for Iran Might Relate to 13 Outlays of Exactly \$99,999,999.99*, N.Y. Sun (Aug. 22, 2016), <http://www.nysun.com/foreign/riddle-of-13-billion-for-iran-might-be-solved-by/89692/>.

did not disburse 13 separate payments of \$99,999,999.99 and one payment of \$10,390,236.28 as shown in the results of the Judgment Fund Payment Search. Instead, Fiscal Service processed a single claim from the DOJ, the submitting agency on behalf of State. Because of system limitations, DOJ divided the amount of this claim into 14 smaller amounts in the Judgment Fund system. These smaller amounts were then processed by Fiscal Service through several information technology applications and the requests were aggregated such that only one payment of approximately \$1.3 billion was made.<sup>20</sup>

Inspector General Thorson, after reviewing source documents, further revealed that a “single payment was made by Fiscal Service through the Federal Reserve Bank of New York (FRBNY) to De Nederlandsche Bank (DNB) . . . DNB was provided instructions to convert the \$1.3 billion into Euro banknotes and disburse up to three payments to an agent of Central Bank of Iran (CBI) on or before specified dates.”<sup>21</sup> Inspector General Thorson also revealed that the reason the claim was divided into 14 small amounts in the Judgment Fund Payment Search is, according to Treasury officials, due to technical limitations in the JFICS that “prevents it from processing requests over 14 characters in length.”<sup>22</sup>

Today, the Judgment Fund Section’s website now includes information about how claims over \$100 million are processed in its Frequently Asked Questions page. It states that JFICS

has a 10 character limit in the payment amount field. Therefore, if the claim you’re submitting is for \$100 million or more, you’ll need to break the total amount into smaller components, none of which may exceed \$99,999,999.99. You’ll submit each of these components into JFICS as a separate claim using the same claim information for each component. Each of these components will be assigned the same control number. If you’re submitting your claim by fax, you may submit a claim for \$100 million or more on a single set of submission forms.<sup>23</sup>

### III. THE JUDGMENT FUND TRANSPARENCY ACT

On February 15, 2017, Representative Chris Stewart introduced H.R. 1096, the Judgment Fund Transparency Act of 2017. To increase government transparency of American taxpayer dollars, this bill requires the Department of the Treasury to disclose details after payments are made from the Judgment Fund. Unless the disclosure is prohibited by law or a court order, Treasury must disclose to the public on a website: the agency or entity whose actions gave rise to the claim or judgment; the plaintiff or claimant; the counsel for the plaintiff or claimant; the amount paid, a description of the facts that gave rise to the claim; the agency that submitted

<sup>20</sup> *Oversight of the Judgement Fund: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Eric Thorson, Inspector General, Dep’t of Treas.), available at <http://docs.house.gov/meetings/JU/JU10/20170302/105620/HMTG-115-JU10-20170302-SD002.pdf>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Available at <https://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/questions.htm> (last visited Oct. 12, 2017).

the claim; and any information available on reports generated by the Judgment Fund Payment Search administered by Treasury. If the payment is made to a foreign state, Treasury must also disclose the following information: the method of payment; the currency denomination used for the payment; and the name and location of each financial institution owned or controlled by a foreign state or an agent of a foreign state through which the payment passed, from which the payment was withdrawn, or that is holding the payment. The bill will also make public the total annual amount paid for attorneys' fees, interest, and all other amounts for all payments made from the Judgment Fund. In addition to the transparency requirements, this bill prohibits Judgment Fund payments to a state sponsor of terrorism or to a foreign terrorist organization.

### **Hearings**

The Committee on the Judiciary held one day of hearings on H.R. 1096 on March 2, 2017, titled "Oversight of the Judgment Fund." Testimony was received from: Paul Figley, Professor, American University Washington College of Law; Chris Jacobs, Founder and CEO, Juniper Research Group; and Neil Kinkopf, Professor, Georgia State University College of Law.

### **Committee Consideration**

On June 28, 2017, the Committee met in open session and ordered the bill, H.R. 1096, favorably reported, with an amendment, by voice vote, a quorum being present.

### **Committee Votes**

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 1096.

### **Committee Oversight Findings**

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

### **New Budget Authority and Tax Expenditures**

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

### **Congressional Budget Office Cost Estimate**

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.J. Res. 92, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:



U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, August 29, 2017.*

Hon. BOB GOODLATTE, CHAIRMAN,  
*Committee on the Judiciary,*  
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1096, the Judgment Fund Transparency Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jacob Fabian who can be reached at 226-2860.

Sincerely,

KEITH HALL.

Enclosure

cc: Honorable John Conyers Jr.  
Ranking Member

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**H.R. 1096—Judgment Fund Transparency Act of 2017**

As ordered reported by the House Committee on the Judiciary on  
June 28, 2017.

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H.R. 1096 would require the Department of the Treasury to prepare certain reports regarding payments from the Judgment Fund. The Judgment Fund has a permanent, indefinite appropriation that is available to pay monetary awards against the United States that are judicially and administratively ordered. The legislation would require detailed reporting of specific information for individual claims. Additionally, the bill would prevent payments from the Judgment Fund to state sponsors of terrorism and foreign terrorist organizations.

Most of the provisions of H.R. 1096 would codify and expand on the current practices of the federal government. The Bureau of the Fiscal Service at the Department of the Treasury already administers a search system for payments from the Judgment Fund that reports the name of the defendant agency, the legal citations for each claim, and the liability amounts.

The legislation would add new requirements to report on information that is not currently available, including the name of the plaintiff or claimant and legal counsel, a brief description of the facts that gave rise to the claim, and other information on any payments made to foreign entities on or after January 1, 2016. Based on the cost of providing similar information, CBO expects that any administrative costs to develop and add those additional reporting requirements would total less than \$500,000 annually; such spending would be subject to the availability of appropriated funds.

Enacting H.R. 1096 would not affect direct spending or revenues; therefore pay-as-you-go procedures do not apply. CBO estimates that enacting the bill would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 1096 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Jacob Fabian. The estimate was approved by Theresa Gullo, Assistant Director for Budget Analysis.

### **Duplication of Federal Programs**

No provision of H.R. 1096 establishes or reauthorizes a program of the Federal government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

### **Disclosure of Directed Rule Makings**

The Committee finds that H.R. 1096 contains no directed rule making within the meaning of 5 U.S.C. 551.

### **Performance Goals and Objectives**

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee states that H.R. 1096 is designed to increase transparency of American taxpayer dollars and strengthen Congress’s power of the purse with respect to the Judgment Fund.

### **Advisory on Earmarks**

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1096 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

### **Section-by-Section Analysis**

The following discussion describes the bill as reported by the Committee.

*Section 1. Short title.* Section 1 sets forth the short title of the bill as the “Judgment Fund Transparency Act of 2017.”

*Sec. 2. Judgment Fund transparency.* Section 2 requires the Department of the Treasury to disclose details after payments are made from the Judgment Fund. Unless the disclosure is prohibited by law (other than section 552a of title 5) or a court order, Treasury must disclose to the public on a website: the agency or entity whose actions gave rise to the claim or judgment, the plaintiff or claimant, the counsel for the plaintiff or claimant, the amount paid, a description of the facts that gave rise to the claim, the agency that submitted the claim, and any information available on reports generated by the Judgment Fund Payment Search administered by Treasury.

If the payment is made to a foreign state, Treasury must also disclose: the method of payment; the currency denomination used for the payment; and the name and location of each financial institution owned or controlled by a foreign state or an agent of a for-

eign state through which the payment passed, from which the payment was withdrawn, or that is holding the payment.

This section also requires that the total annual amount paid for attorneys' fees, interest, and all other amounts for all Judgment Fund payments be made publicly available. In addition to the transparency requirements, this bill prohibits Judgment Fund payments to a state sponsor of terrorism or to a foreign terrorist organization.

### **Changes in Existing Law Made by the Bill, as Reported**

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

## **TITLE 31, UNITED STATES CODE**

\* \* \* \* \*

## **SUBTITLE II—THE BUDGET PROCESS**

\* \* \* \* \*

## **CHAPTER 13—APPROPRIATIONS**

### **SUBCHAPTER I—GENERAL**

\* \* \* \* \*

### **§ 1304. Judgments, awards, and compromise settlements**

(a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—

- (1) payment is not otherwise provided for;
- (2) payment is certified by the Secretary of the Treasury; and
- (3) the judgment, award, or settlement is payable—
  - (A) under section 2414, 2517, 2672, or 2677 of title 28;
  - (B) under section 3723 of this title;
  - (C) under a decision of a board of contract appeals; or
  - (D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 20113 of title 51.

(b)(1) Interest may be paid from the appropriation made by this section—

(A) on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government, and then only from the date of filing of the transcript of the judgment with the Secretary of the Treasury through the day before the date of the mandate of affirmance; or

(B) on a judgment of the Court of Appeals for the Federal Circuit or the United States Court of Federal Claims under section 2516(b) of title 28, only from the date of filing of the

transcript of the judgment with the Secretary of the Treasury through the day before the date of the mandate of affirmance.

(2) Interest payable under this subsection in a proceeding reviewed by the Supreme Court is not allowed after the end of the term in which the judgment is affirmed.

(c)(1) A judgment or compromise settlement against the Government shall be paid under this section and sections 2414, 2517, and 2518 of title 28 when the judgment or settlement arises out of an express or implied contract made by—

(A) the Army and Air Force Exchange Service;

(B) the Navy Exchanges;

(C) the Marine Corps Exchanges;

(D) the Coast Guard Exchanges; or

(E) the Exchange Councils of the National Aeronautics and Space Administration.

(2) The Exchange making the contract shall reimburse the Government for the amount paid by the Government.

*(d)(1) Unless the disclosure of such information is otherwise prohibited by law or court order, the Secretary of the Treasury shall make available to the public on a website, as soon as practicable, but not later than 30 days after the date on which a payment under this section is tendered on or after January 1, 2016, the following information with regard to that payment:*

*(A) The name of the specific agency or entity whose actions gave rise to the claim or judgment.*

*(B) The name of the plaintiff or claimant.*

*(C) The name of counsel for the plaintiff or claimant.*

*(D) The amount paid representing principal liability, and any amounts paid representing any ancillary liability, including attorney fees, costs, and interest.*

*(E) A brief description of the facts that gave rise to the claim.*

*(F) The name of the agency that submitted the claim.*

*(G) Any information available on reports generated by the Judgment Fund Payment Search administered by the Treasury Department.*

*(2) In addition to the information described in paragraph (1), if a payment under this section is made to a foreign state on or after January 1, 2016, the Secretary of the Treasury shall make available to the public in accordance with paragraph (1), the following information with regard to that payment:*

*(A) A description of the method of payment.*

*(B) A description of the currency denominations used for the payment.*

*(C) The name and location of each financial institution owned or controlled, directly or indirectly, by a foreign state or an agent of a foreign state through which the payment passed or from which the payment was withdrawn, including any financial institution owned or controlled, directly or indirectly, by a foreign state or an agent of a foreign state that is holding the payment as of the date on which the information is made available.*

*(3) Not later than January 1, 2018, and annually thereafter, the Secretary of the Treasury shall make available to the public on the website described in paragraph (1)—*

(A) the total amount paid under this section during the year preceding the date of the report; and

(B) the amount paid under this section during the year preceding the date of the report—

(i) for attorney fees;

(ii) for interest; and

(iii) for all other payments.

(4) In this subsection, the term “foreign state” has the meaning given the term in section 1603 of title 28.

(e) 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.

(f) No payment may be made under this section to a state sponsor of terrorism, as defined in section 1605A(h) of title 28, or to an organization that has been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. 1189).

\* \* \* \* \*

### Dissenting Views

H.R. 1096, the “Judgment Fund Transparency Act of 2017,” would, not, contrary to its title, promote transparency and would instead threaten the privacy of victims of government misconduct who are compensated by the Judgment Fund. In short, H.R. 1096 offers, at best, minimal benefit to the public at a potentially tremendous cost to victims of government wrongdoing. That is a balance we are unwilling to accept.

H.R. 1096 would require the Treasury Department, if not otherwise prohibited by statute or court order, to electronically publish information regarding payments made from the Judgment Fund, which Congress created to pay legal judgments against the federal government. Such information must be made available within 30 days of the payment being tendered and include personally identifiable information, such as the plaintiff or claimant’s name, the name of the counsel for the plaintiff or claimant, and potentially sensitive facts concerning the plaintiff’s claim, including claims for sexual harassment, medical malpractice, and race discrimination. The bill would require the Treasury Department to disclose further information about a claim paid to a foreign state and imposes a number of other requirements and restrictions.

The primary concern with H.R. 1096 is that it overrides a critical privacy protection under the Freedom of Information Act (FOIA).<sup>1</sup> For the specified disclosure requirements, the bill would override Exemption 6 of FOIA, which protects against the disclosure of information that would constitute an “unwarranted invasion of personal privacy.” In effect, the measure’s privacy override would require the Treasury Department to bypass the Privacy Act of 1974<sup>2</sup> and to publish personally identifiable information, including the names of plaintiffs or claimants and the basis of their claims, even with respect to sensitive legal matters, paid from the Judgment Fund. Notably, the bill’s proponents have failed to articulate any

<sup>1</sup> 5 U.S.C. § 552 (2017).

<sup>2</sup> 5 U.S.C. § 552a (2017).

valid reason why such potential invasions of personal privacy are warranted.

For these reasons and others explained below, we must respectfully dissent and urge our colleagues to oppose H.R. 1096.

#### DESCRIPTION

The Judgment Fund is a permanent, indefinite appropriation enacted by Congress to pay legal judgments entered against the U.S. government.<sup>3</sup> Congress created the Fund “to reduce the need to allocate specific appropriations for payment of claims.”<sup>4</sup> H.R. 1096 requires the Treasury Department, if not otherwise prohibited by statute or court order, to electronically publish information on payments from the Judgment Fund within 30 days of the payment being tendered. This includes personally identifiable information, such as a plaintiff or claimant’s name, the name of the counsel for the plaintiff or claimant, and a brief description of the facts which gave rise to the claim. If the claim is paid to a foreign state, the Treasury Department is required to disclose further information about the claim and is subject to certain restrictions on payments. Of greatest concern, section 2 of the legislation would deem the required disclosures for adults over age 18 to not be considered a “clearly unwarranted invasion of personal privacy” for purposes of title 5 of the United States Code. As a result, the bill effectively overrides protections against the unwarranted disclosure of personally identifying information contained in FOIA and the Privacy Act.

#### CONCERNS WITH H.R. 1096

##### I. H.R. 1096 UNDERMINES FUNDAMENTAL PRIVACY PROTECTIONS

H.R. 1096 presents a serious risk to personal privacy. Under current law and practice, the Treasury Department withholds publishing the plaintiff or claimant’s name, the name of the counsel for the plaintiff or claimant if a solo practitioner, and a brief description of the facts that gave rise to the claim (which contains personally identifiable information) in order to comply with the requirements of the Privacy Act. The Department publishes this information in accordance with a congressional directive included in a 2011 appropriations bill that, among other things, prohibited the disclosure of this information if barred by another statute, such as the Privacy Act, or court order.<sup>5</sup>

To fully comprehend how the bill threatens personal privacy, it is helpful to understand the interplay between the Privacy Act and FOIA Exemption 6. According to the Department of Justice’s Overview of the Privacy Act of 1974, the general public policy purpose of the Act is “to balance the government’s need to maintain information about individuals with the rights of individuals to be protected against unwarranted invasions of their privacy stemming from federal agencies’ collection, maintenance, use, and disclosure of personal information about them.”<sup>6</sup> Specifically, one of the four

<sup>3</sup>Vivian S. Chu & Brian T. Yeh, Congressional Research Service, *The Judgment Fund: History, Administration, and Common Usage* 2 (2013) [hereinafter CRS Report].

<sup>4</sup>*Id.*

<sup>5</sup>CRS Report, *supra* note 3, at 14.

<sup>6</sup>Department of Justice, Overview of the Privacy Act of 1974 (2015) at 4 available at <https://www.justice.gov/opcl/file/793026/download> [Hereinafter referred to as DOJ Privacy Act Overview].

main policy objectives of the Privacy Act is “[t]o restrict disclosure of personally identifiable records maintained by agencies.”<sup>7</sup> The Privacy Act achieves this goal by generally prohibiting federal agencies from disclosing “any record which is contained in a system of records by any means of communication to any person or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless the disclosure” falls under one of 12 statutory exceptions.<sup>8</sup> Most relevant to the operation of H.R. 1096 is exception 2, the “required FOIA disclosure,”<sup>9</sup> which permits an agency to disclose a record if it would be “required under section 552 of this title,”<sup>10</sup> i.e., FOIA.<sup>11</sup>

Broadly speaking, FOIA’s purpose “is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>12</sup> FOIA serves the public interest by promoting access to government documents in order to reveal the inner workings of the federal executive branch and better guard against the impropriety of government officials. The Supreme Court, however, in interpreting FOIA has long recognized that Congress intended to create a balance between the public’s right-to-know and “the need of the government to protect certain information.”<sup>13</sup> Thus, under FOIA, almost all federal executive branch records “must be made available to the public” unless they are “specifically exempted from disclosure or specially excluded from the Act’s coverage in the first place.”<sup>14</sup>

As such, FOIA is structured to strongly favor disclosure of government records, but balances this with the government’s need to keep some records from disclosure. An agency may withhold information entirely only if either it “reasonably foresees disclosure would harm an interest protected” pursuant to one of nine exemptions or disclosure is otherwise prohibited by law, and the agency must have considered partially redacting the record if practicable.<sup>15</sup> As such, an agency is also required to take “reasonable steps necessary to segregate and release nonexempt information.”<sup>16</sup>

One of the more commonly applied FOIA exemptions, and one critical to understanding the operation of H.R. 1096, is Exemption 6. This exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”<sup>17</sup> While personnel and medical files are somewhat self-explanatory categories, the Supreme Court has held that Congress intended that the term “simi-

<sup>7</sup> *Id.*

<sup>8</sup> 5 U.S.C. § 552a(b) (2017).

<sup>9</sup> DOJ Privacy Act Overview at 74.

<sup>10</sup> 5 U.S.C. § 552a(b)(2) (2017).

<sup>11</sup> 5 U.S.C. § 552 (2017).

<sup>12</sup> Department of Justice Guide to the Freedom of Information Act Introduction (2013) at 1 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)) (hereinafter DOJ FOIA Guide) available at <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>.

<sup>13</sup> *Id.* at 2 (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)).

<sup>14</sup> *Id.* at 6.

<sup>15</sup> 5 U.S.C. § 552(a)(8) (2017).

<sup>16</sup> *Id.*

<sup>17</sup> 5 U.S.C. § 552(b)(6) (2017).

lar files” be interpreted broadly.<sup>18</sup> In determining whether an agency should withhold information contained in a record under this exemption, an agency must identify whether “both a substantial (*i.e.*, more than *de minimis*) privacy interest in nondisclosure of the requested information and a FOIA public interest in its disclosure (*i.e.*, the information opens agency action to the light of public scrutiny)” exist and weigh “the two competing interests . . . against one another in order to determine whether disclosure would constitute a clearly unwarranted invasion of personal privacy.”<sup>19</sup>

The Supreme Court, when reviewing agency actions in light of these two important and competing interests, has interpreted the privacy interests protected by FOIA Exemption 6 to “encompass the individual’s control of information concerning his or her person.”<sup>20</sup> Additionally, the Supreme Court has further stated that “[a]n individual’s interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.”<sup>21</sup> In other words, just because information about a person may be available through another public source, does not necessarily mean that information is no longer covered by Exemption 6. Individuals have a privacy interest in controlling the further spread of this information. Additionally, the Supreme Court has held that “the only relevant ‘public interest in disclosure’ to be weighed in this balance is the extent to which disclosure would serve the ‘core purpose of the FOIA,’ which is ‘contribut[ing] significantly to public understanding of the operations or activities of the government.’”<sup>22</sup> The Court further stated that “[t]hat purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency’s own conduct.”<sup>23</sup>

During the markup of H.R. 1096, Representative Ted Lieu (D-CA) asked Chairman Goodlatte, “Does this bill override the Privacy Act with that section E provision or is it not meant to do that?” Chairman Goodlatte responded as follows:

The language you refer to was offered by a professor who testified before the committee and according to the Department of Justice’s guide to the Freedom of Information Act, under the FOIA privacy encompasses the individual’s control of information concerning his or her person. Exemption 6 protects information about individuals in personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. In his written testimony, Professor Figley stated that “Treasury refuses to release the names of claimants or individual attorneys under the Freedom of Information Act on grounds that those names fall

<sup>18</sup> DOJ FOIA Guide Exemption 6 at 4 (citing *U.S. Dep’t. of State v. Washington Post Co.*, 456 U.S. 595 (1982)) available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption6.pdf>.

<sup>19</sup> *Id.* at 74.

<sup>20</sup> *U.S. Dep’t. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763 (1989).

<sup>21</sup> *U.S. Dep’t. of Defense, et. al. v. Federal Labor Relations Authority*, 510 U.S. 487, 500 (1994).

<sup>22</sup> *Id.* at 495 (quoting *U.S. Dep’t. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 775 (1989)).

<sup>23</sup> *Id.* at 496 (citation omitted).



within FOIA's exemption for personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This language was added to the amendment to prevent a similar refusal to release the names of claimants or individual attorneys under the requirements of the bill. But I would again argue that that position taken by the Treasury is not covered by the Privacy Act because that information is not protected by the Privacy Act; and in the interest of transparency, we need to clarify that so that this information, moving forward, is made public.<sup>24</sup>

Respectfully, we believe that Chairman Goodlatte's analysis was incorrect on two counts. First, the FOIA clearly protects the names of individuals and other personally identifiable information of Judgment Fund claimants in this instance, and the Treasury Department properly withheld such information as a "clearly unwarranted invasion of personal privacy," because releasing individuals' names or other personally identifiable information would do little to serve the public interest in shedding light on the internal decision-making process of the many different federal agencies applying to the Fund for payment of legal claims. We note that Professor Figley acknowledged that, in its FOIA responses, "the [Treasury Department's Bureau of Fiscal Services] 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*."<sup>25</sup> Given the information that was disclosed, releasing individuals' names would have provided little additional transparency about the Judgment Fund's operation but imposed great risk to personal privacy.

Second, the Treasury Department properly protected the disclosure of this personally identifiable information exempted from disclosure under the FOIA. The Department of Justice notes that the purpose of the Privacy Act's exception 2 allowing FOIA-required disclosures "is that the Privacy Act never prohibits a disclosure that FOIA actually requires."<sup>26</sup> The Department further explains:

If an agency is in receipt of a FOIA request for information about an individual that is contained in a system of records and that is not properly withholdable under any FOIA exemption, then it follows that the agency is "required under Section 552 of this title" to disclose the information to the FOIA requester. This would be a subsection (b)(2) disclosure. However, if a FOIA exemption—typically, Exemption 6 or Exemption 7(C)—applies to a Privacy Act-protected record, the Privacy Act prohibits the agency from making a "discretionary" FOIA release because that disclosure would not be "required" by the FOIA within the meaning of subsection (b)(2).<sup>27</sup>

<sup>24</sup> Transcript of the Markup of H.R. 2826; H.R. 1096; H.R. 2480 before the H. Comm. on the Judiciary, Jun. 6, 2017 at 174–175 available at <https://judiciary.house.gov/wp-content/uploads/2017/06/6.28.17-markup-transcript.pdf>.

<sup>25</sup> Paul Figley, *The Judgment fund: America's Deepest Pocket & Its Susceptibility to Executive Branch Misuse*, 18 J. Const. L. 145, 203 (2015) (emphases added).

<sup>26</sup> DOJ Privacy Act Overview, *supra* note 6, at 74 (original emphasis) (citations omitted).

<sup>27</sup> *Id.* (citations omitted).

Generally, unlike FOIA, the Privacy Act favors nondisclosure. Records or information contained in records that are covered by the Privacy Act and subject to FOIA Exemption 6 are considered “discretionary” rather than “required” FOIA disclosures. Thus, for example, the personally identifiable information like individual names that Prof. Figley requested is exempted from FOIA disclosure and therefore protected from disclosure by the Privacy Act because it is a “discretionary” disclosure and does not fall under that Act’s exception 2.

H.R. 1096 disrupts this careful interplay between the Privacy Act and FOIA Exemption 6 in all cases to which the legislation would apply by overriding Exemption 6 and requiring that the Treasury Department publish personally identifiable information of all adult Judgment Fund claimants. Information disclosures under H.R. 1096 would no longer be considered a “discretionary” disclosure under the FOIA’s Exemption 6, and exception 2 of the Privacy Act for “required” FOIA disclosures would then apply. Thus, if H.R. 1096 were enacted, the Privacy Act would no longer bar the Treasury Department from publishing the personally identifiable information about private individuals that it would have otherwise protected.

If enacted, H.R. 1096 would force the Treasury Department not only to publish on the Internet personally identifiable information, but to do so in a format that compounds the harm by facilitating the spread of such information by linking the claimant’s name with the facts of his or her potentially sensitive legal matter, simply because the settlement or judgment related to that matter happened to be paid from the Judgment Fund. A great range of legal claims are paid out of the Fund, including claims that touch on particularly sensitive personal matters, which may include cases concerning medical malpractice and employment discrimination based on race or sex.

There could be serious consequences associated with the disclosure of sensitive personal information under the bill. For example, the revelation of a medical condition might hurt a claimant’s future employment prospects. Similarly, a victim of race or sex discrimination might face difficulty finding work because employers could see such a person as a legal “troublemaker,” rather than the victim of illegal discrimination.<sup>28</sup> Additionally, publishing personally identifiable information on the Internet in an easily searchable format could also make individuals more vulnerable to fraudsters, data brokers, identity thieves, and other predators.

Providing a person’s name *alone* would raise privacy concerns in the Judgment Fund context. Certainly, publishing a name *in combination* with the facts of a legal case is a “clearly unwarranted invasion of personal privacy” and such information should remain exempted from FOIA under Exemption 6 and, thus, protected by the Privacy Act. The Treasury Department’s current practice of withholding the individual names of claimants, plaintiffs, their counsel

<sup>28</sup>The settlements of certain discrimination claims against the government brought by Hispanic, Native American, and women farmers do not provide justification for the bill. We note that simply because the government admitted wrongdoing in discriminating against these plaintiffs and other protected groups on an impermissible basis does not alone demonstrate misuse of the Fund. The resulting settlement payments from the Judgment Fund were entirely appropriate and should not be the subject of criticism, much less cited as support for this flawed legislation.

if a solo practitioner, and the other personally identifiable information contained in a brief factual description comports with the purpose of the Privacy Act and FOIA. Congress should not override these protections for the purposes of this legislation.

## II. THERE IS NO JUSTIFICATION WARRANTING H.R. 1096'S INVASION OF PRIVACY

H.R. 1096 offers little additional transparency of the Judgment Fund, but would violate the privacy of victims of government misconduct. Much of the information that H.R. 1096 would require the Treasury Department to disclose regarding non-foreign-state payments is *already* publically available. In fact, the Treasury Department makes this information available on the website of the Bureau of Fiscal Service, the agency charged with administering the Fund.<sup>29</sup>

In addition, it appears that this legislation was motivated, at least in part, as a response to the Obama Administration's payment of a \$1.7 billion settlement to Iran out of the Judgment Fund as part of a negotiated settlement over a longstanding claim related to arms sales involving the pre-1979, pre-revolutionary Iranian government. Although the proponents no longer appear to cite these payments as a justification for this bill, we note that their arguments, at any rate, lack credible support. The Obama Administration's actions were entirely legal, transparent, supported by precedent, and ultimately saved taxpayer money through a reduced interest payment.

## CONCLUSION

We recognize that there is a strong public interest in knowing how federal taxpayer dollars are spent. Requiring the Treasury Department, however, to disclose personally identifiable information in a format that would reveal information about private persons and their legal matters that give rise to those payments does not sufficiently serve the public's potential interest in such information as to justify the infringement on individual privacy. Disclosing and disseminating such personally identifiable information would not significantly advance the public interests served by transparency measures like FOIA, but would gravely threaten the privacy interests of victims of government wrongdoing. H.R. 1096's proponents offer no convincing rationale for why we should accept a balance so skewed against privacy. We think it is the wrong balance, and we reject it.

For the forgoing reasons, we dissent and strongly urge our colleagues to oppose H.R. 1096.

MR. CONYERS, JR.  
MR. NADLER.  
MS. LOFGREN.  
MS. JACKSON LEE.

<sup>29</sup>The information the Bureau currently publishes includes the agency or entity whose actions gave rise to the claim or judgment; the name of the counsel for the plaintiff or claimant if not a solo practitioner; the amount paid representing principal liability; any amounts paid representing any ancillary liability, including attorney fees, costs, and interest; and the agency that submitted the claim. See Judgement Fund Congressional Report, Bureau of the Fiscal Serv. (July 5, 2017), available at <https://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/congress-reports.htm>.

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