

**Written Testimony of
Neil Kinkopf
Professor of Law, Georgia State University, College of Law
Before the House Judiciary Committee
Subcommittee on the Constitution and Civil Justice
“Oversight of the Judgment Fund: Iran, Big Settlements, and the Lack of
Transparency”**

September 7, 2016

The Judgment Fund fulfills a fundamentally important duty of the federal government: to provide an effective remedy when the rights of individuals are violated. Chief Justice John Marshall wrote the classic expression of this principle in *Marbury v. Madison*, 5 U.S. 137 (1803).

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.... The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

In plainer terms, the idea is that government officials are bound to respect the legal rights (including contractual rights, property rights, and the right to be free of tortious injury) of individuals. These rights are meaningless if there is no effective way to enforce them. The Judgment Fund provides an essential remedy. As such, this obscure and highly technical law actually advances one of our highest constitutional aspirations – that our government observe the rule of law.

Laudable as the Judgment Fund’s function may be, the Committee is to be applauded for exercising oversight into how the fund is actually managed in practice. The Judgment Fund is an extraordinary statute that confers important power and discretion on the Executive Branch. It is extraordinary in that it enacts an indefinite and unlimited appropriation, in contrast to the regular appropriations, which are available for a definite period and for specified purposes. Prior to the Judgment Fund’s enactment in the 1950s, Congress directly appropriated funds to pay specific claims against the federal government. This required the enactment of thousands of private bills each year. This system of private bills was not only a significant drain on congressional resources and time, it was unfair to individuals. Payment came to depend more on the political connections of the claimant than on the merits of the underlying claim.

In this respect, the Judgment Fund is an example of a common challenge in governing our ever-growing nation and its vast economy. It is simply impossible for Congress to legislate in a way that provides for every conceivable situation. As a result, Congress has followed the approach of setting out in broad terms the basic principles of the law and then delegating to the

Executive Branch the authority to elaborate those principles in application and in regulations that fill in the details. This approach to governing raises two concerns. First, the extensive authority delegated to the Executive Branch is subject to overreaching. Second, Congress can be seen as shirking its responsibility to exercise the constitutional legislative power. This is a concern because Congress is accountable to the people through elections, whereas the bureaucrats to whom power is delegated are not.¹

As to the first concern, the courts have been reluctant to interfere with the exercise of delegated authority by the Executive Branch. First, the Supreme Court has repeatedly held that a delegation of authority from Congress to the Executive Branch is valid as long as it is accompanied by an intelligible principle. In a classic case, the Court upheld the delegation to the Federal Communications Commission of the power to regulate the broadcast spectrum “in the public interest.” *NBC v. United States*, 319 U.S. 190, 225-226 (1943); accord *Whitman v. American Trucking Ass’n*, 531 U.S. 457 (2001). Second, the Court has held that if the President does not violate the Constitution even if the President acts beyond the scope of statutory power. See *Dalton v. Specter*, 511 U.S. 462 (1994). Third, when courts review agency action to determine whether it was within the scope of statutory authority, the courts tend to be highly deferential. See, e.g., *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Congress has responded to both sets of concerns over the years. In order to avoid abdicating its constitutional responsibility and to make sure that bureaucratic decisions are subject to some accountable oversight, Congress for decades imposed the legislative veto procedure on delegated power. An agency exercising delegated authority could act, subject to a veto by Congress.² The Supreme Court has ruled legislative vetoes to be unconstitutional on the grounds that this mechanism violates the doctrine of separation of powers. See *INS v. Chadha*, 462 U.S. 919 (1983). The setting of that case is instructive. For many decades Congress dealt with the issue of whether to grant a suspension of deportation for foreign nationals through the mechanism of private bills. Each year Congress would consider hundreds of such measures, each specific to an individual alien. As with the Judgment Fund, this system was time consuming and outcomes depended more on political connections than on the merits of the case. Congress decided to set down standards for suspending deportation and to authorize the Attorney General to suspend deportation whenever he determined that the standards had been met. The Attorney General’s decision was subject to veto by a vote of either the House or the Senate. The Supreme Court struck down the legislative veto as unconstitutional because it gave Congress the ability to exercise power (to overrule the Attorney General) without going through bicameralism and presentment. The Supreme Court has further elaborated this principle, holding that Congress may not assign power to an official it controls, such as the Comptroller General. See *Bowsher v. Synar*, 474 U.S. 714 (1986).

¹ This problem is exacerbated when the recipient of delegated authority is an independent agency (*i.e.*, one headed by an officer who can only be removed for cause and so is not subject to the supervision and control of the President).

² Some legislative vetoes were effective on the vote of both the House and the Senate, others allowed a single chamber to veto administrative action, and still others allowed a Committee of the House or Senate to issue the veto.

In other statutes, Congress has imposed procedural and disclosure requirements on the Executive Branch. Examples include the Administrative Procedure Act, 5 USC 551, *et seq.*, and the Freedom of Information Act, 5 USC 552. The Courts have consistently upheld these requirements. The key distinction between these statutes and those, such as legislative vetoes, that the Court has struck down is that these laws do not grant power to Congress itself or anyone subject to direct congressional control.

I understand that Congress has considered legislation that would require disclosure of how the Executive Branch is administering the Judgment Fund. Such a requirement would be salutary and, in principle, it is impossible to imagine a reason to oppose such a measure. I have reviewed H.R. 1669, The Judgment Fund Transparency Act. The bill would clearly adhere to the constitutional requirements that the Court has articulated in that it would not grant power to Congress or to any official whom Congress can control. The information it would require the Executive to disclose would allow the public, and Congress, to monitor the use of the Judgment Fund and to have some basis for identifying instances of overreach. This bill seems a modest measure that respects the constitutional separation of powers while allowing Congress to fulfill its constitutional responsibilities.

I look forward to the opportunity to address any questions you may have.