

OVERSIGHT OF THE JUDGMENT FUND

HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED FIFTEENTH CONGRESS FIRST SESSION

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Thursday, March 2, 2017

HOUSE OF REPRESENTATIVES,

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE,

COMMITTEE ON THE JUDICIARY,

Washington, DC.

The subcommittee met, pursuant to call, at 9:00 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve King, [Chairman of the Subcommittee] presiding.

Present: Representatives King, Goodlatte, DeSantis, Franks, and Cohen.

Staff Present: John Coleman, Counsel; Jake Glancy, Clerk; James Park, Minority Chief Counsel; Veronica Eligan, Minority Professional Staff Member; and Matthew Morgan, Professional Staff Member.

Mr. KING. The Subcommittee on the Constitution and Civil Justice will come to order. Without objection, the chair is authorized to declare a recess of the committee at any time. We welcome everyone to today's hearing and on the oversight of the Judgment Fund, and I now recognize myself for an opening statement.

Today's hearing is about the Judgment Fund, which was established by statute to pay court judgments and Justice Department compromise settlements of actual or imminent lawsuits against the government. Payment through the Judgment Fund is administered by the Judgment Fund Branch, which is a part of the United States Department of Treasury Bureau of Fiscal Service. We have seen in recent years that the vast bureaucracy of the Federal Government can have the effect of obscuring the facts and circumstances of payments from the Judgment Fund.

When the public seeks to scrutinize executive actions like the Iran settlement, the potential risk corridor settlement, or settlements under the Equal Credit Opportunity Act, Congress is at the mercy of Federal agencies to provide information. This dynamic exists because the Judgment Fund as a permanent appropriation recognizes, excuse me, requires no congressional action for payments to be made.

Today's hearing was in part intended to gather information from Federal officials about how the Judgment Fund is administered. We extended invitations to the Government Accountability Office,

the GAO, and the United States Department of Treasury to testify on this topic. Neither produced witnesses. I am particularly dismayed that given GAO's years of involvement on matters relating to the Judgment Fund, it is unable to voluntarily offer information to contribute to today's hearing; no reason was provided.

I intend to follow up with GAO to ensure that this committee's questions are answered. Nevertheless, at this committee's request, the Inspector General of the U.S. Department of the Treasury, the Honorable Eric Thorson, submitted a letter addressing his office's recent inquiry into the Iran Settlement, which I would like to submit for the record. And without objection, it is so ordered.

LETTER SUBMITTED BY THE HONORABLE ERIC THORSON, INSPECTOR GENERAL OF THE U.S. DEPARTMENT OF THE TREASURY

This material is available at the Committee and can be accessed on the committee repository at: <http://docs.house.gov/meetings/JU/JU10/20170302/105620/HMTG-115-JU10-20170302-SD002.pdf>.

Mr. KING. The conclusion reached by the Inspector General, as well as the description of the materials that the Treasury Department officials relied upon in determining whether the Department of Justice's request for payment in this settlement should be approved, show that the Treasury Department's regulatory and manual-based requirements, appear to set a low bar for approval of payment requests.

For example, the approval of the Iran Settlement claim, relied, in part, on verbal notifications that the Judgment Fund's statutory requirements were met, and that is according to Inspector General Thorson. Fiscal Services chief counsel told us and the Office of Inspector General, that the settlement agreement was not provided to Judgment Fund Branch personnel due to its sensitive nature and legally, the Judgment Fund Branch is not required to review the settlement agreement.

Fiscal Services chief counsel told us, and a Judgment Fund Branch employee confirmed that the chief counsel verbally notified the Judgment Fund Branch employee that the settlement agreement was final as authorization for the Judgment Fund to approve the payment. In other words, a verbal approval.

Moreover, the Inspector General's letter reveals that the lack of publicly available precedence regarding approval of the Judgment Fund request makes it difficult for the public and Congress to understand the approval process. The Treasury Department does not issue decisions regarding Judgment Fund requests, which would document the agency's reasoning.

To make matters worse, the documents that Treasury relied upon in making a decision are not publicly available. Therefore, no recent body of precedent exists to assure Congress and the public that the Judgment Fund's use in any one case was proper.

My hope is that the testimony from today's distinguished panel will inform the committee regarding the current state of the Judgment Fund and that they will provide recommendations about what congressional actions are needed. Indeed, Article I, Section 9, Clause 7 of the 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.” This provision, known as the Appropriation Clause, is the foundation of Congress’ power of the purse.

Today’s hearing is about safeguarding that power, and as I have watched some of these cases come before the news and had difficulty in getting answers about the Judgment Fund, what goes into it and what comes out of it and to whom and why and asks some direct questions of some of the members of the previous administration, I would just like to let this committee know that I am determined to drill into the bottom of this.

We have a congressional obligation to do oversight. We have a constitutional authority that we need to protect, and part of our job also is to restore our Article I authority, hopefully one day in its entirety. And so with that, I would conclude my opening statement, and I would recognize the gentleman from Tennessee, Mr. Cohen, for his opening statement.

Mr. COHEN. Thank you, Mr. Chairman. The Judgment Fund is an issue that the chairman and I probably will agree on. There is an issue about privacy, but in a bill that we passed on the floor which I was a sponsor with Doug Collins on, Congressman Collins, H.R. 1033, it respected the privacy rights of parties who were reimbursed for the litigation cost and that particular bill striking a balance between transparency and privacy interests and prohibited the release of information of the disclosure which is prohibited by law or court order.

If we can get to that in this bill where we do not release information that is prohibited, the disclosure thereof by law or court order, I think we can have a bill that is bipartisan and gets through this committee with unanimity and it to go to transparency which is important in all government affairs. Transparency is so important with funds.

It is important with testimony before Senate Committees and testimony in court and all other things. Transparency is very important, so I think this is a good thing, and I was proud to be the lead Democratic sponsor in the Open Book on Equal Access to Justice Act which passed three days ago, and I think it gives us a pathway to get this bill to go through in a unanimous fashion and without controversy on the floor. And the folks that didn’t respond, should have responded, of course. I would like to enter into the record my statement, which I am not going to go through entirely, and Mr. Conyers’ statement, without objection.

Mr. KING. Without objection, so ordered.

STATEMENT SUBMITTED BY THE HONORABLE STEVEN COHEN, TENNESSEE, RANKING MEMBER, SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

This material is available at the Committee and can be accessed on the committee repository at: <http://docs.house.gov/meetings/JU/JU10/20170302/105620/HMTG-115-JU10-MState-C001068-20170302.pdf>.

STATEMENT SUBMITTED BY THE HONORABLE JOHN CONYERS, JR., MICHIGAN, RANKING MEMBER, COMMITTEE ON THE JUDICIARY

This material is available at the Committee and can be accessed on the committee repository at: <http://docs.house.gov/meetings/JU/JU10/20170302/105620/HMTG-115-JU10-MState-C000714-20170302.pdf>.

Mr. COHEN. But today, there are important matters, and while these are important matters, more important matters, which is the issue of testimony before the Senate and confirmation hearings and Russia's involvement in our election process or possible involvement, I guess we kind of know there was involvement now.

The chairman and I both were on a recent journey when we met with some Russian Duma officials. I can say based on a small bit of information we got from them, that the Russian Duma Officials are just like the Russian Duma officials of 20, 30, 50 years ago. They have not changed, and as the old expression, "Once KGB, always KGB," which applies to Mr. Putin, and I read something today about some intelligence officials that so many people in Russia are considered intelligence officials. They said once an intelligence official, always an intelligence official.

Well, once a Duma member, same thing. And we met with some other folks in private who let us know that Russia does not have the same interests that America has, which we should know, and I know the chairman and I share that perspective. There is an issue about Mr. Sessions being the Attorney General and some of the questions he answered during his confirmation hearings asked by Mr. Franken orally and by Senator Leahy in writing that call into question his veracity at that hearing, when he said he did not have any contact with any Russian officials, and in fact, they now announced he had two meetings with Russian Ambassadors.

There may be a hedge that he can have and some wiggle room, but the Attorney General like Caesar's wife, Caesar's wife was supposed to be beyond reproach. The Attorney General should not need wiggle room, and if there is a wiggle room answer, the Attorney General should be totally forthcoming, and in this case where there is an issue of his veracity, then it is an issue whether he should even remain as Attorney General, but there is certainly an issue whether he should appoint a special counsel to look into any possible transgressions between the Trump campaign and the Russians in influencing our elections, he should appoint a special counsel.

Wiggle room is something we cannot have with lady justice and with our Attorney General, and that is all he has right now is wiggle room. He was asked a direct question, Mr. Chair, by Senator Franken, and he said, "No, I have not met with the Russians," and in fact, now he says he had twice, one time even in September. Russia just keeps coming up, and in the President's speech, he made a point of saying we are going to make some new friends.

We are not only going to be friendly with the old world and support NATO which is great and good, and I was surprised and the first one, I think, to my feet on the—if anybody was on their feet on the floor on that—because we need to support our friends in the Balkans and the Baltic regions and Georgia and Malta and

Ukraine and every place else that is threatened by the big bear, but he said we are going to make some new friends, and what he was saying, he did not say it but what he was saying was Russia, and he pointed toward the Democrats, and he said, with his right hand, we need to get beyond some of our small, trivial differences and move on.

He did not say what those were, but I suspect those were his income taxes, his involvement with Russia, other foreign interests, the Emoluments Clause issues that are going on and serious issues that fall within the jurisdiction of this committee and this subcommittee I would submit as well. And I would ask the chair to consider hearings concerning Russia's hacking of our election, the Attorney General's involvement or lack of involvement in those discussions, and any other issues concerning Mr. Trump, his taxes.

You know, what he should have said when he started, Mr. Chair, he had a good speech written for him, and he delivered it pretty well, pretty good, pretty good, but instead of starting with the last day of Black History Month and the Jewish Cemetery desecration, and the threats on the Jewish Community Centers, which was nice and good, he should have started with, "There is some problems in this country, and we need to resolve them, we need to come together, and I am going to lead by releasing my income taxes," that would have gone a long way towards bringing this country together and making him truly a President.

So, with that I would ask the chair to consider some hearings on these issues, and I know the chair is a patriot and holds America first in his heart and is no big fan of the former Soviet Union and Russia and some of the things they do. I yield back the balance of my time.

Mr. KING. The gentleman yields back the balance of his time, and his words are duly considered, and the chair will now recognize the chairman of the full Judiciary Committee, Mr. Goodlatte, of Virginia for his opening statement.

Chairman GOODLATTE. Thank you, Mr. Chairman. Mr. Chairman, James Madison in Federalist No. 58 stated, "The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse, that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power of the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."

In its current form, the Judgment Fund, when abused, allows the executive branch to pilfer taxpayer dollars to fund its overgrown prerogatives without any congressional action or oversight.

In such cases, Congress' check on these abuses is rigorous oversight to determine whether additional legislation is required. In recent years, it has become apparent that little information is known

about individual payments from the Judgment Fund, particularly with regard to the payment of settlements.

Searches for individual payments from the Judgment Fund in a database maintained by the Treasury Department reveals little about the underlying facts, how the funds were used, and even who received them. In a system of government in which Congress is accountable for the way in which the taxpayer dollars are spent, this is unacceptable.

I look forward to the witnesses' testimony today and to their recommendations regarding how Congress, the immediate representatives of the people, can improve our oversight of this permanent, indefinite appropriation, as well as improve transparency for the public. Thank you, Mr. Chairman.

Mr. KING. I would like to thank the chairman of the full committee. In recognizing that the ranking member of the full committee's statement has been entered into the record, and without objection, other members' opening statements will be made part of the record, and let me now introduce the witnesses.

Our first witness is Professor Paul Figley. Professor Figley is the associate director of Legal Rhetoric at American University Washington College of Law. And our second witness is Professor Neil Kinkopf. Professor Kinkopf is a Professor of Law at Georgia State University College of Law. And our third and final witness is Chris Jacobs, and Mr. Jacobs is the founder and CEO of the Juniper Research Group.

Each of the witnesses' written statements will be entered into the record in its entirety, and I ask that each witness summarize their testimony in 5 minutes or less. And to help you stay within that time limit, there is a light in front of you.

I expect you are familiar with that light, gentlemen. And that switch will turn from green to yellow when there is one minute left and, of course, when it is red, it means the same thing here as it does out on the streets of Washington, D.C. and, however, we want you to summarize your statement and complete your thought. And before I recognize the witnesses, it is the tradition of the committee that they be sworn in.

So, I would ask the witnesses to please stand and raise your right hand. Do you swear that the testimony you are about to give before this committee is the truth, the whole truth, and nothing but the truth, so help you God? Thank you, gentlemen.

Let the record reflect that all the witnesses responded in the affirmative. And I now recognize the first witness for his testimony, Professor Figley, and please proceed with your 5 minutes, Professor Figley.

STATEMENTS OF PAUL FIGLEY, ASSOCIATE DIRECTOR OF LEGAL RHETORIC, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW; NEIL KINKOPF, PROFESSOR OF LAW, GEORGIA STATE UNIVERSITY COLLEGE OF LAW; AND CHRIS JACOBS, FOUNDER AND CEO, JUNIPER RESEARCH GROUP

STATEMENT OF MR. PAUL FIGLEY

Mr. FIGLEY. Thank you, Mr. Chairman. Through the Appropriations Clause, Congress holds the power of the purse. For adminis-

trative convenience, in 1956, it established the Judgment Fund as the means of paying most settlements in judgments against the Federal Government. Since 1977, the Judgment Fund has automatically made those payments regardless of their amount and without congressional review.

The Judgment Fund is not an all-purpose fund for judicial disbursements, rather it can be used only where there is a substantive right to compensation based on the expressed terms of a specific statute. The Attorney General and his delegees have broad authority to settle imminent litigation under his supervision. They do not have authority to circumvent limits Congress places on statutes that authorize the payment of money damages.

The Judgment Fund system is in trouble. Two settlements, each exceeding \$100 million, show the problem. Each paid much more money than the government was likely to lose in court. The decisions to settle them on generous terms appear politically motivated. The suits involved claims similar to those brought by black farmers in the Pigford Litigation that alleged USDA discrimination in farm programs in violation of the Equal Credit Opportunity Act. The Pigford Litigation in the settlements amounting to over \$2.2 billion for which Congress made specific appropriations.

In *Keepseagle*, Native Americans brought a class action alleging USDA discrimination. Although no class was certified for monetary relief, the suit was settled in 2010 for \$760 million, including a settlement fund of \$680 million established with Judgment Fund money. The settlement grossly miscalculated the number of claimants.

When fewer than 4,500 farmers perfected claims, it paid them about \$300 million. That left \$380 million in the settlement fund. Because the settlement agreement lacked a provision requiring reversion of leftover money, that money was not returned to the Treasury. Various Native American groups are still litigating how to use it.

Eventually, that \$380 million of Judgment Fund money will be spent on something other than valid claims against the government. In the *Garcia* and *Love* cases, Hispanic farmers and women farmers filed similar class action suits. In both cases, the district court's decisions to deny class certifications were affirmed on appeal, and the Supreme Court denied certiorari. Then in 2011, USDA and the Department of Justice unilaterally announced a new claims program for Hispanic and women farmers, including they said, at least \$1.33 billion from the Judgment Fund.

The executive branch created this claims program without legislative input or judicial supervision and financed it with Judgment Fund money. The litigative risk posed by *Garcia* and *Love* did not justify the new program. No class had been or ever would be certified, making the prospect of sizable adverse judgments extremely remote. Politics motivated creation of the program.

For example, eight Senators wrote to President Obama arguing that about \$2.25 billion had been allotted to, "Resolve USDA discrimination against black farmers," and calling for equal treatment for Hispanic farmers. Agency descriptions portrayed the new program as comparable, saying it included, "At least \$1.33 billion in

the Judgment Fund.” In fact, no special fund was created. The total amount paid to claimants was about \$160 million.

By creating this program through administrative decree, the administration intentionally bypassed the appropriation process. Secretary Vilsack argued, “We do not have to have an appropriation from Congress for Garcia-Love.” This is something that can be resolved as is the case with virtually every other claim against the United States from the Judgment Fund, but the Judgment Fund is properly available only to settle valid legal claims.

The Judgment Fund is now on the executive’s radar as an easy way to finance new programs and initiatives that are somehow related to claims against the government. Absent legislation, it is likely to be used again. The problem is not partisan.

While the Keepseagle Settlement and the Hispanic woman farmer claims process were products of the Obama administration, it is fair to anticipate that the other administrations will follow the same path if that path remains open. The tension here is between Congress and the executive branch. Congress’ power of the purse is a key part of the Constitution’s system of checks and balances. To preserve that power, Congress should place a limit on the size of payments that the executive branch can make from the Judgment Fund.

Mr. KING. Thank you, Professor Figley. And now I will recognize Professor Kinkopf for his testimony. Professor.

STATEMENT OF MR. NEIL KINKOPF

Mr. KINKOPF. Thank you, Mr. Chairman and Mr. Ranking Member. It is a real honor to appear before you today, especially to do this as sort of an encore performance. We were here in September, and I do not want to repeat what I said then. Much of what I had to say at that time I repeated it in my written statement to you. I will not repeat that here. I just want to say I completely agree with the comments that I think all of the opening statements made to the effect that transparency is good, right? Who could be against transparency? Accountability is good, and accountability and transparency for the Judgment Fund are important.

Like any government program, the Judgment Fund and its administration relies on the good faith administration of those individuals, those human people who actually administer the program, and it is just and legitimate for this committee to engage in oversight to make sure that those functions are being performed in good faith.

I want to respond a bit to what Professor Figley had to say. Well, first of all, the Obama administration’s use of the Judgment Fund is completely within the letter of the law, and there can be no doubt about that. It is also completely and fully within the practice of administrations of both political parties going back to the inception of the Judgment Fund.

So, nothing that the Obama administration did was or could be regarded as illegal. Nothing the Obama administration did is unprecedented. Moreover, I think the way to look at some of the settlements entered into during the Obama administration is not from the perspective of what a private law firm representing a private

party might do. The motto of the Justice Department is, “Qui Pro Domina Justitia Sequitur.” Those who advocate in behalf of justice.

It is a common saying around the Justice Department that, “The Justice Department wins when justice is served.” With respect to the farm litigation, the Department of Agriculture engaged in discrimination on race and gender for decades. It is not the proper function of the Government of the United States to make it difficult for people to receive just compensation for government discrimination perpetrated over decades, and so the fact that perhaps the Justice Department could have hidden behind various legal defenses in order to avoid paying the just compensation for injuries it imposed on citizens is not at all an illegitimate function. It is, in fact, in the highest and best traditions of the Department of Justice. With that, I will yield the balance of my time.

Mr. KING. Thank you, Professor Kinkopf, for his testimony. And I will recognize Mr. Jacobs for his.

STATEMENT OF MR. CHRIS JACOBS

Mr. JACOBS. Thank you, Mr. Chairman. Chairman King, Ranking Member Cohen, members of the subcommittee, thank you for inviting me to testify. As Chairman King stated, my name is Chris Jacobs, and I focus my career on analyzing issues in health policy, including more than 6 years here on Capitol Hill. My entire written statement is before you, so I will not repeat it, but instead emphasize three main points regarding the use of the Judgment Fund as it pertains to health insurer claims regarding risk corridors currently pending in the Court of Federal Claims.

First, past precedence suggests that by prohibiting the use of taxpayer funds for the risk corridor program, Congress has otherwise provided for claims payments, rendering the Judgment Fund inaccessible to insurers' claims. The nonpartisan Congressional Research Service reached this conclusion more than one year ago, consistent with prior opinions by both the Governmental Accountability Office and the Justice Department's Office of Legal Counsel.

Second, the amount of money in dispute regarding risk corridor dwarfs most other Judgment Fund payments. Losses for the risk corridor program in 2014 and 2015 have totaled approximately \$8.3 billion. When final numbers are tabulated, total losses over the program's 3 years, that is 2014, 2015, and 2016, will likely exceed \$10 billion at minimum. By comparison, the Washington Post noted last September, that the Department of Health and Human Services claims paid out from the Judgment Fund over the last decade total only \$18 million.

A potential Judgment Fund verdict or settlement regarding risk corridors would vastly exceed last year's Iran settlement and the Pigford and other settlements discussed by Professor Figley in his testimony.

Third, last fall the Obama administration made no secret of the fact they wished to settle the risk corridor cases by the Judgment Fund to circumvent the express congressional prohibition in the Department of Health and Human Services using taxpayer dollars to fund the program. I understand that the status of risk corridors and the healthcare law, in general, have become a matter of no small dispute between the two parties, but Members in Congress

of both political parties, both Republican and Democrat, should be aware of the consequences of such an executive encroachment on Congress' most important power, the power of the purse, for the roles could easily be reversed in a subsequent case regarding another issue.

For this reason, I believe that Congress and this committee should consider codifying past practice and precedence by enacting language to clarify that where the legislature has enacted limitations or restrictions on appropriations. Congress says, therefore, otherwise provided for payment of claims, and the Judgment Fund should remain off limits in those cases.

Thank you very much for the opportunity to testify this morning, and I look forward to your questions.

Mr. KING. Thank you, Mr. Jacobs. And I will now recognize myself for my 5 minutes of questioning. I want to first turn to Professor Kinkopf and ask you—USDA engaged in discrimination for decades, and I am going to presume you were referring to all four of the cases that we have discussed here, the Keepseagle and Garcia and Love and Pigford?

Mr. KINKOPF. Yes.

Mr. KING. And then, are you aware of any individuals that work for the USDA that were identified as discriminators?

Mr. KINKOPF. No, I am not.

Mr. KING. And would you not question how it would be that we could pay off billions of dollars in damages but not find a single perpetrator within our USDA?

Mr. KINKOPF. I would not say that there were no such perpetrators. The Department of Agriculture conceded that this had happened. I do not know names. The Department of Agriculture conceded that this had happened, and once that happens, I think it is perfectly legitimate for the Justice Department to say we are going to compensate the victims of that discriminatory—

Mr. KING. I do not remember Dan Glickman's confession to that back sometime in the 1990s, and I do not remember any evidence with regard to that discrimination. It always seemed curious to me that the department that could make such a confession and put such an all-out effort out to identify people who are victims of discrimination could not identify a single perpetrator to fire or to at least use as an example.

I turn to Professor Figley. Are you aware of any perpetrators within the USDA with regard to these cases?

Mr. FIGLEY. I am not, and there was some discussion.

Mr. KING. Your microphone, please.

Mr. FIGLEY. I am not, and there was some discussion that there were pretty good defenses that might have been available. The point that, if that answers your question.

Mr. KING. Well, thank you. Did you have a tally on the totals that were paid out on the four cases that you testified on? Did that get added up?

Mr. FIGLEY. I could add it up, I have not. It was about \$2.25 billion for Pigford.

Mr. KING. Does that begin with a B?

Mr. FIGLEY. 1.1 or 1.2 billion dollars for Keepseagle, the Hispanic movement of farmers ended up only \$160 million, although it had been portrayed as a billion-dollar program.

Mr. KING. So, the totals you have given me would be consistent with the total given by Mr. Jacobs that the risk corridors will end up being considerably more than all four cases that have to do with discrimination at USDA?

Mr. FIGLEY. Yes.

Mr. KING. You would agree with that statement?

Mr. FIGLEY. Yes.

Mr. KING. And I want to turn back to you, Professor Kinkopf, and ask you when you said that Obama is completely within the letter of the law and nothing was unprecedented regarding these cases, and I will acknowledge that the authority granted seems to be within that authority granted but would your statement also include, and I would just ask what your position would be.

Do you think if this was litigated and taken back to Article I, Section 9, Clause 7, no money shall be drawn from the Treasury but in consequence of appropriations made by law? I could complete that, but would you not understand that clause? Do you expect that could be litigated with regard to taking it back to the Constitution if someone had standing, could the argument then be made that this kind of expenditures and the billions of dollars are consistent with the Constitution?

Mr. KINKOPF. The Judgment Fund is an appropriation by law.

Mr. KING. Slush fund appropriation by law.

Mr. KINKOPF. So, as long as it is within the judgment and it is an appropriation by law and it is within the Constitution.

Mr. KING. But in consequence for appropriation made by law and a regular statement in account of the receipts and expenditures of all money shall be published from time to time. Has that been complied with?

Mr. KINKOPF. What the Constitution requires has been complied with, although you also point to what has long been a problem with the receipts provision, which is no one has standing because there are any number of off budget expenditures that are made. CIA expenditures are kept secret. There is no provision for that in the Constitution, right? So, with how practice has come to understand that clause, the Judgment Fund is within it.

Now, the measures you are considering to improve transparency I think are salutary, and I would support. I do not think the Constitution requires them, although I think you are quite right to perceive it if I am understanding the premise of your question that legislation that would require greater transparency would promote those constitutional values.

Mr. KING. Thank you, Professor Kinkopf, and I appreciate your testimony promoting a more transparency, and I appreciate the bipartisan look at this transparency, and I want to let people know that not am I only determined to get to the bottom of this, but I believe we have a constitutional obligation to do so, and when billions of dollars stack up without even questioning the motivations for that, and I hear discussions about our Attorney General and his integrity, I am thinking about the answers I did not get from the previous Attorney General.

And so with that, I see that my time has expired, and I now recognize the ranking member for his questioning.

Mr. COHEN. Thank you, Mr. Chair. I find it unfortunately, frequent that my friends—and the chair is one of my friends on the other side, often in these issues about Trump administration and Russia, go back and refer to something that might have happened with Obama and they go but, but, but this happened then, and it is not really important what happened then, that is in the history books.

It is what is happening now on our watch, and to go back and suggest that, oh, something happened then, does not mean you should be mute on issues that are before us today. Professor Kinkopf, you were involved with the Justice Department, can the Attorney General do his job if he is under a cloud of suspicion of giving false testimony before a Senate panel?

Mr. KINKOPF. It certainly makes the job difficult. I would not say it is impossible to do the job, I guess yes, it is possible to do the job. It is much more difficult, depending on how serious the cloud is.

Mr. COHEN. You were a counsel to Senator Biden during the impeachment trial of President Clinton.

Mr. KINKOPF. That is true.

Mr. COHEN. The gravamen of that case was that he lied. It was not the fact that he engaged in oral sex with an intern. It was the fact that he lied about it, is that correct?

Mr. KINKOPF. That is correct.

Mr. COHEN. So, lying is real important under oath.

Mr. KINKOPF. That is correct.

Mr. COHEN. What is the proper remedy or where should this Congress go when there is an issue about whether somebody gave false testimony to the Senate under confirmation hearings?

Mr. KINKOPF. Well, if there is a serious and credible basis for believing someone has given false testimony, then I think Congress should take that very seriously and consider a contempt citation and hearings in support of that.

Mr. COHEN. And would that be limited to the Senate where the testimony was given or could it be this particular House as well, and the Judiciary Committee sits in and involves the integrity of our government and our Attorney General.

Mr. KINKOPF. This committee certainly has legitimate oversight authority with respect to the Justice Department, so it would be a legitimate exercise, and perhaps if the Senate wanted to look into it, they might take precedence because it was a Senate hearing.

Mr. COHEN. And Mr. Jacobs, I see you had some experience with Mr. Pence?

Mr. JACOBS. That is correct.

Mr. COHEN. Sometimes, we have had people suggest that this is just Democrats being upset about losing the election. I want everybody to know my concern is not the Democrats. I am concerned the Democrats lost the election. I am concerned that the Russians might have influenced it, but I am more concerned about the idea that we do not have somebody like Vice President Pence as President who we do not have to have concerns about possibly doing irrational things and blowing up the universe.

Your former boss has served on this committee, had a well-earned reputation for being honest, somewhat little bleep with the general, but it was clear that the general who led him astray, and we would look forward to you being in the executive branch.

So, it is not necessarily an issue with Republicans, it is the particular person who is not really a Republican. He has taken over the party in a coup. A coup at the ballot box, but that is just kind of where we are.

On this law, Professor Figley, assuming I understand where you are coming from on the farmer's suit and Professor Kinkopf his, I do not it has to be settle a case that is done, you have to have a place to pay it. This law would just make it public and give notice. So, if that was done, we would know have known more about it earlier about the T-note payments, but it would not necessarily make it illegal, is that correct? Under this proposed law?

Mr. FIGLEY. Under the Openness Law, that bill, it would not make any difference. As I understand it, this hearing is on a broader topic at the Judgment Fund. If there was a cap placed on the Judgment Fund, that would have made a difference.

Mr. COHEN. Okay, well that might be the case. My time is about up. I am going to ask you a personal question just to see if it is my eyes and my memory, has anybody else thought you looked a little bit like Paul Newman?

Mr. FIGLEY. Oh, I wish. Well, thank you. I will take that home and see if it flies with my wife.

Mr. COHEN. Good. I yield back the balance.

Mr. KING. Again, I thank the witnesses for your testimony.

Mr. FIGLEY. Chairman, if I might make two brief points.

Mr. KING. You are recognized.

Mr. COHEN. Paul Newman.

Mr. FIGLEY. I wish. Professor Kinkopf suggested that nothing done by the Obama administration was unprecedented. Creating a new claims program without any input from Congress is unprecedented, and he suggested that the Department of Justice's best tradition calls for not hiding behind legal defenses. It is the role of the Department of Justice to apply the law equally to everyone, and when Congress places substantive legal defenses into the law, it is not for individuals within the Department of Justice to decline to use those defenses.

The only way, and I speak now from 30 years' experience of Justice, the only way that Justice can fulfill its obligations is to apply the law to every claim, whether the claimant is Little Sisters of the Poor or Hells Angels gang. It is not for us to pick winners and losers, that is for Congress to decide, and we must as Department of Justice attorneys assert every proper legal defense in every case unless Congress gives us the discretion not to do so.

Mr. KING. Thank you, professor, and since we have broken from protocol, I would acknowledge either one of the other two witnesses if you have concluding statement or are you comfortable with what you have delivered today?

Mr. KINKOPF. I am comfortable with what I have delivered, I would simply add that what Professor Figley just said is correctly the perspective of a line attorney in the Department of Justice; however, at the higher levels of decision making, at the cabinet

level, much bigger policy concerns do and should come into account, and concern about preserving the civil rights of individual citizens and compensating those who have been injured, are legitimately within that ambit, and I think were legitimately taken into account by the Justice Department in these cases.

Mr. KING. Thank you, professor. Mr. Jacobs is comfortable with his testimony. He would like to have it capped off here, and I would conclude with this that the statement I made earlier that I intend to drill into this, and get as complete an audit as this can be achieved and to examine the implications, especially if there is political motivation that is indicated with where these dollars have been distributed, I think we should recognize that, and I think the public should know, and they can make their decisions when they go to the ballot box.

So, universal statement here is transparency. I will do my share to achieve that transparency, and I am confident Mr. Cohen will as well.

I thank the witnesses for your testimony here today and without objection, all members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record. This hearing is now adjourned.

[Whereupon at 9:47 a.m., the subcommittee adjourned subject to the call of the chair.]

