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INTERIM ATTORNEY'S FEES AWARDS AGAINST THE FEDERAL GOVERNMENT

GREGORY C. SISK†

With increasing frequency, parties in litigation against the federal government petition courts for awards of attorney's fees at an interim stage of the proceedings. However, the government historically has been entitled to appellate review before being required to pay any monetary award. In this Article, Mr. Sisk discusses several recent decisions awarding interim fees against the government as well as appropriations and fee-shifting statutes that govern such awards. By statute, Congress has established a Judgment Fund for payment of monetary awards against the United States only after final judgment not subject to further review. Some statutes also allow litigants to collect attorney's fees awards from the coffers of individual federal agencies. The Article concludes that contested interim fee awards are not legally payable from the Judgment Fund before the government has exhausted its options for appellate review. Interim awards are permissible, however, when courts order them pursuant to statutes authorizing payment from individual agencies. Finally, the Article outlines strict standards for awarding interim attorney's fees against the government. Although these standards protect the government from premature charges upon the public Treasury, they permit interim awards when necessary to provide assistance to clearly prevailing litigants suffering financial hardship.

With the proliferation of statutes waiving the sovereign immunity of the federal government for awards of attorney's fees¹ and the corresponding explo-

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1. See, e.g., Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1982); Privacy Act, 5 U.S.C. § 552a(g)(3)(B) (1982); Toxic Substances Control Act, 15 U.S.C. § 2618(d) (1982); Equal Access to Justice Act, 28 U.S.C. § 2412 (1982 & Supp. V 1987); Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (Supp. V 1987); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1982); Clean Air Act, 42 U.S.C. §§ 7604(d), 7607(f) (1982). For a comprehensive survey of attorney's fees statutes waiving the sovereign immunity of the federal government, see J. BENNETT, WINNING ATTORNEY'S FEES FROM THE U.S. GOVERNMENT (1988).

The availability of attorney's fees against the federal government, on an interim basis or otherwise, for violation of court rules is beyond the scope of this Article. For a comprehensive treatment of this topic, see 1 M. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES § 9.03[3], at 9-48 to 9-57 (1989) (interim attorney's fees under the Federal Rules of Civil Procedure). Congress has expressly waived the sovereign immunity of the government for awards of fees as sanctions for failure to cooperate in discovery under Federal Rule of Civil Procedure 37. Equal Access to Justice Act, Pub. L. No. 96-481, § 205(a), 94 Stat. 2325, 2330 (1980). A few courts have held that sanctions

sion of attorney's fees litigation, federal courts are being called upon with increasing frequency to consider whether the United States and its agencies may be held liable for fees on an interim or interlocutory basis.² Even against private defendants, awards of interim attorney's fees remain relatively uncommon.³ Courts have been especially reluctant to award fees against the federal government and to charge the public Treasury for such an award before the litigation is complete and the plaintiff's entitlement to payment is certain. But a few courts recently have published decisions allowing interim fees against the government, so this trickle could become a stream.

The advantage of an interim award of attorney's fees to parties in litigation with the government, particularly when the litigation has become protracted, is unmistakable. The federal government, however, traditionally has been held immune from any requirement that an award or judgment for fees or damages be paid prior to appellate review. In an era of fiscal restraint, the government's ability to resist interim awards and to postpone payment of awards until its liability has been confirmed on appeal takes on added importance.

This conflict of interest between private litigants, eager to obtain an immediate infusion of cash resources as litigation with the government drags on, and the government, desiring to avoid payments until it has exercised its right to appellate review, has played itself out in several recent cases.⁴ A few federal courts, sympathetic to the private litigant pleading hardship, have permitted interim fee awards against the United States and have stretched statutes waiving the sovereign immunity of the government to cover this exceptional remedy.⁵ Indeed, some courts have been willing to overlook or avoid—one might say "evade"—express statutory provisions precluding payments of awards before the government has exhausted its rights to appellate review.⁶

for filing frivolous or improper pleadings under Federal Rule of Civil Procedure 11 may be imposed upon the government. *See, e.g.,* *United States v. Gavilan Joint Community College Dist.*, 849 F.2d 1246, 1250-51 (9th Cir. 1988) (dictum); *Adamson v. Bowen*, 855 F.2d 668, 670-72 (10th Cir. 1988) (Equal Access to Justice Act waives sovereign immunity of the United States for rule 11 sanctions).

2. *See, e.g.,* *Rosenfeld v. United States*, 859 F.2d 717 (9th Cir. 1988) (approving interim fee award under Freedom of Information Act); *Haitian Refugee Center v. Meese*, 791 F.2d 1489 (11th Cir.), *as modified on reh'g*, 804 F.2d 1573 (11th Cir. 1986) (per curiam) (upholding interim fee award under Equal Access to Justice Act); *Allen v. Department of Defense*, 713 F. Supp. 7 (D.D.C. 1989) (granting interim fee award under Freedom of Information Act); *Brown v. Marsh*, 707 F. Supp. 21 (D.D.C. 1989) (granting interim fee award under Title VII of the Civil Rights Act of 1964); *McKenzie v. Kennickell*, 669 F. Supp. 529 (D.D.C. 1987) (same); *Jurgens v. EEOC*, 660 F. Supp. 1097 (N.D. Tex. 1987) (same); *Powell v. Department of Justice*, 569 F. Supp. 1192 (N.D. Cal. 1983) (granting interim fee award under the Freedom of Information Act).

3. *Green, From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207, 269 n.332 (1984).

4. *See, e.g.,* *Rosenfeld v. United States*, 859 F.2d 717 (9th Cir. 1988); *Allen v. Department of Defense*, 713 F. Supp. 7 (D.D.C. 1989); *Brown v. Marsh*, 707 F. Supp. 21 (D.D.C. 1989); *McKenzie v. Kennickell*, 669 F. Supp. 529 (D.D.C. 1987); *Jurgens v. EEOC*, 660 F. Supp. 1097 (N.D. Tex. 1987); *Powell v. Department of Justice*, 569 F. Supp. 1192 (N.D. Cal. 1983).

5. *See, e.g.,* *Rosenfeld v. United States*, 859 F.2d 717 (9th Cir. 1988); *Allen v. Department of Defense*, 713 F. Supp. 7 (D.D.C. 1989); *Brown v. Marsh*, 707 F. Supp. 21 (D.D.C. 1989); *McKenzie v. Kennickell*, 669 F. Supp. 529 (D.D.C. 1987); *Jurgens v. EEOC*, 660 F. Supp. 1097 (N.D. Tex. 1987); *Powell v. Department of Justice*, 569 F. Supp. 1192 (N.D. Cal. 1983).

6. *See, e.g.,* *Rosenfeld v. United States*, 859 F.2d 717 (9th Cir. 1988); *Allen v. Department of Defense*, 713 F. Supp. 7 (D.D.C. 1989); *McKenzie v. Kennickell*, 669 F. Supp. 529 (D.D.C. 1987); *Jurgens v. EEOC*, 660 F. Supp. 1097 (N.D. Tex. 1987).

In view of the well-established principle that courts must construe waivers of sovereign immunity strictly in favor of the government,⁷ the willingness of these courts to view attorney's fee statutes expansively is questionable. When the attorney's fee award is payable from the United States' permanent "Judgment Fund,"⁸ rather than from agency funds, express statutory limitations plainly bar payment of nonfinal interim attorney's fee awards.⁹ When an attorney's fee award is properly payable from separate agency funds, however, rather than directly from the public Treasury, there is a stronger basis for inferring the authority to award interim fees. When legally available, such awards still should be reserved for exceptional circumstances.

Even when statutes or principles of sovereign immunity do not bar interim fee awards, a strong presumption disfavoring interim awards against the government should prevail. Petitions for awards of attorney's fees on an interlocutory basis ask the court to make an early judgment about whether the petitioning party has achieved sufficient success in the ongoing litigation to be fairly regarded as actually having prevailed, even though final judgment has not yet been rendered. If a court grants interim fees prematurely, the government could end up subsidizing the litigation of the ultimately losing party. This is a particular concern if the party is impecunious and thus unlikely to be able to repay the award later. Accordingly, interim awards against the government are justified only when the fee applicant has definitively prevailed on the merits of an important claim in the case *and* is suffering such substantial hardship from the protracted nature of the proceedings that the litigation will have to be abandoned absent an immediate award of fees.

This Article explores the question whether a court may order interim awards of attorney's fees against the federal government in the significantly different contexts of statutes that make fee awards payable by the United States from the so-called Judgment Fund,¹⁰ and other statutes that provide for payment of fee awards from agency funds.¹¹ The Article then suggests fairly strict standards to guide court discretion in deciding whether particular circumstances warrant an interim award of fees against the government.¹² The overriding theme of this Article is that courts should move cautiously unless and until Congress returns to this area of the law and establishes explicit statutory standards

7. Waivers of sovereign immunity are construed strictly and narrowly. *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983). In order for claims to be brought against and judgments to be paid by the United States, there must be an explicit waiver of sovereign immunity. *Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981); *United States v. Testan*, 424 U.S. 392, 399 (1976). Because Congress alone may waive the sovereign immunity of the United States, the terms of such waivers define the jurisdiction of the courts to entertain an action against the government. *Block v. North Dakota*, 461 U.S. 273, 287 (1983); *Testan*, 424 U.S. at 399.

8. 31 U.S.C. § 1304 (1982). For a discussion of the Judgment Fund, a permanent appropriation established by Congress for payment of judgments against the United States, see *infra* notes 14-29 and accompanying text.

9. 28 U.S.C. § 2414 (1982).

10. See *infra* notes 14-131 and accompanying text.

11. See *infra* notes 132-231 and accompanying text.

12. See *infra* notes 232-310 and accompanying text.

for interim attorney's fees. Courts must remember that only Congress has the constitutional power to authorize disbursements from public funds.¹³

I. AWARDS OF INTERIM FEES PAYABLE BY THE UNITED STATES

A. *The Judgment Fund*

Prior to 1956,¹⁴ judgments awarded against the United States generally could not be paid until Congress enacted specific appropriations legislation for that purpose.¹⁵ As a consequence, payments of money judgments were frequently long delayed.¹⁶ With the enactment of the Judgment Fund statutes, 31 U.S.C. § 1304¹⁷ and 28 U.S.C. § 2414,¹⁸ Congress established a procedure to permit timely payment of money awards *after* the judgment became final upon the exhaustion of appellate rights.¹⁹

Subsection 1304(a) of Title 31, United States Code, which establishes the Judgment Fund, provides a general waiver of immunity for payment of money judgments and awards rendered against the United States and its agencies, when "payment is not otherwise provided for" by another statute.²⁰ The Judgment Fund is a permanent and continuing appropriation, separate and distinct from any agency operating appropriations. It provides the sole source for payment of

13. U.S. CONST. art. I, § 9, cl. 7.

14. In 1956, Congress established the permanent appropriation known as the "Judgment Fund." Supplemental Appropriation Act of 1957, Pub. L. No. 814, 70 Stat. 678, 694 (codified at 31 U.S.C. § 1304 (1982)).

15. See S. REP. NO. 733, 87th Cong., 1st Sess., reprinted in 1961 U.S. CODE CONG. & ADMIN. NEWS 2439, 2439, 2441; *In re S.S. Silberblatt, Inc. v. East Harlem Pilot Block—Payment of Judgment*, 62 Comp. Gen. 12, 16 (1982).

Actually, on rare occasions, Congress refused to appropriate funds for a particular judgment "leaving the judgment creditor with a valid entitlement against the United States but no funds legally available to satisfy it." U.S. GENERAL ACCOUNTING OFFICE, OFFICE OF GENERAL COUNSEL, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 12-3 (1st ed. 1982) [hereinafter PRINCIPLES OF FEDERAL APPROPRIATIONS LAW] (the General Accounting Office is currently preparing a second edition of this manual); see, e.g., Act of February 2, 1932, Pub. L. No. 5, 47 Stat. 15, 28 (expressly excepting certain judgments from the appropriation for payment of Court of Claims judgments); see also *Glidden Co. v. Zdanok*, 370 U.S. 530, 570 (1962) (plurality opinion of Harlan, J., announcing judgment of the Court) (citing a study finding only 15 instances in 70-year period in which Congress had refused to appropriate funds for a judgment).

16. See S. REP. NO. 733, 87th Cong., 1st Sess., reprinted in 1961 U.S. CODE CONG. & ADMIN. NEWS 2439, 2439, 2441; *S.S. Silberblatt, Inc.*, 62 Comp. Gen. at 16.

17. Act of July 27, 1956, Pub. L. No. 84-814, §§ 1301-1302, 70 Stat. 678, 694-95 (codified as amended at 31 U.S.C. § 1304 (1982)).

18. Act of June 25, 1948, Pub. L. No. 80-773, §§ 2414, 62 Stat. 869, 974 (codified as amended at 28 U.S.C. § 2414 (1982)).

19. As originally enacted, the Judgment Fund was only available for the payment of judgments not in excess of \$100,000. Supplemental Appropriation Act of 1957, Pub. L. No. 814, 70 Stat. 678, 694 (originally codified at 31 U.S.C. § 724a (1976)) (codified as amended, 31 U.S.C. § 1304 (1982)); see PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 15, at 12-4 to 12-5. The statute was amended to eliminate any ceiling on payments in 1977. Supplemental Appropriations Act of 1977, Pub. L. No. 95-26, 91 Stat. 61, 96 (1977) (codified at 31 U.S.C. § 1304 (1982)).

20. Subsection 1304(a) reads in pertinent part:

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 Comptroller General; and

court awards and judgments against the United States and its agencies, except when another statute designates a different payment source that is legally available to pay judgments.²¹ Because appropriations of agency funds rarely provide for use of such funds in the payment of judgments, as a general rule, awards and judgments are payable only from the Judgment Fund.²²

Subsection 1304(a) authorizes payment from the Judgment Fund only on the terms and conditions set forth in that provision. Section 2414 of Title 28, United States Code, referred to in Subsection 1304(a)(3)(A), establishes one of the primary conditions on payments from the Judgment Fund.²³ Section 2414 provides that "payment of *final judgments* rendered by a district court . . . shall be made on settlement by the General Accounting Office."²⁴ The statute deems a judgment to be final "[w]henever the Attorney General determines that no

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- (3) the judgment, award, or settlement is payable
(A) under section 2414 . . . of title 28

31 U.S.C. § 1304(a) (1982).

21. Subsection 1304(a)(1) excepts an award or judgment from the Judgment Fund as the sole source of payment only if "payment is . . . otherwise provided for." *Id.* § 1304(a)(1) (emphasis added). The explicit use of the term "payment" makes clear that the subsection refers to other statutes that provide for actual "payment" of awards or judgments from certain appropriations, and not merely to substantive waivers of sovereign immunity which make the government liable for monetary awards or judgments. If the mere creation by statute of substantive liability on the federal government's part served also to except judgments under such a statute from the finality requirement of the Judgment Fund statutes, the Judgment Fund statutes obviously would be rendered nugatory. In fact, it is the rare statute that both waives the immunity of the federal government against monetary liability *and* also provides for the actual payment of money judgments from designated appropriations. For discussion of one of those rare statutes, see *infra* notes 165-231 and accompanying text. Subsection 1304(a)(1) is thus a codification of the longstanding rule that, in the absence of a specific statutory provision for payment of judgments, judgments against the government could not be paid from agency appropriations. 34 Comp. Gen. 221, 224 (1954); 15 Comp. Gen. 933, 934-35 (1936).

22. If the named defendant in a lawsuit is a federal agency or federal officer rather than the United States, this fact does not determine whether an attorney's fee award is charged against the United States Treasury (*i.e.*, payable from the Judgment Fund) or against agency funds. "The nature of the judgment and not the caption of the case is the controlling factor" for determining whether an award or judgment is to be paid from the Judgment Fund. PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 15, at 12-8. For example, under both the Freedom of Information Act and Title VII of the Civil Rights Act of 1964, the named defendant invariably is an agency or the head of an agency. The attorney's fees provisions in both statutes, however, provide for payment of the award by the United States. 5 U.S.C. § 552(a)(4)(E) (1982) (Freedom of Information Act); 42 U.S.C. § 2000e-5(k) (1982) (Title VII); see *infra* notes 44-127 and accompanying text for discussion of these two fee-shifting statutes. Likewise, in environmental litigation against federal agencies, including citizen suits to compel the Environmental Protection Agency to take certain action, awards of attorney's fees are payable from the Judgment Fund, not from agency funds. PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 15, at 12-17 (Comptroller General has ruled that fees awarded against the Environmental Protection Agency in citizen suits under the Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (1982 & Supp. V 1987), are payable from the Judgment Fund).

23. Section 2414 reads, in pertinent part, as follows:

Except as provided by the Contract Disputes Act of 1978, payment of final judgments rendered by a district court or the Court of International Trade against the United States shall be made on settlements by the General Accounting Office. . . .

Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final.

28 U.S.C. § 2414 (1982).

24. *Id.* (emphasis added).

appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same."²⁵ In addition, Subsection 1304(a)(2) requires that the Comptroller General of the General Accounting Office certify the award for payment. The Comptroller General may not make this certification properly until the underlying judgment is final and no longer subject to modification upon appeal. In an official ruling, the Comptroller General²⁶ has explained:

In order for a judgment to be paid from the permanent appropriation, it must be certified by the Comptroller General to the Treasury Department for payment. This cannot be done until we have been furnished the amount to be certified for payment, with the assurance that it is not subject to further litigation.²⁷

In sum, Sections 1304 and 2414 permit payment of a monetary award against the United States only after the Attorney General has notified the Comptroller General that the government has exhausted the appeal process or does not contemplate further appeal²⁸ and the Comptroller General has certified the

25. *Id.*; see also 7 AM. JUR. 2D *Attorney General* § 31, at 40 & n.9 (1980) (whenever the Attorney General has determined not to take an appeal or seek further review, a judgment is deemed final under Section 2414); cf. *McDonald v. Schweiker*, 726 F.2d 311, 313 (7th Cir. 1983) (for purposes of 46 U.S.C. § 784 (1982), defining the circumstances under which the United States will pay admiralty claims, the term "final judgment" "must mean final after all appeals, for one cannot imagine the government being willing to pay before then").

Section 2517 of Title 28 establishes a similar finality requirement for the payment of judgments by the United States Claims Court from the Judgment Fund. 28 U.S.C. § 2517 (1982). Section 2517 does not contain the same language providing for certification by the Attorney General that no further review of the judgment will be sought. This section does, however, expressly limit payment to "every final judgment," which has been understood to mean final after all appeals in the same manner as Section 2414. *Id.* (emphasis added); cf. *McDonald*, 726 F.2d at 313.

26. Because the Comptroller General is designated by the statute to certify payment to the Treasury, the published opinions of the Comptroller General construing his certification powers are entitled to the same deference given to an administrative agency's regulations implementing a statute. Accordingly, judicial review is narrow and deferential. *Young v. Community Nutrition Inst.*, 476 U.S. 974, 980-81 (1986). Courts must defer to the Comptroller General's opinion if it "is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). See *infra* notes 122-23 and accompanying text for discussion of the deference owed to the Comptroller General's opinions on payment of attorney's fee awards.

27. *In re Payment of Judgments Under Back Pay Act and Title VII of Civil Rights Act*, 58 Comp. Gen. 311, 314 (1979) (citations omitted); see also *In re Attorney Fees—Judicial Awards Under Equal Access to Justice Act*, 63 Comp. Gen. 260 (1984) (permanent indefinite appropriation for judgments under 31 U.S.C. § 1304 is available to pay attorney's fees awarded under subsection (b) of the Equal Access to Justice Act, 28 U.S.C. § 2412(b) (Supp. V 1987), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1982), and under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1982), provided, *inter alia*, the award is final). See generally PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 15, at 12-25 to 12-28 (discussing finality requirement; the forthcoming second edition of this manual will discuss the finality requirement at section D of chapter 13).

28. Before the Judgment Fund was created to pay awards and judgments against the United States, Congress traditionally included specific finality language in its appropriations for the payment of judgments. See, e.g., Supplemental Appropriations Act of 1977, Pub. L. No. 95-26, 91 Stat. 61, 96 (1977) ("no judgment herein appropriated for shall be paid until it shall become final and conclusive against the United States by failure of the parties to appeal or otherwise"); Act of February 2, 1932, Pub. L. No. 5, 47 Stat. 15, 28 ("None of the judgments contained under this caption shall be paid until the right of appeal shall have expired except such as have become final and conclusive against the United States by failure of the parties to appeal or otherwise."); Act of March

award's finality.²⁹

The manifest purpose of these statutes is to protect the public Treasury. Congress has determined that the United States ought not to pay unreviewed awards by district courts when the United States contemplates appellate action, because a successful appeal will render such payments unjustified.³⁰ Moreover, the finality requirement protects the United States from expending additional resources to recoup monies that a court might improperly direct the government to pay at an interlocutory stage.

Because courts have understood almost intuitively that they may not compel the United States to make payment on money judgments until litigation is concluded, few courts have found occasion to address the limitations of Sections 1304 and 2414. However, in *Barnes v. United States*,³¹ the United States Court of Appeals for the Third Circuit recognized the statutes' requirement that the litigation reach final judgment before any monetary judgment can be paid. In that case, the government appealed from a judgment in excess of \$1.5 million entered in favor of plaintiff, contesting its liability as to approximately \$665,000 in damages.³² Although the government conceded its liability for \$900,000 in damages, plaintiff was unable to obtain any payment of this sum because of the finality requirement of Section 2414.³³ In order to avoid a lengthy delay in the payment of this uncontested portion of the judgment, the Third Circuit granted plaintiff's motion for partial summary affirmance of the *undisputed* portion of damages.³⁴ In that way, the court could enter final judgment as to the undisputed amount and satisfy Section 2414.³⁵

4, 1925, Pub. L. No. 631, 43 Stat. 1313, 1347 ("None of the judgments contained herein shall be paid until the right of appeal shall have expired.").

29. J. STEADMAN, D. SCHWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT 115 (1983) ("The GAO is not authorized to certify a judgment until it is final, that is, when the appellate process is completed."); see also *Keasler v. United States*, 585 F. Supp. 825, 836 (E.D. Ark. 1984) (for purposes of Sections 2414 and 1304, final judgment "does not occur until the appellate court has acted"), *aff'd*, 766 F.2d 1227, 1230 (8th Cir. 1985); *Citizens Bank & Trust Co. v. United States*, 240 F.2d 863, 864 n.3 (D.C. Cir. 1956) (Danaher, J., concurring) (decision was final under 28 U.S.C. § 2414 because the Attorney General had certified no appeal would be taken), *cert. denied*, 355 U.S. 825 (1957).

30. PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 15, at 12-25 ("the purpose of the finality requirement is to protect the Government 'against loss by premature payment of a judgment which might later through appeal be amended or reversed'") (citing Comp. Gen. Op. No. B-129227, unpublished decision (Dec. 22, 1960)). The same principle is reflected in Federal Rule of Civil Procedure 62(e), which provides for an automatic stay of monetary awards against the United States and its officers and agencies when an appeal is noted. This rule protects the government from making an immediate payment of any judgment until it has been reviewed on appeal.

31. 678 F.2d 10, 11 (3d Cir. 1982).

32. *Id.* at 11.

33. *Id.*

34. *Id.* at 11-13.

35. *Id.* at 11. In *Parker v. Lewis*, 670 F.2d 249 (D.C. Cir. 1981), the court entered an order to the same effect, although the court did not mention the express finality limitations of the Judgment Fund statutes. In *Parker*, the government had taken an appeal challenging the amount of an award of attorney's fees in a Title VII employment discrimination suit, thereby obtaining a stay as to payment of the entire award under Federal Rule of Civil Procedure 62(d). *Id.* at 250 & n.1. To permit immediate payment of the uncontested amount of the award, the court entered summary affirmance as to that amount. *Id.* at 249-50.

B. The Judgment Fund Finality Requirement And Interim Fees

Attorney's fees generally cannot be paid on an interim basis because payments from the Judgment Fund may not be made until an award or judgment is final. Sections 1304 and 2414 prohibit the General Accounting Office from settling an award and certifying payment to the Treasury until the award is no longer subject to appellate review.³⁶ Interim fee awards by their very nature will be subject to eventual appellate review, usually after final judgment in the district court; therefore, the strictures of Sections 1304 and 2414 cannot be satisfied. Moreover, the validity of an attorney's fee award is almost invariably contingent upon the validity of the underlying court ruling on the merits of the primary issues in the case. Until the merits of the case have been finally resolved as well—that is, until the winner's victory has been vindicated on appeal or the time for an appeal on the merits has passed—the entitlement of any litigant to fees necessarily remains uncertain. Thus, a fee award cannot be said to be final within the meaning of the Judgment Fund statutes until there has been an opportunity for appeal on both the underlying merits and the award itself. Because there is no statutory authority permitting the payment of a monetary award that the United States intends to appeal, a judicial order requiring immediate payment of such an award would be unlawful.

Of course, in a literal sense, the Judgment Fund finality requirement does not actually bar an "award" of interim fees; it simply prevents the payment of any such award. An interim fee award is of little practical use, however, if it cannot be paid until the conclusion of the litigation. Thus, as a result of the limitations on payment from the Judgment Fund, interim fee awards are not permissible in the usual case.

One important exception does exist, although it applies only when an award of fees is not disputed. A district court may entertain an application for interim fees and then allow the United States to decide whether it contests the request. If the United States is willing to concede the legitimacy of an interim award, and the Attorney General is willing to certify that the government will not seek appellate review of such an award in the future, the award can properly be paid from the Judgment Fund. The finality limitation in Sections 1304 and 2414 turns on the government's desire to seek eventual appellate review, not on the actual stage of the litigation.³⁷

As an example, in *Young v. Pierce*,³⁸ in which plaintiff had sought an award of fees under 28 U.S.C. § 2412(b),³⁹ the district court correctly held that "while

36. See *supra* notes 23-29 and accompanying text.

37. See generally Comp. Gen. Op. No. B-208999 (Sept. 13, 1982) (LEXIS, Genfed library, ComGen file) (an interim attorney's fee award may be paid, regardless of the status of the underlying litigation, provided the fee award itself is "final" because the Attorney General has determined not to appeal the award).

38. 822 F.2d 1376 (5th Cir. 1987).

39. Subsection 2412(b) is part of the Equal Access to Justice Act (EAJA). See 28 U.S.C. § 2412(b) (Supp. V 1987). Most awards under the EAJA are made pursuant to Subsection 2412(d), 28 U.S.C. § 2412(d) (Supp. V 1987), and are paid out of agency funds. Subsection 2412(b) awards are paid from the Judgment Fund, unless the award is made for reasons of bad faith. 28 U.S.C. § 2412(c) (1982). See *infra* notes 139-64 and accompanying text.

the disbursement statute [31 U.S.C. § 1304(a)] does prevent payment of fees prior to the entry of final judgment, it does not define final judgment as the resolution of all issues in a civil action."⁴⁰ Because the court in that case had certified the fee award as a final judgment under Federal Rule of Civil Procedure 54(b), allowing an immediate appeal, and because the still pending remedy phase of the litigation would not affect the award's validity,⁴¹ the finality requirement of Sections 1304 and 2414 was satisfied. Moreover, the government in *Young* had expressly conceded that an attorney's fee award was appropriate and thus did not raise any challenge to the propriety of such an award on appeal.⁴²

Cases like *Young*, although not rare, are still not typical. In the ordinary case, the distinction between finality within the meaning of the Judgment Fund statutes and final judgment in the district court followed by affirmance in the court of appeals may be merely theoretical. Because an appeal usually will lie only from a final judgment in the district court,⁴³ and the government is unlikely to concede interim liability in the ordinary case, the finality requirement in the Judgment Fund statutes is difficult to satisfy when district court litigation is still in an interlocutory posture. In the ordinary case, the conditions on payment from the Judgment Fund will be met only after the litigation in the district court has been concluded and the government has either taken an unsuccessful appeal or has determined not to seek appellate review.

C. Interim Fee Awards Under Title VII of the Civil Rights Act of 1964

Three federal district courts have permitted interim attorney's fee awards against the United States in litigation under Title VII of the Civil Rights Act of 1964,⁴⁴ payable from the Judgment Fund, notwithstanding the express finality requirement of Sections 1304 and 2414. In *Brown v. Marsh*,⁴⁵ *McKenzie v. Kennickell*,⁴⁶ and *Jurgens v. EEOC*,⁴⁷ these courts ruled that the Title VII attorney's fee provision, 42 U.S.C. § 2000e-5(k)⁴⁸—although it contains neither language concerning the actual payment of fee awards⁴⁹ nor any statement that fees are available before final judgment—supersedes the express prohibition in Section 2414 against the payment by the United States of nonfinal money judgments.

These three courts rested their decisions on the language in Subsection 2000e-5(k), which states that the United States bears the same liability as a "pri-

40. *Young*, 822 F.2d at 1377 (describing district court ruling).

41. *Id.*

42. *Id.* The government did, however, appeal the method of calculation of the attorney's fee award. *Id.*

43. See 28 U.S.C. § 1291 (1982). This Article suggests, however, that interlocutory appeals of interim fee awards should be more readily available. See *infra* notes 283-310 and accompanying text.

44. 42 U.S.C. § 2000e (1982 & Supp. V 1987).

45. 707 F. Supp. 21, 23 (D.D.C. 1989).

46. 669 F. Supp. 529, 536 (D.D.C. 1987).

47. 660 F. Supp. 1097, 1103 (N.D. Tex. 1987).

48. 42 U.S.C. § 2000e-5(k) (1982).

49. See *supra* note 21 and accompanying text (an award is excepted from the Judgment Fund and the attendant finality requirement only when made under a statute that expressly provides for payment of the award from another appropriation).

vate person" for the purposes of awarding attorney's fees.⁵⁰ Because an award of interim attorney's fees would be available against a private party under Title VII,⁵¹ these courts concluded that Subsection 2000e-5(k) mandates that such an award must be available against the federal government as well.⁵² To the extent that Sections 1304 and 2414 conflicted with that conclusion, these courts held that the more specific Title VII statute prevailed.⁵³

These three decisions are almost certainly wrong. Although one court acknowledged that waivers of sovereign immunity are to be strictly construed,⁵⁴ all three nevertheless broadly read the private person provision in Subsection 2000e-5(k) as a waiver of the government's historical immunity from being required to pay awards before it exhausts its rights to appeal. Under the mandatory strict construction, the courts should have read the private person language as simply describing the nature of the relief available against the government—that is, describing the manner in which entitlement to attorney's fees is to be determined—rather than affecting the timing or the payment of such awards.

The general rule that statutes are to be construed to avoid conflict if possible also compels this narrower reading. These three courts assumed that the Title VII fees provision conflicts with Sections 1304 and 2414. To the contrary, the Title VII statute simply provides for a certain type of relief—awards of attorney's fees—and the Judgment Fund statutes serve the separate and compatible purpose of establishing the manner and timing of payment of awards.⁵⁵

In addition, these three decisions do not square with the United States Supreme Court's ruling in *Library of Congress v. Shaw*⁵⁶ that the federal government is not liable for an award of interest upon an attorney's fee award under Title VII.⁵⁷ The plaintiff in *Shaw*, like the plaintiffs in *Brown*, *McKenzie*, and

50. Subsection 2000e-5(k) provides:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k) (1982).

51. Applying the same principles that generally make interim awards permissible against private parties, courts have had little difficulty concluding that private parties may be liable under appropriate circumstances for interim awards of attorney's fees under Title VII. See, e.g., *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 358-59 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978); *Nicodemus v. Chrysler Corp.-Toledo Machining Plant*, 445 F. Supp. 559, 560 (N.D. Ohio 1977). Of course, in such circumstances, no principles of sovereign immunity are involved, nor do statutes preclude payment by private parties of nonfinal awards or judgments.

52. *Brown*, 707 F. Supp. at 23; *McKenzie*, 669 F. Supp. at 534; *Jurgens*, 660 F. Supp. at 1099-1100.

53. *Brown*, 707 F. Supp. at 23; *McKenzie*, 669 F. Supp. at 534; *Jurgens*, 660 F. Supp. at 1102.

54. *Jurgens*, 660 F. Supp. at 1101 (agreeing that waivers of sovereign immunity are "strictly construed").

55. For discussion of the similar suggestion that the attorney's fee provision in the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1982), conflicts with and supersedes the Judgment Fund statutes, see *infra* notes 112-21 and accompanying text.

56. 478 U.S. 310 (1986).

57. *Id.* at 314 ("In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award.").

Jurgens, relied on a broad reading of the private person language in Subsection 2000e-5(k).⁵⁸ The Supreme Court's decision in *Shaw* rested in part on the conclusion that interest is a separate element of damages rather than a part of the fees and costs authorized by Subsection 2000e-5(k).⁵⁹ The Court, however, also justified its ruling by observing that "[o]ther statutes placing the United States in the same position as a private party also have been read narrowly to preserve certain immunities that the United States has enjoyed historically."⁶⁰ One of those historical and central immunities is the immunity from having to pay money awards before final judgment, as preserved in Sections 1304 and 2414.

The facts of both the *McKenzie* and *Jurgens* cases indicate that the fee awards there likely satisfied—or nearly satisfied—the finality requirement of the Judgment Fund statutes. Both cases dealt with largely undisputed claims that substantially, if not technically, could be considered final for purposes of Sections 1304 and 2414. In *Jurgens*, ninety-two percent of the Title VII claimants had already accepted the government's offers of settlement, thereby finalizing those claims.⁶¹ In addition, the government had "certified" that the court's fee award was "warranted."⁶² In *McKenzie*, the government had stipulated to a final order resolving all substantive issues and then openly conceded that an attorney's fee award was warranted.⁶³ Indeed, the government reported to the district court that the plaintiffs were entitled to \$200,000 as an irreducible minimum amount.⁶⁴ Moreover, the *McKenzie* court recognized that if the govern-

58. *Id.* at 317-19.

59. *Id.* at 321. These three district courts distinguished the *Shaw* decision on this basis. *Brown*, 707 F. Supp. at 23; *McKenzie*, 669 F. Supp. at 535; *Jurgens*, 660 F. Supp. at 1102. In a very recent decision, the Supreme Court appeared to retreat somewhat from this interest-as-damages rationale for *Shaw*, indicating that the primary basis for the *Shaw* ruling was the special and historical immunity of the federal government from liability for interest. See *Missouri v. Jenkins*, 109 S. Ct. 2463, 2468 n.3 (1989).

60. *Shaw*, 478 U.S. at 319-20.

61. *Jurgens*, 660 F. Supp. at 1099, 1103 n.5.

62. *Id.* at 1099. Moreover, following the district court's decision in *Jurgens*, the Department of Justice decided against appeal to the Fifth Circuit and certified that decision to the General Accounting Office, thereby permitting immediate payment in full accordance with Sections 1304 and 2414. The Solicitor General officially determined against an appeal on February 9, 1987, thereby allowing proper payment of the award in accordance with the district court's order requiring payment by February 10, 1987. *Id.* at 1103. The Solicitor General's determination against appeal in *Jurgens* is a matter of record at the Department of Justice.

63. *McKenzie*, 669 F. Supp. at 530.

64. *Id.* at 531. Thus, the *McKenzie* court's interim award based on the undisputed amount of \$200,000 is very similar to the separate judgment issued by the Third Circuit in *Barnes v. United States*, 678 F.2d 10, 13 (3d Cir. 1982), to permit immediate payment of the undisputed amount of an award, discussed *supra* notes 31-35 and accompanying text. See also *Trout v. Lehman*, 702 F. Supp. 3, 3-4 (D.D.C. 1988) (following *McKenzie*, court ordered interim payment of what it deemed an "irreducible minimum amount" of fees in Title VII case), *appeal dismissed sub nom.* *Trout v. Ball*, No. 88-5264, unpublished order (D.C. Cir. Mar. 30, 1989), *petition for rehearing granted*, No. 88-5264, unpublished order (D.C. Cir. Aug. 24, 1989), *petition for a writ of mandamus pending sub nom.* *In re Ball*, No. 89-5137 (D.C. Cir. filed May 15, 1989); *King v. Palmer*, 641 F. Supp. 186, 189 (D.D.C. 1986) (granting interim awards against District of Columbia in Title VII case limited to "the core of attorneys' fees and costs that are not seriously contested").

A district court, however, may not create a final fee award by ruling that a certain amount of interim fees is an irreducible minimum or is undisputed when the government *does* contest such an award. Certainly, the court should be able to force the government's hand by ordering the government to make specific objections to the attorney's fee petitions it opposes and by not allowing the government to sit silently and refuse to respond. In the *Trout* case, for example, the government had

ment filed a notice of appeal, it could invoke Federal Rule of Civil Procedure 62(d) to stay the award until after its appellate rights were exhausted.⁶⁵ For these reasons, *McKenzie* and *Jurgens* cannot be viewed as substantial authority for the proposition that interim attorney's fee awards are available under Title VII against the United States.

The *Brown* decision, on the other hand, made an award in a case that was far from final resolution. In that case, the government unequivocally opposed an award of any amount of fees.⁶⁶ Although the court suggested that the government did not contend that plaintiff would "not ultimately be entitled to an award of attorney's fees and costs of some kind,"⁶⁷ actually, the government expressly reserved the possibility of an appeal on the underlying merits.⁶⁸ Moreover, in contrast with *McKenzie* and *Jurgens*,⁶⁹ the *Brown* court made no pretense that there was an irreducible minimum amount of fees that could be awarded without dispute. Thus, *Brown* is the only decision forthrightly asserting that courts have the authority to order the government to pay interim attorney's fee awards under Title VII when the award is not final or uncontested.⁷⁰

D. Interim Fee Awards Under The Freedom Of Information Act

Recently, a growing number of courts also have been asked to pass upon petitions for interim attorney's fee awards against the United States in Freedom of Information Act (FOIA)⁷¹ litigation.⁷² This type of litigation can be ex-

not agreed to any irreducible amount of fees and was endeavoring to take discovery concerning the fee application. At the time the court issued its order awarding interim fees, there was a pending motion by the government to compel responses to that discovery. Petition for a Writ of Mandamus at 5-6, 19-20, *In re Ball*, No. 89-5137 (D.C. Cir. filed May 15, 1989); Appellants' Opposition to Appellees' Motion for Summary Affirmance at 2-6, *Trout v. Ball*, No. 88-5264 (D.C. Cir. Mar. 30, 1989); Appellants' Response to Order to Show Cause at 3-4, *Trout v. Ball* (D.C. Cir. Mar. 30, 1989).

65. *McKenzie*, 669 F. Supp. at 535 (citing FED. R. Civ. P. 62(d)).

66. *Brown*, 707 F. Supp. at 22, 24.

67. *Id.* at 22.

68. *Id.* at 23.

69. See *McKenzie*, 669 F. Supp. at 530-31 (government conceded an interim award was warranted and suggested an irreducible minimum amount); *Jurgens*, 660 F. Supp. at 1099 (government conceded that an award was warranted). The *Brown* decision also contrasts with the decision in *Trout v. Lehman*, 702 F. Supp. 3 (D.D.C. 1988) (discussed in detail *supra* note 64), *appeal dismissed sub nom. Trout v. Ball*, No. 88-5264, unpublished order (D.C. Cir. Mar. 30, 1989), *petition for rehearing granted*, No. 88-5264, unpublished order (D.C. Cir. Aug. 24, 1989), *petition for a writ of mandamus pending sub nom. In re Ball*, No. 89-5137 (D.C. Cir. filed May 15, 1989). In *Trout* the court limited the interim award of fees to a "minimum irreducible amount" that the court characterized as "undisputed." *Trout*, 702 F. Supp. at 3.

70. In *Grubbs v. Butz*, 548 F.2d 973 (D.C. Cir. 1976), the District of Columbia Circuit, after concluding that a Title VII plaintiff was not entitled to attorney's fees because she was not yet a prevailing party, suggested that an interim fee award might be appropriate once discrimination had been established. *Id.* at 976-77. This comment by the court is entitled to little weight both because it is dictum and because the court did not consider the stringent standards for interpreting a waiver of sovereign immunity. In another case, the District of Columbia Circuit implicitly ruled that a district court cannot order the government to pay a contested award of fees under Title VII before appellate review. See *Parker v. Lewis*, 670 F.2d 249 (D.C. Cir. 1981). In *Parker*, the court entered summary affirmance of the uncontested portion of an attorney's fee award so that this portion could be paid over immediately. *Id.* at 249-50.

71. Freedom of Information Act, 5 U.S.C. § 552 (1982 & Supp. V 1987).

72. See, e.g., *Rosenfeld v. United States*, 859 F.2d 717 (9th Cir. 1988); *Allen v. Department of Defense*, 713 F. Supp. 7 (D.D.C. 1989); *Irons v. FBI*, No. 82-1143-G (D. Mass. June 26, 1987).

tremely complex and slow-moving, because it sometimes requires painstaking *in camera* review by the trial judge of thousands of pages of documents to determine whether statutory exemptions from disclosure permit the government to withhold the documents in question.⁷³ Because such litigation may drag on for many years, private litigants and their counsel may become financially strapped and unable to continue the lawsuit if an award of attorney's fees is postponed until the completion of the litigation.

Notwithstanding the equities of the situation, the FOIA attorney's fee statute, 5 U.S.C. § 552(a)(4)(E),⁷⁴ simply makes no provision for an interim award of fees and the legislative history is silent on the matter.⁷⁵ This silence combined with the strict and narrow construction standards applicable to waivers of sovereign immunity⁷⁶ should end the inquiry.

The very language of the provision appears to preclude awards of fees before the litigation is concluded. Subsection 552(a)(4)(E) states that "[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."⁷⁷ Thus, under Subsection 552(a)(4)(E), fees may only be awarded to a plaintiff who has "substantially prevailed" in the "case." The pertinent question, then, is not whether a party has succeeded on one or more issues, but whether that party has substantially prevailed in the case as a whole.⁷⁸ For that reason, as one district court has ruled, the "proper evaluation and weighing of the relevant criteria could not be complete until the suit is complete."⁷⁹ Or, as the United States Court of Appeals for the District of Columbia Circuit put it, the governing statutory standard for fees in FOIA cases is whether the plaintiff has "substantially prevailed as to his *overall* request."⁸⁰

Until quite recently, district courts uniformly have rejected petitions by

(LEXIS, Genfed library, Dist file); *Powell v. Department of Justice*, 569 F. Supp. 1192 (N.D. Cal. 1983); *Hydron Laboratories, Inc. v. EPA*, 560 F. Supp. 718 (D.R.I. 1983); *Diamond v. FBI*, 532 F. Supp. 216 (S.D.N.Y. 1981), *aff'd*, 707 F.2d 75 (2d Cir. 1983); *Letelier v. Department of Justice*, 1 Gov't Disclosure Serv. (P-H) ¶ 80,252 (D.D.C. Oct. 2, 1980); *Biberman v. FBI*, 496 F. Supp. 263, 265 (S.D.N.Y. 1980).

73. See 1 J. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* § 8.01, at 8-3 (1988) ("The elements of the FOIA case . . . should be seen in the context of a months-long or years-long controversy between citizen and agency which can be expected to tax the patience of each.").

74. 5 U.S.C. § 552(a)(4)(E) (1982).

75. See H.R. CONF. REP. NO. 1380, 93d Cong., 2d Sess. (1974); H.R. REP. NO. 93-876, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6267; S. CONF. REP. NO. 1200, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6285; S. REP. NO. 854, 93d Cong., 2d Sess. (1974); H.R. REP. NO. 1419, 92d Cong., 2d Sess. (1972).

76. See, e.g., *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983).

77. 5 U.S.C. § 552(a)(4)(E) (1982).

78. For discussion of an argument that a FOIA case can be broken into phases for purposes of awarding attorney's fees, see *infra* note 92.

79. *Letelier v. Department of Justice*, 1 Gov't Disclosure Serv. (P-H) ¶ 80,252 (D.D.C. Oct. 2, 1980); see also *Irons v. FBI*, No. 82-1143-G (D. Mass. June 26, 1987) (LEXIS, Genfed library, Dist file) ("It is necessary to wait till [sic] the close of litigation to put in focus the advances and retreats, gains and losses made by the parties in their conflict over the scope of disclosures.").

80. *Weisberg v. Department of Justice*, 745 F.2d 1476, 1497 (D.C. Cir. 1984).

plaintiffs for interim fee awards in FOIA cases, expressing concern that allowing piecemeal adjudication of attorney's fee issues would result in duplicative requests for further fees at each successive stage of the litigation.⁸¹ Moreover, such awards would deter agencies from settling cases partially or disclosing portions of the entire record.⁸² One district court indicated interim fees might be possible under extenuating circumstances, but acknowledged that the court can address attorney's fee awards "more efficiently" at the conclusion of a case.⁸³

One district judge, however, in two recent cases departed from that uniform practice of refusing to award interim fees in FOIA cases.⁸⁴ When the government sought interlocutory review from one of those decisions, the United States Court of Appeals for the Ninth Circuit declined to overturn the award as improper.⁸⁵ Since the Ninth Circuit's ruling, one other district court has followed suit by allowing an interim award in a FOIA case.⁸⁶

In *Powell v. Department of Justice*⁸⁷ a district judge ruled that interim fees were available under FOIA, citing the general intent of Congress to permit fees to plaintiffs in meritorious FOIA litigation.⁸⁸ The court set forth certain guidelines for interim fees, focusing particularly upon whether the plaintiff and his counsel would suffer substantial hardship from a delay in the award of fees and whether there had been unreasonable delay on the government's part in the litigation.⁸⁹

In a subsequent case, *Rosenfeld v. Department of Justice*,⁹⁰ this same district judge entertained a petition for interim fees after ruling against the government on a preliminary issue concerning waiver of FOIA document processing fees.⁹¹ Although the plaintiff had yet to achieve any victory with respect to disclosure of documents withheld as exempt, the district court nevertheless

81. See, e.g., *Irons v. FBI*, No. 82-1143-G (D. Mass. June 26, 1987) (LEXIS, Genfed library, Dist file); *Hydron Laboratories, Inc. v. EPA*, 560 F. Supp. 718, 722 (D.R.I. 1983); *Letelier, 1 Gov't Disclosure Serv.* ¶ 80,252; see also *Diamond v. FBI*, 532 F. Supp. 216, 234 (S.D.N.Y. 1981), *aff'd*, 707 F.2d 75 (2d Cir. 1983) (rejecting request for interim attorney's fees in FOIA case but without expressing concern about duplicative requests). The district court decision in *Ettlinger v. FBI*, 596 F. Supp. 867 (D. Mass. 1984), has been mistakenly cited as granting attorney's fees in a FOIA case on an interlocutory basis. See *Irons*, No. 82-1143-G. To the contrary, nothing in the decision reflects that the fees were awarded on an interim basis or that further litigation was anticipated after the award of fees. Indeed, the court's unqualified statement that the plaintiff had "prevailed on both counts in her complaint," *Ettlinger*, 596 F. Supp. at 880, firmly establishes that the court thought that the litigation was at an end. Also, the court did not require the government to pay the fees immediately prior to final judgment, but instead encouraged the parties to stipulate as to the amount of fees. *Id.* at 882.

82. *Letelier*, 1 Gov't Disclosure Serv. ¶ 80,252.

83. *Biberman v. FBI*, 496 F. Supp. 263, 265 (S.D.N.Y. 1980).

84. *Rosenfeld v. Department of Justice*, Nos. C-85-2247 MHP & C-85-1709 MHP (N.D. Cal. Oct. 1, 1987) (Patel, J.), *appeal dismissed and mandamus denied*, 859 F.2d 717 (9th Cir. 1988); *Powell v. Department of Justice*, 569 F. Supp. 1192 (N.D. Cal. 1983) (Patel, J.).

85. *Rosenfeld v. United States*, 859 F.2d 717 (9th Cir. 1988).

86. See *Allen v. Department of Defense*, 713 F. Supp. 7 (D.D.C. 1989).

87. 569 F. Supp. 1192 (N.D. Cal. 1983) (Patel, J.).

88. *Id.* at 1197-98.

89. *Id.* at 1200.

90. Nos. C-85-2247 MHP & C-85-1709 MHP (N.D. Cal. Oct. 1, 1987), *appeal dismissed and mandamus denied*, 859 F.2d 717 (9th Cir. 1988).

91. *Id.*; see also *Rosenfeld*, 859 F.2d at 719 (describing proceedings in the district court).

awarded interim attorney's fees to plaintiff and ordered the government to pay these fees within sixty days.⁹² The principal part of the case, concerning the application of various statutory exemptions from disclosure to those documents withheld by the government, was still pending before the district court.⁹³

After obtaining a stay of the district court's order of immediate payment from the Ninth Circuit, the government filed an interlocutory appeal and, in the alternative, a petition for a writ of mandamus.⁹⁴ The government contended that the district court had acted beyond its jurisdictional authority in awarding attorney's fees against the sovereign before the completion of the litigation.⁹⁵ The government argued that the FOIA attorney's fee provision did not authorize the extraordinary remedy of interim fees and that the Judgment Fund statutes, Sections 1304 and 2414, precluded payment of any award until there was a final judgment and all appeals had been exhausted.⁹⁶ Because the government contested both the underlying fee waiver determination and the award of attorney's fees, the government contended that it could not legally pay the interim award.⁹⁷

Acknowledging the exceptional importance of the government's challenge to the district court's jurisdiction, the court of appeals exercised supervisory mandamus jurisdiction to review the matter as an issue of first impression.⁹⁸

92. See *Rosenfeld*, 859 F.2d at 719. Even though the litigation was not complete and one could not yet determine whether plaintiff had substantially prevailed in the case as a whole, the district court ruled that the initial proceedings were a "sufficiently separable" and "discrete" phase of the litigation to permit a separate interim fee award. *Rosenfeld*, Nos. C-85-2247 MHP & C-85-1709 MHP, slip op. at 4 (N.D. Cal. Oct. 1, 1987); see also *Allen v. Department of Defense*, 713 F. Supp. 7, 12 (D.D.C. 1989) (speaking of FOIA proceedings as having "two discrete phases"); *Irons v. FBI*, No. 82-1143-G (D. Mass. June 26, 1987) (LEXIS, Genfed library, Dist file) (citing *Powell* for theory that FOIA litigation has distinct phases); *Powell*, 569 F. Supp. at 1196-97 (speaking of FOIA litigation as having "separate" and "distinct" phases). There is no support in the statute for this bifurcation of the litigation into "phases" for awarding attorney's fees at successive stages of the lawsuit. On the contrary, the governing standard is whether the plaintiff has "substantially prevailed as to his overall request." *Weisberg v. Department of Justice*, 745 F.2d 1476, 1497 (D.C. Cir. 1984).

93. *Rosenfeld*, 859 F.2d at 719.

94. *Id.*

95. *Id.* at 719-20.

96. *Id.* at 725-26.

97. *Id.*

98. *Id.* at 722-23. The court rejected the government's argument that an interlocutory appeal should lie under the collateral order doctrine or other exceptions to the general requirement of a final decision before appeal. *Id.* at 720-22. The court did not address the government's principal argument that, absent an immediate appeal, the United States would be left in the untenable position of either paying an illegal award in violation of express statutes or not paying the award under threat of contempt by the district court. See Brief for Appellants and Petition for a Writ of Mandamus at 24-33, *Rosenfeld* (No. 87-2975). The government's overriding concern was with upholding the integrity of the Judgment Fund statutes, which expressly bar premature payment, even when later recoupment might be possible. *Id.* The government argued that this unique injury to the government's sovereign immunity and the integrity of the governing statutes, not the economic impact of this particular award, caused irreparable harm and justified immediate appellate review. *Id.*; see also Reply Brief for Appellants-Petitioners at 12-14, *Rosenfeld* (No. 87-2975) (stating that the issue was not "economic hardship" but whether "the sovereign United States may unlawfully be compelled to violate express federal statutes while this Court of law may only stand helplessly by"). The court discussed only the government's alternative argument that an interim attorney's fee award should be immediately appealable if there is no assurance that the money could be recouped if the award is overturned later. *Rosenfeld*, 859 F.2d at 720-22; see also *infra* notes 283-310 and accompanying text (discussing appealability of interim fee awards).

The Ninth Circuit then held that the FOIA attorney's fee provision, although it contains no language on interim fees, implicitly authorizes such a remedy because it promotes the policy of encouraging efforts by citizens to seek disclosure of government documents.⁹⁹ The court also dismissed the bar on payment of nonfinal awards in the Judgment Fund statutes by ruling that the FOIA attorney's fee provision, now construed to permit interim fee awards, supersedes these statutes.¹⁰⁰

The Ninth Circuit's analysis is mistaken and is particularly vulnerable because the court failed to apply certain basic legal standards that the Supreme Court has established as fundamental canons of statutory interpretation. First, the Supreme Court has instructed courts to construe waivers of sovereign immunity strictly and narrowly in favor of the government.¹⁰¹ The *Rosenfeld* court, far from viewing the statute narrowly in favor of the government, expansively construed the FOIA attorney's fees provision to implicitly authorize interim fee awards. To reach this conclusion, the court largely adopted the reasoning of the district court in the *Powell* decision,¹⁰² saying it could "add little" to the district court's "thorough analys[is]." ¹⁰³ The *Powell* decision, however, failed even to mention the doctrine of sovereign immunity; instead, it unhesitatingly embraced decisions permitting interim fees against nonfederal government parties and neglected the strict standards for interpreting waivers of sovereign immunity.¹⁰⁴ By adopting the *Powell* analysis as its own, the Ninth Circuit perpetuated this error.

Moreover, the Ninth Circuit overlooked the actual language of the FOIA attorney's fees provision, failing to consider the implicit preclusion of interim

99. *Rosenfeld*, 859 F.2d at 723-25.

100. *Id.* at 725-27.

101. "Waivers of immunity must be 'construed strictly in favor of the sovereign,' *McMahon v. United States*, 342 U.S. 25, 27 (1951), and not 'enlarge[d] . . . beyond what the language requires,' *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686 (1927)." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983); see also *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986) (quoting same sources).

102. See *supra* text accompanying notes 87-89 for discussion of the *Powell* decision. The *Rosenfeld* court also cited *Biberman v. FBI*, 496 F. Supp. 263 (S.D.N.Y. 1980), in which a district court denied an application for interim fees but suggested such an award might be available in an extraordinary case. *Biberman*, 496 F. Supp. 264-65. The *Biberman* court did not mention the doctrine of sovereign immunity. See *id.*

103. *Rosenfeld*, 859 F.2d at 724.

104. *Powell v. Department of Justice*, 569 F. Supp. 1192, 1194-97 (N.D. Cal. 1983). The *Powell* decision did cite two cases dealing with requests for fees against the federal government, *Van Hoomissen v. Xerox Corp.*, 503 F.2d 1131 (9th Cir. 1974) and *Grubbs v. Butz*, 548 F.2d 973 (D.C. Cir. 1976). See *Powell*, at 1195-96. In *Van Hoomissen*, the Ninth Circuit upheld a fee award against the Equal Employment Opportunity Commission in Title VII litigation, *Van Hoomissen*, 503 F.2d at 1133, but this decision cannot provide support for the availability of interim fee awards against the federal government. First, the fee award in *Van Hoomissen* was granted to a party who had prevailed in an earlier appeal and then the appellate court ruled on the fee award itself. *Id.* at 1132-33. In other words, the fee award was payable only when it became final after the exhaustion of all appellate review. Second, the Supreme Court cited *Van Hoomissen* with implicit disapproval in *Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980) (per curiam). See also *Proctor v. Consolidated Freightways Corp.*, 795 F.2d 1472, 1478 (9th Cir. 1986) (saying *Hanrahan* casts doubt on *Van Hoomissen*). In *Grubbs*, the District of Columbia Circuit denied the request for interim fees and only suggested in dictum that an interim award might be appropriate at a later stage of the proceedings. *Grubbs*, 548 F.2d at 976-77; see also *supra* note 70 (discussing *Grubbs* decision).

awards in the statutory requirement that a court may award a fee only to a plaintiff who has "substantially prevailed" in the "case" as a whole.¹⁰⁵ In this way, the court neglected to adhere to the fundamental principle that every issue of statutory interpretation must begin with the language of the statute.¹⁰⁶

The Ninth Circuit instead turned its focus away from the language of the statute to the legislative history of the FOIA, which it perceived as supporting an implicit interim fee authorization.¹⁰⁷ The court conceded that the legislative history nowhere directly addresses the availability of interim fee awards; instead, the court relied on general statements in the legislative reports that Congress intended for the courts to consider the existing body of attorney's fee law when formulating the specific criteria for deciding whether to award fees.¹⁰⁸ The court then reasoned that because other attorney's fee statutes have been construed to permit interim fee awards against private parties, the FOIA statute should be viewed as authorizing interim awards against the government.¹⁰⁹ But, the legislative direction that the courts consult other attorney's fee statutes when setting criteria on *whether* to award fees in FOIA suits cannot provide any guidance on the issue of *when* courts may order such fees.

Under the strict standards applicable to waivers of sovereign immunity, the Ninth Circuit should have accepted the silence in the statute and the legislative history on the availability of interim fees as dispositive. As the United States Court of Appeals for the First Circuit recently admonished, "[t]o work abrogation of federal sovereign immunity, . . . the legislative intent must be so clear and explicit as to brook no reasonable doubt."¹¹⁰ Manifestly, that cannot be said about the availability of interim attorney's fees under the FOIA.

The *Rosenfeld* court's most serious error lies in its treatment of the express finality requirement in the Judgment Fund statutes. Having derived an interim fees authorization from Subsection 552(a)(4)(E), the Ninth Circuit viewed this implicit provision as repealing—sub silentio—the Judgment Fund statutes which expressly limit the payment of awards to final judgments not subject to further appeal.¹¹¹ By holding that a general waiver of sovereign immunity—which makes no provision for timing of payments—overrides the specific finality requirement in the Judgment Fund statutes, the court effectively read these provisions out of the statute books.

The court dismissed the Judgment Fund statutes, saying they do not impose "a superseding limitation on the government's waiver of sovereign immunity" for attorney's fees in Subsection 552(a)(4)(E).¹¹² The fundamental flaw in this

105. 5 U.S.C. § 552(a)(4)(E) (1982); *see also supra* notes 77-80 and accompanying text (discussing language of FOIA attorney's fees provision).

106. *See* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

107. *Rosenfeld*, 859 F.2d at 724-25.

108. *Id.* at 724; *see* S. CONF. REP. NO. 1200, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6285, 6288.

109. *Rosenfeld*, 859 F.2d at 724.

110. *In re* Stephen C. Perry, No. 88-1475, slip op. at 23-24 (1st Cir. Aug. 3, 1989).

111. *Rosenfeld*, 859 F.2d at 725-27.

112. *Id.* at 726-27.

theory—that the FOIA attorney's fee provision countermands the finality requirement in the Judgment Fund statutes—is that it rests upon the premise that the FOIA provision implicitly repeals those statutes. The Supreme Court has made clear the strong presumption against implicit repeal of statutes.¹¹³ A court may infer repeal only when "clear and manifest" evidence establishes that Congress so intended.¹¹⁴ In addition, when an implicit repeal would expand a waiver of sovereign immunity, one may argue that the already stringent standard for finding an implicit repeal should be tightened further. Unfortunately, the Ninth Circuit failed to address this objection.¹¹⁵

There is no clear and manifest indication of congressional intent to supersede the Judgment Fund statutes. Nothing in the language of Subsection 552(a)(4)(E) or in its legislative history even mentions the possibility of an interim fee award, much less suggests that it was intended to override the finality requirement in Sections 1304 and 2414.¹¹⁶

Moreover, the question whether to infer a repeal does not arise unless there is an "irreconcilable conflict"¹¹⁷ between the statutes "in the sense that there is a positive repugnancy between them or that they cannot mutually coexist."¹¹⁸ The FOIA attorney's fees provision and the Judgment Fund statutes fit neatly together into an overall framework; there is simply no conflict at all between Subsection 552(a)(4)(E) and Sections 1304 and 2414. The FOIA provision waives the government's sovereign immunity for a certain type of remedy—at-

113. *TVA v. Hill*, 437 U.S. 153, 189-91 (1978).

114. *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

115. The court relied on two district court decisions awarding interim fees under Title VII that were discussed earlier in this Article. *Rosenfeld*, 859 F.2d at 726-27 (citing *Jurgens v. EEOC*, 660 F. Supp. 1097 (N.D. Tex. 1987); *McKenzie v. Kennickell*, 669 F. Supp. 529 (D.D.C. 1987)). For a discussion of *Jurgens* and *McKenzie*, see *supra* notes 44-70 and accompanying text. The *Jurgens* and *McKenzie* decisions had interpreted the broader language of the Title VII attorney's fee provision—expressly placing the government in the same position as a "private party," 42 U.S.C. § 2000e-5(k)—as taking precedence over the Judgment Fund statutes. There is no similar language in the FOIA provision. Also, the *Jurgens* and *McKenzie* cases, as discussed earlier, are probably wrong. First, *Jurgens* and *McKenzie* cannot be reconciled with *Library of Congress v. Shaw*, 478 U.S. 310 (1986), in which the Supreme Court held that statutes placing the United States in the same position as a private party nevertheless must be "read narrowly to preserve certain immunities that the United States has enjoyed historically." *Id.* at 319-20; see *supra* notes 56-60 and accompanying text for discussion of the *Shaw* decision. One of those historical immunities, preserved in the Judgment Fund statutes, is the immunity from being required to pay money before final judgment. Second, *Jurgens* and *McKenzie* also ignored the presumption against implicit repeal of statutes.

116. The amendment of Section 2414 in 1978 to except money awards under the Contract Disputes Act illustrates that Congress well knows how to exempt certain payments from the requirements of Section 2414 when it intends to do so. See Contract Disputes Act of 1978, Pub. L. No. 95-563, § 14(d), 92 Stat. 2383, 2390 (1978); S. REP. NO. 1118, 95th Cong., 2d Sess. 34, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5235, 5268. Although the Contract Disputes Act excepts contract judgments under that statute from the requirements of Section 2414, payments of such judgments are made from the Judgment Fund and remain subject to Section 1304. 41 U.S.C. § 612 (1982) (providing that judgments under the Contract Disputes Act shall be paid pursuant to 31 U.S.C. § 1304 (1982)). The Comptroller General has interpreted Section 1304 as independently requiring finality, although payment of partial judgments from the Judgment Fund, which is not normally permissible, has been allowed in Contract Disputes Act cases. *In re Inland Servs. Corp.*, 60 Comp. Gen. 573, 574-76 (1981) (construing 31 U.S.C. § 724a, the predecessor to Section 1304, in the context of the Contract Disputes Act); PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 15, at 11-68 (discussing 60 Comp. Gen. 573 (1981)).

117. *Posadas*, 296 U.S. at 503.

118. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).

torney's fees. It makes no provision for the appropriation of funds to pay that award, the procedures for such payment, or, most importantly, the timing of such payment.¹¹⁹ Instead, Sections 1304 and 2414 govern those matters.¹²⁰ An FOIA attorney's fee award, like any other money judgment payable from the appropriated Judgment Fund, is payable only pursuant to Sections 1304 and 2414 after its finality is certified by the Attorney General and the Comptroller General. Because the "statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective."¹²¹

Even if there were some ambiguity in the Judgment Fund statutes, the clear precedent of the Comptroller General establishes that such attorney's fees awards are payable from the Fund subject to the statutory finality requirement.¹²² The courts must defer to the Comptroller General as the official designated by statute to certify payment to the Treasury if the Comptroller General's opinion is "based on a permissible construction of the statute."¹²³ The Ninth Circuit in *Rosenfeld* did not acknowledge the Comptroller General's opinion or accord it due deference.

Finally, in declining to enforce the finality limitations of the Judgment Fund statutes,¹²⁴ the *Rosenfeld* court offered the unsupported and conclusory

119. See *supra* note 21 (the Judgment Fund and the attendant finality requirement apply to an award unless it is made under a statute that expressly provides for payment of the award from another appropriation).

120. See *International Ass'n of Machinists & Aerospace Workers v. Boeing Co.*, 833 F.2d 165, 169 (9th Cir. 1987) (implicit repeal of a statute occurs only if there is an irreconcilable conflict, and "[n]o conflict exists if the two statutes serve independent and separate purposes"), *cert. denied*, 108 S. Ct. 1488 (1988).

121. *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

The *Rosenfeld* decision confirms the concerns expressed by then Judge Scalia in explaining the importance of the doctrine disfavoring implicit repeals of statutes:

It will not do to give this principle [presumption against implied repeals] mere lip service and vacillating practical application. A steady adherence to it is important, primarily to facilitate not the task of judging but the task of legislating. It is one of the fundamental ground rules under which laws are framed. . . .

. . . The major rationale of the presumption, in modern times at least, is not that Congress is unlikely to change the law . . . ; but rather, that Congress "legislate[s] with knowledge of former related statutes," *Continental Insurance Co. v. Simpson*, 8 F.2d 439, 442 (4th Cir. 1925), and will expressly designate the provisions whose application it wishes to suspend, rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction.

United States v. Hansen, 772 F.2d 940, 944 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986).

122. *In re Attorney Fees—Judicial Awards Under Equal Access to Justice Act*, 63 Comp. Gen. 260, 261 (1984) (Judgment Fund is source for payment of attorney's fee awards against United States, including awards under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), provided the award is final); Comp. Gen. Op. No. B-208999 (Sept. 13, 1982) (LEXIS, Genfed library, Com-Gen file) (interim attorney's fee award against United States may not be paid when the Attorney General has determined to appeal the award because the award is not then final within the meaning of Sections 2414 and 3104).

123. See *NLRB v. United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

124. The court cited the legislative history of the Judgment Fund statutes for the proposition that Congress did not intend the express limitation on payment of nonfinal awards to be a condition on waivers of sovereign immunity. *Rosenfeld*, 859 F.2d at 727 (citing S. REP. NO. 733, 87th Cong., 1st Sess., reprinted in 1961 U.S. CODE CONG. & ADMIN. NEWS 2439). On the contrary, the Senate report expressly warned that the creation of the Judgment Fund was not to be construed as expanding any waiver of sovereign immunity. S. REP. NO. 733, 87th Cong., 1st Sess., reprinted in 1961

opinion that "[t]he government's insistence that the Judgment Fund is the only possible source of payment of an interim fee award is simply wrong."¹²⁵ The court did not—and could not—identify another source of funds for payment, however. The Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."¹²⁶ Congress exercised this exclusive constitutional power to establish a permanent appropriation in the form of the Judgment Fund as the source for payment of awards and judgments rendered against the United States. That statutory mandate cannot be ignored; nor can funds appropriated for other designated purposes be diverted to pay court awards.¹²⁷

* * * * *

Notwithstanding the rulings of the Ninth Circuit and a smattering of district courts in the context of Title VII and the FOIA,¹²⁸ the Judgment Fund statutes pose an insurmountable obstacle to interim attorney's fee awards against

U.S. CODE CONG. & ADMIN. NEWS 2439, 2440. Even if there were no Judgment Fund, an interim award under the FOIA could not be paid out of agency funds appropriated for other purposes, but instead would be administered in the manner applicable to awards issued before the creation of the permanent Judgment Fund appropriation. Prior to the adoption of the Judgment Fund provisions in 1956, judgments awarded against the United States generally could not be paid until after the enactment of specific appropriations legislation for that purpose. S. REP. NO. 733, 87th Cong., 1st Sess., reprinted in 1961 U.S. CODE CONG. & ADMIN. NEWS 2439, 2439, 2441. If interim fee awards against the United States are not payable out of the Judgment Fund, the plaintiff should be relegated to the pre-Judgment Fund procedure of waiting for Congress to pass a private bill approving an appropriation to satisfy her award. See *supra* notes 14-16 and accompanying text.

125. *Rosenfeld*, 859 F.2d at 727. The court also noted "that when a court has rejected the Judgment Fund argument, the government has managed to pay the interim award." *Id.* The Ninth Circuit was citing *Jurgens v. EEOC*, 660 F. Supp. 1097 (N.D. Tex. 1987), which described a prior unpublished district court decision, in which the government paid an interim fee award under threat of sanctions. *Jurgens*, 660 F. Supp. 1101-02 (citing *Shafer v. Commander, Army and Air Force Exch. Serv.*, No. CA 3-76-1246-R (N.D. Tex. Dec. 3, 1985)). The *Jurgens* court stated that, because the government paid the *Shafer* interim award notwithstanding the Judgment Fund restrictions when faced with a citation for contempt of court, the court "believe[d] that the EEOC can also arrange for immediate payment of this court's interim award." *Id.* at 1102. This is not a legitimate argument in support of awards of interim fees against the federal government. Even though the United States has suffered previous blows to its sovereign immunity and has acceded to the violation of the Judgment Fund statutes under threat of contempt, this hardly justifies the conclusion that it should be forced to do so again in future cases.

126. U.S. CONST. art. I, § 9, cl. 7.

127. Comp. Gen. Op. No. B-208999 (Sept. 13, 1982) (LEXIS, Genfed library, ComGen file) (when interim attorney's fee award against United States could not be made from the Judgment Fund because it was not final, no other appropriation was legally available to make the payment); see also *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850) (no officer of the United States, no matter how high, is authorized to pay a debt due from the United States Treasury, whether or not reduced to judgment, unless an appropriation has been made for that purpose, citing U.S. CONST. art. I, § 9); *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 906 (Ct. Cl. 1976) (same). There are administrative and criminal penalties for diverting funds from the purpose for which they were appropriated. See 31 U.S.C. § 1518 (1982) (administrative penalties); *id.* § 1519 (criminal penalties).

128. One district court also has awarded interim attorney's fees against the Environmental Protection Agency in a citizens suit under the Clean Air Act, 42 U.S.C. § 7604(a)(2) (1982). *Citizens for a Better Env't v. Costle*, No. 80 C 0003 (N.D. Ill. May 27, 1988) (LEXIS, Genfed library, Dist file). Attorney's fee awards made pursuant to the Clean Air Act's attorney's fees provision, 42 U.S.C. § 7604(d) (1982), are payable only from the Judgment Fund, not from agency funds. The government did not question the court's authority to enter an interim fee award, however, and the court did not consider the doctrine of sovereign immunity or the Judgment Fund statutes. The court based the award on two concluded counts of the case, and the court did not mandate immediate payment before appeal.

the United States. Because the Ninth Circuit is the only court of appeals that has addressed this matter to date, other courts presented with the issue will have to confront the *Rosenfeld* decision.¹²⁹ For the reasons stated above, the Ninth Circuit's *Rosenfeld* decision is seriously flawed and other courts should decline to follow it.¹³⁰

Although one can make strong policy arguments for the availability of an interim remedy for parties in litigation with the government, at least in extraordinary circumstances, the courts are not free to "improve upon the statutory scheme that Congress enacted into law."¹³¹ Congress alone should make such adjustments as it deems appropriate.

II. AWARDS OF INTERIM FEES PAYABLE FROM AGENCY FUNDS

As a general rule, agency operating appropriations are not available to pay money judgments, including awards of attorney's fees.¹³² Thus, the sole source of payment for judgments and associated attorney's fee awards is ordinarily the Judgment Fund, with its attendant express finality requirement. There are exceptions to this general rule, however, when separate agency funds are made available by statute for the payment of judgments and when other express provisions of law include such authority.¹³³

Although attorney's fee awards under most statutes waiving the immunity of the federal government are payable only from the Judgment Fund, in practice most attorney's fee awards against the government are paid from agency funds. This is because most fee awards against the government today are made under the Equal Access to Justice Act,¹³⁴ which expressly provides for payment of certain fee awards from agency funds.¹³⁵ In addition, when judgments are issued against agencies with statutory "sue-and-be-sued" authority and against government corporations,¹³⁶ fee awards also may be payable from separate agency or corporate funds.¹³⁷

129. One other district court has adopted the Ninth Circuit's approach, with no independent analysis, and has permitted an interim fee award against the government in a FOIA case. *See Allen v. Department of Defense*, 713 F. Supp. 7 (D.D.C. 1989).

130. The issue is pending before the District of Columbia Circuit on appeal and petition for a writ of mandamus from an interim attorney's fee award in a Title VII case. *Trout v. Lehman*, 702 F. Supp. 3 (D.D.C. 1988), *appeal dismissed sub nom. Trout v. Ball*, No. 88-5264, unpublished order (D.C. Cir. Mar. 30, 1989), *petition for rehearing granted*, No. 88-5264, unpublished order (D.C. Cir. Aug. 24, 1989), *petition for a writ of mandamus pending sub nom. In re Ball*, No. 89-5137 (D.C. Cir. filed May 15, 1989). For discussion of the *Trout* case, see *supra* note 64.

131. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979).

132. PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 15, at 12-3; *see also* 34 Comp. Gen. 221, 224 (1954); 15 Comp. Gen. 933, 934-35 (1936) (in the absence of a specific statutory provision for payment of judgments, judgments against the government cannot be paid from agency appropriations); *supra* note 21 (an award must be paid from the Judgment Fund unless another statute expressly provides for payment of the award from another appropriation).

133. PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, *supra* note 15, at 12-3.

134. 28 U.S.C. § 2412 (1982 & Supp. V 1987).

135. *Id.* § 2412(c)(2), (d)(4); *see also infra* notes 151 and 155 and accompanying text (explaining that certain attorney's fee awards under this statute are payable from agency funds).

136. *See infra* notes 165-231 and accompanying text.

137. In every case, there is only one possible source of payment for a judgment and fee award, depending upon the nature of the judgment and the applicable statutes. If an agency appropriation

When a fee award is payable from agency funds, rather than from the Judgment Fund, the express finality requirement established in Section 2414 does not apply. Is it true that, read in isolation, Section 2414 appears to require that the Attorney General certify the finality of all judgments for settlement by the General Accounting Office (GAO) before payment is proper. The statute is not limited expressly to those judgments that are payable from the Judgment Fund under Section 1304. Therefore one could make an argument that *all* judgments, even when payable from separate agency funds, remain subject to the finality requirement in Section 2414. In practice, however, Section 2414 has not been so understood or applied.¹³⁸

Section 2414 provides for payment of "final judgments" upon "settlements" by the GAO. The Attorney General's certification that the judgment is final is necessary before the GAO properly can exercise its settlement responsibility. The Comptroller General, however, has taken the position that when a statute authorizes payment of judgments from agency funds, GAO involvement is not required. Realistically, GAO involvement would serve no useful purpose. Each agency knows best which of its appropriation accounts should be charged with a judgment. If GAO settled such judgments, it would have to request this information from the agency, which would delay unnecessarily the payment of the judgment.

For this reason, the GAO's practice over the past thirty years has been to generally view the two provisions in Section 2414 concerning finality of the judgment and the GAO's settlement authority as inextricably intertwined. The Section 2414 finality requirement comes into play only when the GAO has settlement responsibility, which occurs only when payment is to be made out of the Judgment Fund pursuant to Section 1304. In contrast, when a judgment is payable from agency funds, and the GAO is not involved in settlement, the finality requirement falls out. In other words, Sections 2414 and 1304 work together as a statutory package, requiring finality only of judgments to be paid from the Judgment Fund.

That the courts have interpreted more readily those statutes permitting fee awards from agency funds as allowing interim awards confirms this approach. Although such statutes still constitute waivers of sovereign immunity that should be construed narrowly, there are nevertheless substantial grounds to con-

is legally available for payment of a judgment, the Judgment Fund is not available, even as an alternative if agency funds are low. If agency appropriations are not expressly available for the payment of judgments, the Judgment Fund is the only available source. One statute, however, appears to allow the court to frame its judgment to determine the source of the payment. Under the Government-in-the-Sunshine Act, 5 U.S.C. § 552b (1982), the court may assess attorney's fees and litigation costs against the government in favor of a substantially prevailing party. *Id.* § 552b(i). The statute states, however, that "[i]n the case of assessment of costs against an agency, the costs may be assessed by the court against the United States." *Id.* Even under that statute, once the court issues its judgment and exercises its apparent right of choice, only one source of payment is possible.

138. The discussion concerning the practice of the Comptroller General with respect to settlements pursuant to Section 2414 is based upon the author's personal knowledge and experience as a litigator with the Department of Justice, as well as interviews by the author with attorneys in the Office of the General Counsel of the General Accounting Office.

clude that Congress intended to waive immunity from interim awards in those contexts in which it has made agencies directly liable for attorney's fees.

A. *The Equal Access to Justice Act*

Congress enacted the Equal Access to Justice Act (EAJA)¹³⁹ "to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States."¹⁴⁰ In Subsection 2412(d),¹⁴¹ the Act provides that a court shall award fees¹⁴² to any party meeting specified qualifications¹⁴³ who prevails in a nontort civil action against the federal government, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."¹⁴⁴ In sum, EAJA Subsection 2412(d) generally authorizes an award of attorney's fees whenever the government's position in the litigation was not "substantially justified," that is, not "justified to a degree that could satisfy a reasonable person."¹⁴⁵

A separate subsection of the EAJA, Subsection 2412(b), subjects the United States to liability for attorney's fees "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award."¹⁴⁶ This provision makes the government liable for fees under common-law and statutory fee-shifting rules to the

139. 28 U.S.C. § 2412 (1982 & Supp. V 1987). The original EAJA, which was enacted in 1980 as an experimental program with a "sun-set" provision, expired by its own terms on October 1, 1984. Act of Oct. 21, 1980, Pub. L. No. 96-481, Title II, § 204(c), 94 Stat. 2325, 2329 (1980). Congress reenacted the EAJA, with some clarifying amendments, as a permanent statute in 1985. Act of Aug. 5, 1985, Pub. L. No. 99-80, § 6(a), 99 Stat. 183, 186 (1985). On the EAJA, see generally *Pierce v. Underwood*, 108 S. Ct. 2541, 2546-51 (1988); 2 M. DERFNER & A. WOLF, *supra* note 1, § 7.04[4]; J. BENNETT, *supra* note 1, §§ 1.01-1.04 (same).

140. Act of Oct. 21, 1980, Pub. L. No. 96-481, Title II, § 202(c)(1), 94 Stat. 2325, 2325 (1980) (not codified).

141. 28 U.S.C. § 2412(d) (Supp. V 1987).

142. The EAJA places a specific cap on permissible fee awards by directing that fees "shall not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." *Id.* § 2412(d)(2)(A).

143. The EAJA establishes various eligibility qualifications for an award of fees under Subsection 2412(d). Under this provision, only individuals whose net worth does not exceed \$2 million, and owners of businesses, partnerships, corporations, associations, units of local government, and organizations whose net worth does not exceed \$7 million are eligible for a fee. *Id.* § 2412(d)(2)(B). Tax-exempt organizations and cooperative agricultural organizations are exempt from the net worth limitation. *Id.* In addition, organizational and governmental entities (with no exceptions) are eligible only if they do not employ more than 500 persons. *Id.*

144. *Id.* § 2412(d)(1)(A).

145. *Pierce v. Underwood*, 108 S. Ct. 2541, 2550 (1988) (the standard adopted by the Supreme Court is no different from the "reasonable basis both in law and fact" formulation adopted by most courts of appeals); H.R. CONF. REP. NO. 1434, 96th Cong., 2d Sess. 22, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5003, 5011 ("The test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact."); H.R. REP. NO. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4989 ("The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made.").

146. 28 U.S.C. § 2412(b) (Supp. V 1987).

same extent as nonfederal government parties.¹⁴⁷ In effect, the statute places the government on "equal footing" with private parties in terms of liability for attorney's fee awards.¹⁴⁸

Awards of attorney's fees made pursuant to EAJA Subsection 2412(b) are payable by the United States,¹⁴⁹ unless the award is based upon the common-law rule permitting fees for bad faith conduct,¹⁵⁰ in which case the award must be charged against agency funds.¹⁵¹ The EAJA makes payment of Subsection 2412(b) non-bad faith fee awards expressly subject to the Judgment Fund limitations of 28 U.S.C. § 2414.¹⁵² The finality limitation in 31 U.S.C. § 1304 and 28 U.S.C. § 2414 discussed previously¹⁵³ therefore applies with full force to most Subsection 2412(b) fee awards.¹⁵⁴

In contrast with Subsection 2412(b) and with most attorney's fee provisions waiving the government's sovereign immunity, Subsection 2412(d) of the EAJA expressly provides that "[f]ees . . . awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise."¹⁵⁵ Consequently, such payments are not made from the Judgment Fund, nor are they subject to any statutory finality requirement.

Because the EAJA contains no language suggesting that interim fees are available, one could argue that, under the narrow construction given to waivers

147. *Unification Church v. INS*, 762 F.2d 1077, 1079-81 (D.C. Cir. 1985); *Lauritzen v. Lehman*, 736 F.2d 550, 552-54 (9th Cir. 1984); H.R. REP. NO. 1418, 96th Cong., 2d Sess. 17, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4996.

148. H.R. REP. NO. 1418, 96th Cong., 2d Sess. 9, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4987; J. BENNETT, *supra* note 1, at 1-26. For example, Subsection 2412(b) incorporates the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1982). Prior to the enactment of the EAJA, Section 1988 was found not to provide authority for the assessment of fees against the federal government because it did not contain an express waiver of sovereign immunity. *NAACP v. Civiletti*, 609 F.2d 514, 516-21 (D.C. Cir. 1979), cert. denied, 447 U.S. 922 (1980); *Shannon v. HUD*, 577 F.2d 854, 855-56 (3d Cir.), cert. denied, 439 U.S. 1002 (1978). Under the EAJA, however, if the United States actually has violated one of the civil rights statutes listed in Section 1988, it is now liable for attorney's fees to the same extent that any other party would be liable. *Unification Church*, 762 F.2d at 1079-81; *Lauritzen*, 736 F.2d at 552-59; see also *Geier v. Richardson*, 871 F.2d 1310, 1312 & n.1 (6th Cir. 1989) (holding, with little discussion, that EAJA Subsection 2412(b) and Section 1988 "operate together to permit the district court in its discretion to award reasonable attorney's fees against the United States" to a prevailing civil rights action party).

149. 28 U.S.C. § 2412(c)(2) (1982) (providing for payment of fee awards under EAJA Subsection 2412(b)). See generally *In re Attorney Fees—Judicial Awards Under Equal Access to Justice Act*, 63 Comp. Gen. 260, 262 (1984) (discussing payment of attorney's fee awards under Subsection 2412(b)).

150. See *Sanchez v. Rowe*, 870 F.2d 291, 293-95 (5th Cir. 1989) (discussing, in the context of EAJA Subsection 2412(b), the bad faith exception to American rule against recovery of attorney's fees from the losing party).

151. 28 U.S.C. § 2412(c)(2) (1982).

152. *Id.*

153. See *supra* notes 14-131 and accompanying text.

154. For discussion of an EAJA Subsection 2412(b) fee award in *Young v. Pierce*, 822 F.2d 1376 (5th Cir. 1987), see *supra* notes 38-42 and accompanying text.

155. 28 U.S.C. § 2412(d)(4) (Supp. V 1987); see also *Electrical Dist. No. 1 v. Federal Energy Regulatory Comm'n*, 813 F.2d 1246, 1248 (D.C. Cir. 1987) ("[a]gency operating appropriations are available to make payments [to satisfy awards under EAJA] unless otherwise prohibited" (quoting *In re Availability of Funds for Payment of Intervenor Attorney Fees—Nuclear Regulatory Commission*, 62 Comp. Gen. 692, 700 (1983))).

of sovereign immunity,¹⁵⁶ the government's historical immunity from payment of awards prior to appellate review should be preserved. However, in striking contrast with the silence regarding interim fees found in the legislative history of other statutes waiving the sovereign immunity of the government for fee awards, the legislative history of the EAJA provides strong support for the implication of interim fee authority. The Conference Report accompanying the bill stated that "[a]n award may . . . be appropriate where the party has prevailed on an interim order which was central to the case, or where an interlocutory appeal is 'sufficiently significant and discrete to be treated as a separate unit.'"¹⁵⁷ Although interim fee awards remain as uncommon in the EAJA context as they do elsewhere, the Eleventh Circuit, in *Haitian Refugee Center v. Meese*,¹⁵⁸ cited the legislative history and had little difficulty concluding such a remedy should be available.¹⁵⁹ The path toward permitting interim fee awards under Subsection 2412(d) of the EAJA thus appears well marked.

The availability of the EAJA, for interim fee awards or otherwise, must be qualified. Subsection 2412(d) allows an award of attorney's fees when the government's position is not substantially justified "[e]xcept as otherwise specifically provided by statute."¹⁶⁰ Section 206 of the EAJA further states that "[n]othing in section 2412(d) . . . alters, modifies, repeals, invalidates, or supersedes any other provision of Federal law which authorizes an award" of attorney's fees against the United States.¹⁶¹ In other words, while the EAJA may supplement existing authorizations for fee awards against the government,¹⁶² it does not

156. See *In re Stephen C. Perry*, No. 88-1475, slip. op. at 23-24 (1st Cir. Aug. 3, 1989) (the principle that courts strictly construe waivers of sovereign immunity in favor of the sovereign "applies full bore in the EAJA context"); *Unification Church v. INS*, 762 F.2d 1077, 1089 (D.C. Cir. 1985) ("It is undisputed that Congress intended by its passage of the [EAJA] to broaden significantly the number of cases in which fees could be awarded against the federal government. It is equally true, however, that the language of the Act, as with the language of any waiver of sovereign immunity, is to be construed narrowly.") (citations omitted).

157. H.R. CONF. REP. NO. 1434, 96th Cong., 2d Sess. 22, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 5003, 5011 (citations omitted); see also H.R. REP. NO. 1418, 96th Cong., 2d Sess. 11, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4990 (same).

158. 791 F.2d 1489 (11th Cir.), as modified on reh'g, 804 F.2d 1573 (11th Cir. 1986) (per curiam).

159. *Id.* at 1495-96; see also *Kopunec v. Nelson*, 801 F.2d 1226, 1228 (10th Cir. 1986) (citing legislative history concerning interim fee awards and permitting award of fees under EAJA when case was remanded to the agency for ultimate disposition). The Eleventh Circuit held, in accordance with the legislative history quoted above, *supra* text accompanying note 157, that the party seeking an interim fee award must have actually "prevailed" upon a main or central issue in the case. *Haitian Refugee Center*, 791 F.2d at 1496; see also H.R. CONF. REP. NO. 1434, 96th Cong., 2d Sess. 22, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 5003, 5011 (interim award may be appropriate when the party has prevailed on an interim issue that "was central to the case"); H.R. REP. NO. 1418, 96th Cong., 2d Sess. 11, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4990 (same); *infra* notes 256-60 and accompanying text (comparing the general prevailing party rule for fee-shifting statutes with the requirements for an interim award of fees under the EAJA).

160. 28 U.S.C. § 2412(d)(1)(A) (Supp. V 1987).

161. Act of Oct. 21, 1980, Pub. L. No. 96-481, Title II, § 206, 94 Stat. 2325, 2330 (1980), as amended by Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 184, 186 (1985) (not codified); see also H.R. REP. NO. 1418, 96th Cong., 2d Sess. 18, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4997 (Subsection 2412(d) does not apply to actions "already covered by existing fee-shifting statutes"); S. REP. NO. 253, 96th Cong., 1st Sess. 19-22 (1979) (same).

162. What constitutes the use of the EAJA to supplement existing fee-shifting statutes as opposed to impermissible replacing or superseding of such statutes has been the subject of much litigation.

"replace or supersede any existing fee-shifting statutes such as the Freedom of Information Act [or] the Civil Rights Acts."¹⁶³ When another statute waiving the immunity of the government for fees is applicable in a case, that statute establishes the exclusive basis for a fee award. Thus, a plaintiff may not evade the finality limitation of Sections 2414 and 1304 for payment of fee awards against the United States from the Judgment Fund, under statutes such as the Freedom of Information Act or Title VII, by disavowing the applicable fee-shifting statute in order to seek an interim fee award under Subsection 2412(d) of the EAJA.¹⁶⁴

B. "Sue-and-Be-Sued" Agencies and Government Corporations

Certain federal agencies and instrumentalities, by statute, have been shed of most aspects of sovereign immunity and therefore are more amenable to liability for judgments and for awards of costs and fees incidental to litigation.¹⁶⁵ As the Supreme Court held in *Federal Housing Administration, Region 4 v. Burr*,¹⁶⁶ "[W]hen Congress [has] launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be."¹⁶⁷ With these types of agencies and entities, the bar of sovereign immunity is at its lowest ebb. The traditionally strict and narrow interpretation of waivers of immunity gives way to a liberal construction; a presumption arises that restrictions on that waiver are not to be implied.¹⁶⁸ Accordingly, there are

tion. See, e.g., *Guthrie v. Stewart*, 718 F.2d 104, 107-08 (4th Cir. 1983) (EAJA applies in Social Security Act cases to supplement 42 U.S.C. § 406(b)(1) (1982), which only authorized award of fees to be paid out of the benefit award), *superseded by* Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 183, 186 (not codified) (providing that 42 U.S.C. § 406(b)(1) (1982) shall not prevent award of fees under EAJA); *Environmental Defense Fund, Inc. v. EPA*, 716 F.2d 915, 918-19 (D.C. Cir. 1983) (EAJA fills gap when fee-shifting provision in Resource Conservation and Recovery Act, 42 U.S.C. § 6972(e) (Supp. V 1981), does not apply to appellate petition for review); *Natural Resources Defense Council, Inc. v. EPA*, 703 F.2d 700, 704-06 (3d Cir. 1983) (EAJA supplements Clean Water Act fee provision, 33 U.S.C. § 1365(d) (1976), which allows fees for district court actions but is silent on fees for appellate petitions for review); *United States v. 329.73 Acres of Land*, 678 F.2d 21, 23 (5th Cir. 1982) (EAJA does not encompass condemnation actions that are governed by separate limited fee-shifting statute, 42 U.S.C. § 4654), *rev'd on reh'g*, 704 F.2d 800, 804-08 (5th Cir. 1983) (en banc) (EAJA supplements fee-shifting statute for condemnation actions when that statute would not permit fees).

163. H.R. REP. NO. 1418, 96th Cong., 2d Sess. 18, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4997.

164. Existing fee-shifting statutes usually are more generous than Subsection 2412(d). Most other statutes allow fees to parties who have prevailed or substantially prevailed in litigation with the government, whereas Subsection 2412(d) also requires that the prevailing party establish that the government's position in the case lacks substantial justification. Although Subsection 2412(d) greatly expands the contexts in which fee awards may be available against the government, it also establishes a more stringent standard than most other statutes that waive the government's immunity from liability for fees.

165. If Congress has not decided to allow suits against an agency, such as by empowering the agency to sue and be sued, then the agency is not a legal entity and the suit may only be brought against the United States. 14 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3655, at 214-16 (1985).

166. 309 U.S. 242 (1940).

167. *Id.* at 245.

168. The Supreme Court explained that:

[S]uch waivers by Congress of governmental immunity in case of such federal instrumen-

compelling reasons to believe that interim awards of attorney's fees are authorized in the context of "sue-and-be-sued" agencies and federal corporations.

Several federal agencies are amenable to suit under express sue-and-be-sued clauses that are generally limited to certain specified functions or activities. For example, the Secretary of Housing and Urban Development may sue and be sued under 12 U.S.C. § 1702¹⁶⁹ with respect to the federal mortgage insurance programs established under the National Housing Act¹⁷⁰ and under 42 U.S.C. § 1404a¹⁷¹ with respect to low income housing programs under the United States Housing Act of 1937.¹⁷² Both of these sue-and-be-sued clauses have been the subject of considerable litigation concerning their scope and limitations.¹⁷³ Other agencies that have been granted authority to sue and be sued include the Small Business Administration¹⁷⁴ and, with respect to certain specified activities, the Secretaries of Commerce,¹⁷⁵ Education,¹⁷⁶ and the Interior.¹⁷⁷

These sue-and-be-sued clauses waive the immunity of the agency only as to existing federal or state causes of action and only with regard to the specific activities enumerated in the statute; they do not grant any substantive rights or create new causes of actions or standards of liability.¹⁷⁸ For instance, they do not establish any general right of judicial review of administrative actions;¹⁷⁹

talities should be liberally construed. . . . Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to "sue or be sued," that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.

Id. (footnote omitted).

169. 12 U.S.C. § 1702 (Supp. V 1987).

170. *Id.* §§ 1701-1750g (1982 & Supp. V 1987).

171. 42 U.S.C. § 1404a (Supp. V 1987).

172. *Id.* §§ 1437-1437s (1982 & Supp. V 1987).

173. See generally CIVIL ACTIONS AGAINST THE UNITED STATES: ITS AGENCIES, OFFICERS AND EMPLOYEES §§ 6.43 to 6.58, at 407-31 (1982) [hereinafter CIVIL ACTIONS AGAINST THE UNITED STATES] (discussing the scope and limitations of the sue-and-be-sued clauses in 12 U.S.C. § 1702 and 42 U.S.C. § 1404a as developed in litigation).

174. 15 U.S.C. § 634(b)(1) (1982) (Small Business Administrator may sue and be sued with respect to all the "functions, powers, and duties" vested in it).

175. See, e.g., 19 U.S.C. § 2350 (1982) (Secretary of Commerce may sue and be sued with respect to activities in providing technical and financial assistance to firms under tariff adjustment program); 42 U.S.C. § 3211(11) (1982) (Secretary of Commerce may sue and be sued with respect to certain public works and economic development programs).

176. See, e.g., 20 U.S.C. § 1132d-1(b)(2) (Supp. V 1987) (Secretary of Education may sue and be sued with respect to loan programs for construction, reconstruction, and renovation of academic facilities).

177. See, e.g., 25 U.S.C. § 1496(a) (1982) (Secretary of Interior may sue and be sued with respect to loan guaranty and insurance program to finance economic development of Indians and Indian organizations).

178. CIVIL ACTIONS AGAINST THE UNITED STATES, *supra* note 173, §§ 6.47, 6.50, at 412-14, 415-16.

179. See, e.g., *Sapp v. Hardy*, 204 F. Supp. 602, 605-06 (D. Del. 1962); *Gart v. Cole*, 166 F.

such review instead must be maintained under the Administrative Procedure Act.¹⁸⁰

Moreover, the courts have construed sue-and-be-sued clauses as limited waivers of sovereign immunity applying only to suits against the agency and not applying to suits that are in reality against the United States.¹⁸¹ The distinction between an action properly maintained against the agency and one against the United States is whether the funds to satisfy any monetary judgment will come from separate agency funds or from the public Treasury.¹⁸² As the Supreme Court explained in the *Federal Housing Administration* case, agency liability under a sue-and-be-sued clause is limited to "those funds . . . which are in [the agency's] possession, severed from Treasury funds and Treasury control."¹⁸³ With a couple of possible exceptions,¹⁸⁴ the courts of appeals have entertained monetary actions against agencies under sue-and-be-sued clauses only if the plaintiff identified a separate agency fund related to the government program at issue which, at least in part, received its capital from a source other than the public Treasury.¹⁸⁵

Supp. 129, 136 (S.D.N.Y. 1958), *aff'd*, 263 F.2d 244 (2d Cir.), *cert. denied*, 359 U.S. 978 (1959); *see also* *Armor Elevator Co. v. Phoenix Urban Corp.*, 655 F.2d 19, 22 (1st Cir. 1981) (suit alleging agency's failure to comply with its own regulations is beyond waiver in sue-and-be-sued clause). *See generally* CIVIL ACTIONS AGAINST THE UNITED STATES, *supra* note 173, § 6.50, at 415-16 (sue-and-be-sued clauses do not authorize judicial review of administrative acts).

180. 5 U.S.C. §§ 701-706 (1982 & Supp. V 1987).

181. *See, e.g.*, *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 674-76 (8th Cir. 1986); *Falls Riverway Realty v. City of Niagara Falls*, 754 F.2d 49, 55 (2d Cir. 1985); *Marcus Garvey Square, Inc. v. Winston Burnett Constr.*, 595 F.2d 1126, 1132 (9th Cir. 1979); *Carlyle Gardens Co. v. Delaware State Hous. Auth.*, 659 F. Supp. 1300, 1304 (D. Del. 1987).

182. CIVIL ACTIONS AGAINST THE UNITED STATES, *supra* note 173, § 6.51, at 417-18.

183. *Federal Hous. Admin., Region 4 v. Burr*, 309 U.S. 242, 250 (1940).

184. In *Holbrook v. Pitt*, 643 F.2d 1261, 1275 n.28 (7th Cir. 1981), the United States Court of Appeals for the Seventh Circuit indicated that Department of Housing and Urban Development housing assistance funds in a reserve account constituted an "identifiable res" upon which an equitable lien could be imposed in favor of low income tenants claiming third party beneficiary status to a subsidized rental housing assistance contract. The court, however, did not consider the problems of sovereign immunity or the jurisdictional limitations of the sue-and-be-sued clause. In *Jaimes v. Lucas Metropolitan Housing Authority*, 833 F.2d 1203, 1208-09 (6th Cir. 1987), the United States Court of Appeals for the Sixth Circuit ruled that a sue-and-be-sued clause waived the immunity of the Department of Housing and Urban Development for an award of damages in a civil rights case without examining whether a separate agency fund existed for payment of the award. The *Jaimes* court also failed to distinguish an earlier Sixth Circuit decision, *Selden Apartments v. HUD*, 785 F.2d 152, 157-58 (6th Cir. 1986), which had held that a civil rights action could not be maintained under a sue-and-be-sued clause because the judgment would not be recoverable from separate agency funds as opposed to Treasury funds.

185. *See, e.g.*, *Mann v. Pierce*, 803 F.2d 1552, 1557 (11th Cir. 1986) (HUD general insurance fund which was funded by deposit of rents from tenants in agency-owned properties); *Selden Apartments v. HUD*, 785 F.2d 152, 157 (6th Cir. 1986) (civil rights suit for damages against HUD could not be maintained under sue-and-be-sued clause because judgment would not be recoverable from separate agency funds but would be satisfied from Treasury funds); *Portsmouth Redevelopment and Hous. Auth. v. Pierce*, 706 F.2d 471, 473-74 (4th Cir.) (HUD operating subsidy funds were public Treasury funds so action could not proceed under sue-and-be-sued clause), *cert. denied*, 464 U.S. 960 (1983); *Merrill Tenant Council v. HUD*, 638 F.2d 1086, 1092-93 (7th Cir. 1981) (separate fund of collected rents and security deposits from tenants in properties owned by HUD); *Industrial Indem., Inc. v. Landrieu*, 615 F.2d 644, 646 (5th Cir. 1980) (general insurance fund obtaining most of its working capital from proceeds of mortgage insurance program); *S.S. Silberblatt, Inc. v. East Harlem Pilot Block*, 608 F.2d 28, 36 (2d Cir. 1979) (special risk insurance fund receiving most of capital from mortgage insurance proceeds); *see also In re S.S. Silberblatt, Inc. v. East Harlem Pilot Block—Payment of Judgment*, 62 Comp. Gen. 12 (1982) (Comptroller General ruled that judgment arising

When a suit for monetary relief actually seeks recovery out of "the public treasury or domain," it must be treated as one against the United States,¹⁸⁶ usually under the Tucker Act.¹⁸⁷ The Tucker Act is a jurisdictional statute waiving the sovereign immunity of the United States for monetary claims "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."¹⁸⁸ The United States Claims Court possesses trial court jurisdiction over Tucker Act claims,¹⁸⁹ and district courts retain concurrent jurisdiction over Tucker Act claims for \$10,000 or less.¹⁹⁰ Most appeals in cases involving a Tucker Act claim lie within the exclusive jurisdiction of the United States Court of Appeals for the Federal Circuit.¹⁹¹ The EAJA governs petitions for attorney's fee awards in successful Tucker Act claims against the United States.¹⁹²

Even when a sue-and-be-sued clause authorizes an action against an agency, the proposition that the clause suffices to waive the immunity of the agency from awards of attorney's fees is not wholly without doubt, or at least it was not before the enactment of the EAJA. The United States Court of Appeals for the District of Columbia Circuit ruled in *NAACP v. Civiletti*¹⁹³ that the statute allowing the Small Business Administration to sue and be sued¹⁹⁴ was not a suffi-

out of HUD's mortgage insurance program must be paid from the special risk insurance fund rather than the Judgment Fund).

186. *Land v. Dollar*, 330 U.S. 731, 738 (1947); *Portsmouth Redevelopment and Hous. Auth. v. Pierce*, 706 F.2d 471, 473 (4th Cir.), *cert. denied*, 464 U.S. 960 (1983).

187. In some cases, parties may be able to maintain actions for monetary relief, other than traditional money damages, through a suit for specific relief under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1982 & Supp. V 1987). See *Bowen v. Massachusetts*, 108 S. Ct. 2722 (1988). The *Bowen* decision creates a rather uncertain exception to the general principle that monetary claims against the United States must proceed under the Tucker Act. See *id.* at 2742-51 (Scalia, J., dissenting). The courts have yet to define the extent to which the Administrative Procedure Act may be the vehicle for monetary claims under the *Bowen* analysis. See generally Webster, *Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief*, 49 OHIO ST. L.J. 725 (1988) (suggesting one possible interpretation of the intersection between the Administrative Procedure Act and the Tucker Act in the aftermath of *Bowen*); Sisk, *Two Proposals to Clarify the Tucker Act Jurisdiction of the Claims Court*, 36 FED. BAR NEWS & J. (to be published December, 1989) (criticizing the *Bowen* decision and suggesting legislative proposals to restore the Tucker Act as the exclusive vehicle for monetary claims against the United States).

188. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (1982). See generally *Bowen v. Massachusetts*, 108 S. Ct. 2722 (1988) (construing the Tucker Act); *United States v. Mitchell*, 463 U.S. 206 (1983) (same); J. STEADMAN, D. SCHWARTZ & S. JACOBY, *supra* note 29, chs. VII-IX, XI (discussing the Tucker Act); 14 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3657 (1985 & Supp. 1988) (same). The Tucker Act "does not create any substantive right enforceable against the United States for money damages," *United States v. Testan*, 424 U.S. 392, 398 (1976), but instead provides a limited waiver of sovereign immunity for substantive rights "found in some other source of law," *Mitchell*, 463 U.S. at 216.

189. 28 U.S.C. § 1491(a)(1) (1982).

190. *Id.* § 1346(a)(2).

191. *Id.* § 1295 (1982 & Supp. V 1987); Pub. L. No. 100-702, § 501, 102 Stat. 4652 (1988) (to be codified at 28 U.S.C. § 1292(d)(4)). See generally Sisk, *Tucker Act Appeals to the Federal Circuit*, 36 FED. BAR NEWS & J. 41 (1989) (discussing appellate jurisdiction over Tucker Act claims).

192. See *supra* notes 139-164 and accompanying text. The EAJA allows fee awards in both district court and Claims Court proceedings. 28 U.S.C. § 2412(d)(2)(F) (Supp. V 1987) (including Claims Court in definition of "court").

193. 609 F.2d 514 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 922 (1980).

194. 15 U.S.C. § 634(b)(1) (1982).

ciently express waiver of sovereign immunity to allow an award of attorney's fees against the agency.¹⁹⁵ However, the court premised its 1979 decision largely on the theory that the sue-and-be-sued clause could not overcome the explicit prohibition of fee awards against the government then contained in 28 U.S.C. § 2412.¹⁹⁶ Congress has since lifted the former prohibition in Section 2412 and amended the statute through the EAJA to make the government liable for fees to the same extent as private parties.¹⁹⁷

That development weakens the argument that an implied restriction on fee awards in sue-and-be-sued clauses "is necessary to avoid grave interference with the performance of a governmental function."¹⁹⁸ It now seems appropriate to read agency sue-and-be-sued clauses more expansively to permit fee awards by their own terms. Indeed, some courts recently have permitted fee awards pursuant to sue-and-be-sued clauses in cases in which the fees would be paid from agency funds as an incident to the legal proceedings.¹⁹⁹

If this approach is correct, and it certainly seems to be, then sue-and-be-sued clauses should be understood to waive the sovereign immunity of the agency for fee awards in much the same manner as Subsection 2412(b) of the Equal Access to Justice Act.²⁰⁰ As a general waiver of sovereign immunity, the sue-and-be-sued clause makes the agency amenable to an award of fees in the same manner as a private party under common-law or statutory fee-shifting rules.²⁰¹ And, importantly, by obviating the need for recourse to Subsection 2412(b), under which awards are payable from the Judgment Fund only when final,²⁰² an award of fees under the sue-and-be-sued clause properly may be paid from agency funds. Moreover, because courts should construe sue-and-be-sued clauses liberally, the agency arguably should be liable for awards on an interim basis.

Again, one must remember that sue-and-be-sued clauses do not create any new causes of action; that means they also do not establish any new basis for fee-shifting. If no existing common law or statutory ground allows for an award of attorney's fees, the only alternative basis would be Subsection 2412(d) of the EAJA if the plaintiff can establish that the government's position in the litiga-

195. *NAACP*, 609 F.2d at 520 n.12; see also *Cassata v. Federal Sav. & Loan Ins. Corp.*, 445 F.2d 122 (7th Cir. 1971) (holding that Federal Savings & Loan Insurance Corporation, which is authorized to sue and be sued, was not subject to an award of attorney's fees).

196. *NAACP*, 609 F.2d at 520 n.12 (discussing bar on attorney's fees in 28 U.S.C. § 2412 (1976)).

197. 28 U.S.C. § 2412(b) (Supp. V 1987).

198. *Federal Hous. Admin., Region 4 v. Burr*, 309 U.S. 242, 245 (1940).

199. For example, in *Merrill Tenant Council v. Department of Housing and Urban Development*, No. 78 C 710 (N.D. Ill. Oct. 29, 1987) (LEXIS, Genfed library, Dist file), the district court awarded attorney's fees pursuant to a sue-and-be-sued clause under a state fee-shifting statute in a situation in which the fees were to be paid out of funds within the control of the agency. See also *Merrill Tenant Council v. HUD*, 638 F.2d 1086, 1091-92 (7th Cir. 1981) (holding state fee-shifting statute applied to agency as incorporated through government contract).

200. See *supra* notes 146-48 and accompanying text.

201. See, e.g., *Merrill Tenant Council v. HUD*, No. 78 C 710 (N.D. Ill. Oct. 29, 1987) (LEXIS, Genfed library, Dist file) (sue-and-be-sued clause waived agency immunity for fees under state fee-shifting statute).

202. See *supra* notes 149-54 and accompanying text.

tion was not substantially justified.²⁰³ As discussed earlier, courts have permitted interim awards under Subsection 2412(d).²⁰⁴

Moreover, certain statutes by their very terms provide that the "United States," rather than the agency, must pay the fee award.²⁰⁵ Under such statutes, even if a judgment for damages against an agency would be payable from a separate agency fund, any attorney's fee award would be payable by the United States from the Judgment Fund, subject to the statutory finality requirement.²⁰⁶

Another type of governmental entity, that is very similar to the sue-and-be-sued clause agency and likewise liberally amenable to suit, is the federal government corporation.²⁰⁷ The United States Postal Service, although not statutorily designated as a corporation,²⁰⁸ is nevertheless a quintessential example of this type of entity.²⁰⁹ The Postal Service has the authority to "sue and be sued,"²¹⁰ and has its own claims settlement authority.²¹¹ By statute, a "judgment against the Government of the United States arising out of activities of the Postal Service shall be paid by the Postal Service out of any funds available to the Postal

203. 28 U.S.C. § 2412(d) (Supp. V 1987).

204. See *supra* notes 157-59 and accompanying text.

205. See, e.g., Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1982); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1982). A conflict exists between these statutes, providing for payment of fees by the "United States," and the unique statutory provision for the United States Postal Service, requiring that Service funds cover all judgments arising out of the activities of the Postal Service. 39 U.S.C. § 409(e) (1982). The more specific Postal Service statute prevails and attorney's fee awards against the Service are payable out of its own funds rather than the Judgment Fund. Therefore, the Postal Service may be the only government agency that is properly subject to an interim fee award under Title VII. See *Chisholm v. United States Postal Serv.*, 570 F. Supp. 1044 (W.D.N.C. 1983) (court granted interim award of fees against the Postal Service in Title VII case, with no discussion of the source of payment or whether interim awards are permissible). This is hardly surprising because, as discussed *infra* notes 208-16 and accompanying text, the Postal Service is nearly indistinguishable from government corporations.

206. See *supra* notes 14-131 and accompanying text. A similar regime prevails in the tax context, although the Internal Revenue Service does not have the capacity to sue and be sued. *In re Morrell*, 69 Bankr. 147, 149 (Bankr. N.D. Cal. 1986). Under the Tax Equity and Fiscal Responsibility Act of 1982, attorney's fees may be paid to the prevailing party in suits "in connection with the determination, collection or refund of any tax, interest or penalty." 26 U.S.C. § 7430(a) (1982 & Supp. V 1987). See generally J. BENNETT, *supra* note 1, § 6.02, at 6-5 to 6-10 (discussing recovery of attorney's fees under the Internal Revenue Code). Although the Internal Revenue Service controls a separate appropriation for payment of tax refunds with interest, that appropriation by its terms is not available for payment of any other type of award, including attorney's fees. 28 U.S.C. § 2411 (Supp. V 1987). Attorney's fee awards under Section 7430 therefore are payable from the Judgment Fund pursuant to the finality requirement. See *In re Source of Funds for Payment of Awards Under 26 U.S.C. 7430*, 63 Comp. Gen. 470 (1984).

207. See generally J. STEADMAN, D. SCHWARTZ & S. JACOBY, *supra* note 29, § 16.117, at 345-48 (discussing government corporations).

208. When the term "government corporation" is used, it ordinarily refers to those entities designated as corporations by law and identified in the Government Corporation Control Act, 31 U.S.C. § 9101 (1982). Although the Postal Service does not fall in this category, it is nevertheless a useful example because it enjoys powers similar to those of corporations, its sovereign immunity has largely been waived, and judgments against it are paid from Postal Service funds.

209. See generally *Loeffler v. Frank*, 108 S. Ct. 1965 (1988) (discussing nature of United States Postal Service and its amenability to suit); *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512 (1984) (same).

210. 39 U.S.C. § 401(1) (1982) (Postal Service may "sue and be sued in its official name").

211. *Id.* § 401(8) (Postal Service may "settle and compromise claims by or against it"); *id.* § 2603 (Postal Service may "adjust and settle" claims for damage to property and persons).

Service."²¹² The Supreme Court has held that "[b]y launching 'the Postal Service into the commercial world,' and including a sue-and-be-sued clause in its charter, Congress has cast off the Service's 'cloak of sovereignty' and given it the 'status of a private commercial enterprise.'"²¹³ Thus, the Postal Service "is designed to be self-supporting and to operate very much like a commercial business."²¹⁴ At times, courts have suggested rather baldly that the Postal Service retains no sovereign immunity,²¹⁵ although this is certainly an overstatement.²¹⁶

Examples of entities that Congress actually has designated as government corporations and that frequently face litigation include the Federal Deposit Insurance Corporation,²¹⁷ the Federal Savings and Loan Insurance Corporation,²¹⁸ the Pension Benefit Guaranty Corporation,²¹⁹ the Export-Import Bank,²²⁰ the Tennessee Valley Authority,²²¹ and Amtrak.²²²

212. *Id.* § 409(e).

213. *Loeffler*, 108 S. Ct. at 1970 (quoting *Library of Congress v. Shaw*, 478 U.S. 310, 317 n.5 (1986); *Franchise Tax Bd.*, 467 U.S. at 520).

214. *Perez v. United States*, 830 F.2d 54, 60 (5th Cir. 1987).

215. See, e.g., *Franchise Tax Bd.*, 467 U.S. at 519-20 & n.12 (citing lower federal court cases for the proposition that "the Postal Reorganization Act constitutes a waiver of sovereign immunity"); *Harrison v. United States Postal Serv.*, 840 F.2d 1149, 1152 n.6 (4th Cir. 1988) ("The Postal Service has no sovereign immunity."); *Springer v. Seamen*, 821 F.2d 871, 880 n.9 (1st Cir. 1987); *Active Fire Sprinkler Corp. v. United States Postal Serv.*, 811 F.2d 747, 752-53 (2d Cir. 1987).

216. The Postal Service remains "an independent establishment of the executive branch of the Government of the United States," 39 U.S.C. § 201 (1982), and "operate[s] as a basic and fundamental service provided to the people by the Government of the United States," *id.* § 101(a). The courts have understood that the Postal Service retains at least some incidents of sovereign immunity. See, e.g., *Rider v. United States Postal Serv.*, 862 F.2d 239, 242 (9th Cir. 1988) (applying rule precluding estoppel of federal government to Postal Service notwithstanding waiver of sovereign immunity in sue-and-be-sued clause), *cert. denied*, 109 S. Ct. 2430 (1989); *Young v. United States Postal Serv.*, 698 F. Supp. 1139, 1144 (S.D.N.Y. 1988) (Postal Service is part of government for purpose of rule barring jury trials in suits against the United States and sue-and-be-sued clause does not waive immunity from jury trial), *mandamus denied sub nom. In re Young*, 869 F.2d 158 (2d Cir. 1989). But see *Azar v. United States Postal Serv.*, 777 F.2d 1265, 1271 (7th Cir. 1985) (holding Postal Service subject to estoppel by employee misstatement).

217. 12 U.S.C. § 1819 Fourth (1982) (Federal Deposit Insurance Corporation "shall become a body corporate and as such shall have power . . . [t]o sue or be sued"); see also 31 U.S.C. § 9101(2)(C) (1982) (listing Federal Deposit Insurance Corporation as a "mixed-ownership Government corporation"). But cf. *Rauscher Pierce Refsnes, Inc. v. Federal Deposit Ins. Corp.*, 789 F.2d 313, 315 (5th Cir. 1986) (describing essential governmental nature of Federal Deposit Insurance Corporation's functions in maintaining and regulating the banking system).

218. 12 U.S.C. § 1725(c)(4) (1982) (Federal Savings and Loan Insurance Corporation "shall become a body corporate, and shall be an instrumentality of the United States, and as such shall have power . . . [t]o sue and be sued"); see also 31 U.S.C. § 9101(3)(E) (1982) (listing Federal Savings and Loan Insurance Corporation as a "wholly owned Government corporation").

219. 29 U.S.C. § 1302(a) (1982) (establishing Pension Benefit Guaranty Corporation as "a body corporate" within the Department of Labor); *id.* § 1302(b)(1) (empowering Pension Benefit Guaranty Corporation "to sue and be sued . . . in its corporate name"); see also 31 U.S.C. § 9101(3)(I) (1982) (listing Pension Benefit Guaranty Corporation as a "wholly owned Government corporation"). See generally *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 214 (1986) (litigation against the Pension Benefit Guaranty Corporation); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984) (same).

220. 12 U.S.C. § 635(a)(1) (Supp. V 1987) ("[t]here is created a corporation with the name Export-Import Bank of the United States, which shall be an agency of the United States of America" and which "is authorized and empowered . . . to sue and to be sued"); see also 31 U.S.C. § 9101(3)(B) (1982) (listing the Export-Import Bank as a "wholly owned Government corporation"). See generally *Nu-Air Mfg. Co. v. Frank B. Hall & Co.*, 822 F.2d 987, 996 (11th Cir. 1987) (discussing waiver of immunity of the Export-Import Bank), *cert. denied*, 108 S. Ct. 1270 (1988).

221. 16 U.S.C. § 831c(b) (1982) (Tennessee Valley Authority has the power to "sue and be sued

Federal government corporations are amenable to suit in much the same manner as the sue-and-be-sued clause agencies, except that even the last vestiges of sovereign immunity have largely been stripped away from these instrumentalities. Judgments against government corporations, including awards incidental to litigation, are payable from corporation funds without any appropriation by Congress to pay the judgment.²²³ Whether government corporations retain even a small measure of immunity depends on whether Congress has chosen to confer such protection.²²⁴

Because many government corporations are financially self-sufficient and are designed to operate much like commercial businesses, it is appropriate to regard their immunity from legal process very narrowly. Courts should construe waivers of sovereign immunity broadly when a governmental entity's activities "are primarily commercial and . . . those activities aspire to profitability."²²⁵ For these reasons, the discussion above regarding agencies' liability for attorney's fees under sue-and-be-sued clauses applies with additional force to government corporations. Because many government corporations are essentially commercial in nature and because any award of fees would be paid out of corporate funds, not the public Treasury, it seems especially appropriate for interim attorney's fee awards to be available against such entities.²²⁶

However, even when an action would otherwise fall within the scope of an

in its corporate name"); see also 31 U.S.C. § 9101(3)(M) (1982) (listing the Tennessee Valley Authority as a "wholly owned Government corporation").

222. 45 U.S.C. § 541 (1982) (the National Railroad Passenger Corporation (Amtrak) is not "an agency or establishment of the United States Government" and, to the extent consistent with the statute, is subject to the District of Columbia Business Corporation Act); see also 31 U.S.C. § 9101(2)(A) (1982) (listing Amtrak as a "mixed-ownership Government corporation"). This unique statutory provision clearly evinces Congress' intention that Amtrak not retain any incidents of sovereign immunity other than those expressly reserved in the statute. See *Kimbrough v. National R.R. Passenger Corp.*, 549 F. Supp. 169, 173 (M.D. Ala. 1982) ("Amtrak is to be considered a private corporation rather than a federal government entity").

223. *Walling v. Norfolk S. Ry.*, 162 F.2d 95, 97 (4th Cir. 1947) (judgment for costs against government corporation is payable from corporation funds without the need for an appropriation by Congress to pay the judgment).

224. *Federal Deposit Ins. Corp. v. Citizens Bank & Trust Co.*, 592 F.2d 364, 369 (7th Cir.), cert. denied, 444 U.S. 829 (1979). See generally CIVIL ACTIONS AGAINST THE UNITED STATES, *supra* note 173, § 1.5, at 9 (the doctrine of sovereign immunity generally does not apply to government corporations); J. STEADMAN, D. SCHWARTZ & S. JACOBY, *supra* note 29, § 16.121, at 350-52 (discussing immunity of government corporations). There is authority for the proposition that even when Congress has not made a government corporation expressly amenable to suit, the entity still does not enjoy sovereign immunity. In *Kiefer & Kiefer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939), the Supreme Court held that the Regional Agricultural Credit Corporation was subject to suit even absent a statutory waiver of sovereign immunity. *Id.* at 389-94. The Court reached this conclusion, however, primarily because the parent corporation of this regional entity was expressly subject to suit under a sue-and-be-sued clause. *Id.* at 392-93. More recently, the Court has construed its prior decisions allowing judgments, including awards of costs, against the Reconstruction Finance Corporation to be based upon the express statutory grant of authority to "sue and be sued." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 143 n.2 (1971).

225. *A.L.T. Corp. v. Small Business Admin.*, 823 F.2d 126, 128 (5th Cir. 1987).

226. In at least two reported decisions, courts granted interim attorney's fee awards against the United States Postal Service, although neither decision addressed sovereign immunity concerns or the threshold question whether interim awards are permissible in the first instance. See *Mantoletto v. Bolger*, 791 F.2d 784, 786 (9th Cir. 1986) (awarding interim fees under Rehabilitation Act of 1973, 29 U.S.C. § 794a(b) (1982)); *Chisholm v. United States Postal Serv.*, 570 F. Supp. 1044, 1046-47 (W.D.N.C. 1983) (awarding interim fees under Title VII).

agency's or government corporation's sue-and-be-sued clause, there are exceptions to the general rules that such actions may be maintained directly against the agency or corporation and that any judgment will be satisfied from agency or corporation funds. Perhaps most importantly, the Federal Tort Claims Act²²⁷ modifies the sue-and-be-sued doctrine by making that Act the exclusive remedy for tort actions against federal agencies.²²⁸ For purposes of this exclusive remedy, the Federal Tort Claims Act defines "federal agency" as including "corporations primarily acting as instrumentalities or agencies of the United States."²²⁹ The United States is generally not liable for attorney's fees in tort actions, whether the fee award is sought under the Federal Tort Claims Act²³⁰ or under

227. 28 U.S.C. §§ 1346(b), 2671-80 (1982).

228. The Act states that:

The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title and the remedies provided by this title in such cases shall be exclusive.

Id. § 2679(a); see also *Federal Deposit Ins. Corp. v. Citizens Bank & Trust Co.*, 592 F.2d 364, 369-73 (7th Cir.) (Federal Tort Claims Act is exclusive remedy for tort action against agency and withdraws sue-and-be-sued waiver of sovereign immunity over torts covered by the Act), *cert. denied*, 444 U.S. 829 (1979); *Bor-Son Bldg. Corp. v. Heller*, 572 F.2d 174, 177 (8th Cir. 1978) (same). But see *Woodbridge Plaza v. Bank of Irvine*, 815 F.2d 538, 542-44 (9th Cir. 1987) (Federal Tort Claims Act is not the exclusive remedy for tort actions outside the ambit of the Act; therefore, sue-and-be-sued clause waives immunity for such torts).

229. 28 U.S.C. § 2671 (1982); see also *Federal Deposit Ins. Corp. v. Hartford Ins. Co.*, 877 F.2d 590, 591-92 (7th Cir. 1989) (discussing, without deciding, whether the Federal Deposit Insurance Corporation is a "federal agency" within the meaning of the Federal Tort Claims Act when acting in its capacity as a receiver of a bank rather than in its corporate capacity as an insurer of deposits). See generally J. STEADMAN, D. SCHWARTZ & S. JACOBY, *supra* note 29, §§ 13.112.5, 13.116, at 263-64, 268-71 (discussing tort liability of government corporations). The Federal Tort Claims Act expressly covers even the Postal Service, 39 U.S.C. § 409(c) (1982), although tort judgments arising from Postal Service activities continue to be paid from Postal Service funds pursuant to the express mandate of Subsection 409(e). With respect to government corporations, the suggestion has been made from time to time that the Judgment Fund should not be available to pay tort awards against such entities even when the lawsuit falls within the Federal Tort Claims Act because the corporation was "primarily acting as [an] instrumentality or agency of the United States." 28 U.S.C. § 2671 (1982). The argument has been that tort judgments involving a government corporation should be regarded as a business expense, especially because the corporation, unlike regular government agencies, could procure liability insurance. Thus, the impact on the corporation of paying the judgment is correspondingly reduced and the United States Treasury should not be opened to pay the judgment. This is a sound policy argument, but since the Federal Tort Claims Act makes the United States, and not the corporation, the true defendant under such circumstances, it is difficult to see why the judgment is not properly payable from the Judgment Fund like other judgments against the United States. But see *Federal Deposit Ins. Corp. v. Hartford Ins. Co.*, 877 F.2d at 593 (suggesting that judgments against the Federal Deposit Insurance Corporation when acting as a receiver are payable as expenses out of the receivership estate rather than the Judgment Fund). When government corporations are not "primarily acting as instrumentalities or agencies of the United States," 28 U.S.C. § 2671 (1982), but instead are operating primarily as commercial business entities, the Federal Tort Claims Act does not apply. Those corporations remain liable for tort claims pursuant to their general sue-and-be-sued clause powers. In addition, the Tennessee Valley Authority is excepted from the provisions of the Federal Tort Claims Act. 28 U.S.C. § 2680(f) (1982). The Tennessee Valley Authority's liability for tort action therefore stems from its status as a government corporation and its sue-and-be-sued clause.

230. The Federal Tort Claims Act provides only that attorney's fees may be allowed up to a maximum of 25 percent of the amount of damages recovered in the suit and makes no provision for any shifting of fees to the government. 28 U.S.C. § 2678 (1982); see also *Joe v. United States*, 772 F.2d 1535, 1536-37 (11th Cir. 1985) (per curiam) ("The FTCA does not contain the express waiver of sovereign immunity necessary to permit a court to award attorneys' fees against the United States directly under that act.").

the EAJA.²³¹ Thus, fees usually cannot be granted against the federal government or its agencies and corporations, on an interim basis or otherwise, when the action sounds in tort.

III. STANDARDS FOR INTERIM AWARDS OF ATTORNEY'S FEES

*If the fees are paid before the
battle's won,
The winner may pay the loser.
But if the fees are withheld until the
lawsuit's done,
The winner may become the loser.*

Assuming the availability of interim attorney's fee awards against the federal government at least under some circumstances, the next inquiry concerns the standards that should guide a district court's discretion to adjudge whether an interim award is warranted in a particular case.²³² The rhyme set forth above summarizes the real concerns underlying the interim fee question. First, no fee award can be granted properly until "the battle's won," that is, until the party to be awarded fees truly has prevailed on an important issue in the case so that the party's ultimate entitlement to attorney's fees is free from any reasonable dispute. Second, interim fees should be awarded only "in cases of protracted litigation where a party's ability to obtain redress . . . would be imperiled without such an award."²³³ In other words, interim awards should be reserved for those situations when, without an immediate award, the "winner may become the loser."

The basic presumption should be that interim fee awards are the exception and are disfavored. In order to avoid repeated requests for new awards of fees at each successive stage of litigation, the courts should make plain that ordinarily

231. Subsection 2412(d) of the EAJA expressly excepts "cases sounding in tort" from its fee-shifting provision. 28 U.S.C. § 2412(d)(1)(A) (Supp. V 1987); *see also* *Campbell v. United States*, 835 F.2d 193, 195-96 (9th Cir. 1987) (tort actions were expressly excluded from the EAJA). Subsection (b), making the government liable for fees to the same extent as private parties, does not include a similar exception. 28 U.S.C. § 2412(b) (Supp. V 1987). The marked dearth of statutory provisions shifting fees in tort actions, and the interpretation of Subsection (b) to waive immunity from fee awards only pursuant to federal law and federal statutes, *Joe*, 772 F.2d at 1537, indicates that the federal government is liable for attorney's fees in a tort action only under the bad faith exception. Because plaintiffs' attorneys generally handle tort cases on a contingency fee basis, Congress has not seen a need for fee-shifting schemes in the tort area. *See* H.R. CONF. REP. NO. 1434, 96th Cong., 2d Sess. 25, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 5003, 5014 (tort actions were excluded from EAJA because Congress believed the legal remedies available, such as contingency fee arrangements, were adequate).

232. The standards outlined in this Article to guide a court's discretion in awarding interim attorney's fees also may apply to requests for interim awards against private parties. But because an award against the federal government usually constitutes a charge, directly or indirectly, against the public Treasury, such a strict approach toward interim fees is especially important in the context of suits against the government. Congress should consider these standards if it decides to expand the availability of interim fee awards against the government by statutory enactment. If Congress decides to permit interim fee awards in additional contexts, it should make its intention clear in the actual language of the fee-shifting statute and, when necessary, by amending the statutes governing payment of awards from the Judgment Fund.

233. *Yakowicz v. Pennsylvania*, 683 F.2d 778, 781 (3d Cir. 1982) (footnote omitted).

they will consider attorney's fees petitions only at the close of the litigation and that they will grant petitions on an interlocutory basis only in extraordinary circumstances.

In addition to the awkward piecemeal resolution of fee disputes that necessarily attends interim consideration of fee petitions, several other factors counsel against frequent or routine grants of interim fees. First and foremost, if courts prematurely assess attorney's fees, "the ultimately successful party might end up having subsidized a large segment of the losing party's suit."²³⁴ Courts can reduce this danger by careful adherence to the requirement that they award fees only to a party that has prevailed on the merits of an important issue in the case. Even then, the risk remains that the appellate court, or the trial court itself on reconsideration, will reverse the interlocutory ruling on the merits and change the ultimate outcome of the case.

A second, related reason to discourage interim fee applications is that a petition for fees effectively asks a trial court to prejudge the merits of the case. Fee applicants too frequently ask courts to conjecture prematurely about whether the applicant will succeed ultimately in the litigation. It is often "too difficult to determine in the flow of litigation, without an opportunity for retrospection" whether a party seeking fees truly has prevailed.²³⁵ Moreover, a judge who has awarded interim fees may, almost unconsciously, find it difficult subsequently to rule against the party on the remaining bones of contention in the case, knowing that adverse rulings could cause the party to forfeit the tentative status as a prevailing party. In that event, of course, any earlier interim fee award would have to be disgorged.²³⁶ A premature fee award therefore may have the perverse effect of driving the underlying substantive litigation.

Finally, when ordered against the government, an interim fee award may serve as a thinly disguised mechanism for evading the well-settled principle that "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award."²³⁷ Indeed, some courts that have permitted interim fee awards against the United States have acknowledged forthrightly that a primary motive for that action was to preserve the current value of the sum for the peti-

234. *Grubbs v. Butz*, 548 F.2d 973, 976 (D.C. Cir. 1976).

235. *Irons v. FBI*, No. 82-1143-G (D. Mass. June 26, 1987) (LEXIS, Genfed library, Dist file).

236. See *Rosenfeld v. United States*, 859 F.2d 717, 720 (9th Cir. 1988) ("the government could recover the interim fees it paid out if it successfully appealed" the award); *Palmer v. City of Chicago*, 806 F.2d 1316, 1319 (7th Cir. 1986) ("we assume that the district court has an inherent power to order attorneys to whom fees were paid over by their clients pursuant to court order to repay the fees should the order be reversed"), *cert. denied*, 481 U.S. 1049 (1987); 1 M. DERFNER & A. WOLF, *supra* note 1, § 9.03[2][d], at 9-46.2 (precedent holds or suggests that plaintiff awarded fees on an interlocutory basis may be forced to remit them if the defendant later prevails or the award is found to have been erroneous); Green, *supra* note 3, at 270-71 (discussing concerns about recoupment of an interim award of fees that is later overturned).

237. *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986). For example, the courts consistently have held that 28 U.S.C. § 1961(a) (1982), which generally authorizes awards of interest on district court civil judgments, is not a sufficiently unambiguous waiver of sovereign immunity to permit the recovery of judgment interest against the United States. See, e.g., *Thompson v. Kennickell*, 797 F.2d 1015, 1026 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 905 (1987); *International Woodworkers of Am., Local 3-98 v. Donovan*, 792 F.2d 762, 766-67 (9th Cir. 1986).

tioning party and spare the litigant any losses due to delay.²³⁸ Because Congress has not seen fit to compensate uniformly those litigating against the government "for the belated receipt of money,"²³⁹ it seems indefensible for courts to resort to interim fee awards as a means of circumventing the no interest rule.²⁴⁰ A litigant must show hardship greater than the loss of current value through delay in payment before a court can properly grant an interim fee award against the federal government.

When considering a request for an interim award, a court always retains the discretion to postpone an award of attorney's fees until a later stage of the litigation or until after final judgment, even if the applicable statute mandates an award of fees at the conclusion of the lawsuit.²⁴¹ For the reasons stated, courts should exercise that discretion regularly and apply strict standards for departure from the general rule disfavoring interim fee awards. The burden of establishing eligibility for and entitlement to an award of attorney's fees, at any stage, rests squarely upon the fee applicant.²⁴² An applicant for an interim remedy also bears the heavier burden of overcoming the negative presumption in a particular case.

A. *Party Must Prevail on an Important Claim on the Merits*

A threshold and absolute prerequisite to any successful petition for attorney's fees against the federal government, at any stage of litigation, must be that the petitioner is truly a prevailing or substantially prevailing party. At a minimum, the party seeking fees must have established entitlement "to some relief on the merits of his claims."²⁴³ Success on procedural, evidentiary, or most preliminary matters, no matter how significant, is not sufficient to establish prevailing-

238. See, e.g., *McKenzie v. Kennickell*, 669 F. Supp. 529, 533 (D.D.C. 1987) ("Speedy decisions on fee petitions and frequent grants of interim awards are necessary to minimize the loss in value of the total award."); *Jurgens v. EEOC*, 660 F. Supp. 1097, 1099, 1103 (N.D. Tex. 1987) (citing the loss of "non-recoverable interest" that will continue to occur if interim fees are not paid).

239. *Shaw*, 478 U.S. at 322.

240. The District of Columbia Circuit has prevented district courts from adjusting attorney's fee awards upwards to compensate the attorney at a higher rate for work completed in earlier years, saying such an adjustment is "simply a forbidden award of interest under another name." *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 50 (D.C. Cir. 1987), *vacated on other grounds*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc); see also *Weisberg v. Department of Justice*, 848 F.2d 1265, 1272 (D.C. Cir. 1988) (enhancing attorney's fee award under the FOIA for delay in receipt of payment was equivalent to an interest award and as such was precluded under *Shaw*). But see *Wilket v. ICC*, 844 F.2d 867, 876-77 (D.C. Cir.) (under the EAJA provision allowing enhancement of a fee when a "special factor" is present, 28 U.S.C. § 2412(d)(2)(A) (Supp. V 1987), "unusual delay" between the time the legal work is performed and the time award is made justified a higher fee), *reh'g en banc denied*, 857 F.2d 793, 794, 795 (D.C. Cir. 1988) (Starr, J., dissenting; Edwards, J., concurring).

241. 1 M. DERFNER & A. WOLF, *supra* note 1, § 9.03[2][a], at 9-32.

242. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

243. *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (per curiam). What constitutes a sufficiently clear case of success on the merits to warrant an interim attorney's fee award is beyond the scope of this Article. See generally 1 M. DERFNER & A. WOLF, *supra* note 1, § 9.03, at 9-26 to 9-46.2 (discussing what type of litigative success qualifies a litigant for an interim award of attorney's fees); E. LARSON, *FEDERAL COURT AWARDS OF ATTORNEY'S FEES* 244-49 (1981) (same); H. NEWBERG, *ATTORNEY FEE AWARDS* § 3.05, at 112-13 (1986 & Supp. 1989) (same).

party status.²⁴⁴ There must have been some final determination of "the substantial rights of the parties"²⁴⁵ such that the plaintiff can "point to a resolution of the dispute which changes the legal relationship between itself and the defendant."²⁴⁶

For example, if an interim award is otherwise warranted, a court might properly consider a petition for interim fees when the liability of the federal government has been established definitively and all that remains to be adjudicated is the appropriate relief.²⁴⁷ Likewise, an interim fee award may be warranted when a court has entered partial summary judgment against the government on a discrete and important claim in the case.²⁴⁸

In *Texas State Teachers Association v. Garland Independent School District*,²⁴⁹ the Supreme Court rejected a test for prevailing party status under 42 U.S.C. § 1988²⁵⁰ that required a party to have prevailed on the "central issue" in the litigation and not merely upon significant secondary issues.²⁵¹ The Court instead adopted a general rule that, to be a prevailing party under fee-shifting statutes, a litigant need only have succeeded on "any significant issue in [the] litigation which achieve[d] some of the benefit the parties sought in bringing the suit."²⁵²

Although one could argue for a stricter central issue test when a litigant seeks the extraordinary remedy of interim fees, at least in suits against the government, such a general rule would be very difficult to reconcile with the Supreme Court's decision. First, although the *Texas State Teachers Association* case dealt with a fee award made after completion of the litigation, the Court relied heavily upon its prior decision in *Hanrahan v. Hampton*,²⁵³ which indicated an interim fee award was proper when a party had prevailed only on a "significant" rather than a "central" issue.²⁵⁴ Second, although a stricter standard arguably should apply to awards against the government under traditional principles of sovereign immunity, the *Texas State Teachers Association* Court strongly criticized the central issue standard as an unworkable test "focusing on the subjective importance of an issue to the litigants" and thereby turning "largely on the mental state of the parties."²⁵⁵

244. *Hanrahan*, 446 U.S. at 758-59. For discussion of the rule against fee awards for prevailing on procedural matters, see 1 M. DERFNER & A. WOLF, *supra* note 1, § 9.03[2][b], at 9-33 to 9-38. For discussion of the rule against fee awards for prevailing on most preliminary relief issues, see *id.* § 9.03[2][c], at 9-38 to 9-46.2.

245. *Hanrahan*, 446 U.S. at 758.

246. *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 109 S. Ct. 1486, 1493 (1989).

247. For an example of the award of interim fees when the litigation has proceeded through the liability stage, see *Mills v. Electric Auto-Lite Corp.*, 396 U.S. 375, 389-97 (1970).

248. 1 M. DERFNER & A. WOLF, *supra* note 1, § 9.03[2][a], at 9-30.

249. 109 S. Ct. 1486 (1989).

250. 42 U.S.C. § 1988 (1982).

251. *Texas State Teachers Ass'n*, 109 S. Ct. at 1491-94.

252. *Id.* at 1491 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)); see also *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (same).

253. 446 U.S. 754 (1980).

254. *Texas State Teachers Ass'n*, 109 S. Ct. at 1492 (citing *Hanrahan*, 446 U.S. at 757).

255. *Id.* at 1492-93.

However, although the Court made clear that it was enunciating a general prevailing party rule for fee-shifting statutes, whether made on an interim basis or otherwise,²⁵⁶ particular statutory contexts may require exceptions to the general *Texas State Teachers Association* standard. For example, the legislative history of the EAJA expressly provides that an interim award "may . . . be appropriate where the party has prevailed on an interim issue which was *central* to the case."²⁵⁷ Moreover, fees are available under the EAJA only when the government's position in the litigation is not substantially justified,²⁵⁸ a standard which requires the court to evaluate the reasonableness of the government's litigating position in the context of the case as a whole,²⁵⁹ an inquiry that could not proceed before the court resolves the heart of the case.²⁶⁰ Even though the Supreme Court has found the central issue standard to be unwieldy, it nevertheless is the standard Congress has mandated for interim fee awards under the EAJA. Similarly, even if interim fees were available under the FOIA,²⁶¹ that statute's attorney's fees provision allows fees only to parties who have "substantially prevailed" in the "case."²⁶² Thus, this provision, by its very terms, contemplates that the courts should evaluate the significance of partial success in terms of the overall objectives of the litigation.²⁶³

The distinction between prevailing on a "central" issue or a "significant" issue often may be largely a semantical debate and should not obscure the underlying basis for a strict standard of success, however articulated, before an interim award against the government is appropriate. The question is less whether a party has prevailed on some issue than whether the party's entitlement to fees is sufficiently clear at an interlocutory stage to justify an early award of fees. The objective is to ensure that fees are not awarded prematurely when there remains substantial doubt as to the party's ultimate entitlement to fees. The court should

256. *Id.* at 1489, 1492.

257. H.R. CONF. REP. NO. 1434, 96th Cong., 2d Sess. 22, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 5003, 5011 (emphasis added); H.R. REP. NO. 1418, 96th Cong., 2d Sess. 11, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 4984, 4990 (emphasis added); see also *Haitian Refugee Center v. Meese*, 791 F.2d 1489, 1496 (11th Cir.) (interim award of attorney's fees under Equal Access to Justice Act permitted when party has prevailed on central or main issue in case), as modified on reh'g, 804 F.2d 1573 (11th Cir. 1986).

258. 28 U.S.C. § 2412(d)(1)(A) (Supp. V 1987).

259. *Battles Farm Co. v. Pierce*, 806 F.2d 1098, 1102 (D.C. Cir. 1986) ("Under the EAJA, the focus of a court's analysis must be on the justification of the government's *overall* litigating position." (emphasis added)), vacated and remanded, 108 S. Ct. 2890 (1988).

260. The substantial justification standard is not actually part of the test for determining whether a litigant is a prevailing party for EAJA purposes. It is an additional requirement, however, that must be satisfied before a prevailing party is entitled to fees under EAJA Subsection 2412(d). Because the substantial justification of the government's position must be assessed on the basis of its overall litigating position, it would be premature to engage in that inquiry before a litigant had prevailed on the central matter at issue. Not until the central part of the case had been adjudicated would the government's overall position on the merits of the case have been presented and considered.

261. But see *supra* notes 71-127 and accompanying text (explaining that interim fee awards are not available under the FOIA).

262. 5 U.S.C. § 552(a)(4)(E) (1982).

263. See *Weisberg v. Department of Justice*, 745 F.2d 1476, 1497 (D.C. Cir. 1984) (the governing statutory standard for fees in FOIA cases is whether the plaintiff has "substantially prevailed as to his *overall* request"); see also *supra* notes 77-80 and accompanying text (discussing how substantially prevailing status is determined under the FOIA).

resolve any doubts about whether a party has achieved sufficient relief on the merits to qualify as a prevailing party by denying any interim award and waiting until the litigation has reached a more mature stage. Likewise, if the court found the merits of the underlying claims close so that there is a fair prospect of reversal on appeal, the court properly may regard the litigant's prevailing party status as tentative and uncertain. Under such circumstances, the court should be reluctant to order any immediate payment of fees.²⁶⁴ Again, the presumption remains that interim awards are disfavored.

B. Interim Award Must be Necessary to Alleviate Substantial Hardship

The only legitimate circumstance in which to charge the federal government with an award of attorney's fees prior to the completion of litigation is when "delay[ing] a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel."²⁶⁵ In the context of private parties, courts have granted awards of fees on an interlocutory basis much more readily when the petitioning party is experiencing "extreme cash-flow problems"²⁶⁶ due to the protracted nature of the litigation and the "disparity between the petitioner's and the defendants' resources."²⁶⁷ The courts understandably have been troubled by any prospect that a wealthier defendant may secure "victory through an economic war of attrition against the plaintiffs."²⁶⁸

When courts have stretched statutory provisions to imply an interim fee remedy against the United States—wrongly in this author's view²⁶⁹—they generally have recognized that such a remedy can be justified only when it is necessary "to enable meritorious litigation to continue."²⁷⁰ Therefore, these courts

264. For these same reasons, if a court makes an interim award, it should limit the award to the minimum amount to which the fee applicant clearly is entitled. Substantial disputes concerning the proper hourly rate, the reasonable number of hours expended, enhancements for taking the case on contingency, upward adjustments for the quality of the work or results obtained, etc., should be postponed for resolution at the conclusion of the litigation. These issues are not appropriately addressed at any interlocutory stage. After all, an interim award of fees is best regarded as a stop-gap measure when there is a compelling need for an early award.

265. See *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 723 (1974). In *Bradley*, the Supreme Court cited the "substantial hardship" factor as a justification for interim fee awards, but did not state expressly that a finding of such hardship was a necessary precondition for granting such awards. In the context of the federal government, however, to justify charging the fee award against the sovereign and the public Treasury, a showing of hardship should be a requirement, not merely a consideration.

266. *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 358-59 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978).

267. 1 M. DERFNER & A. WOLF, *supra* note 1, § 9.03[2][a], at 9-23.

268. *James*, 559 F.2d at 359 (footnote omitted).

269. See *supra* notes 14-131 and accompanying text.

270. *Rosenfeld v. United States*, 859 F.2d 717, 725 (9th Cir. 1988) (failure to permit interim fee awards would be to "countenance the government's dragging its heels, thereby forcing impecunious litigants to abandon their quest"); *Powell v. Department of Justice*, 569 F. Supp. 1192, 1199 (N.D. Cal. 1983) ("Without an award of interim fees, many plaintiffs without the financial wherewithal to engage in such protracted litigation would be forced to abandon their FOIA lawsuits in mid-stream."); *Biberman v. FBI*, 496 F. Supp. 263, 264-65 (S.D.N.Y. 1980) ("Experience teaches that cases arise in which the protracted nature of the litigation is such that, without the support of an interim award of attorneys fees, a plaintiff's meritorious claim might have to be dropped."). In cases between private parties, the courts also have held that interim fee awards are appropriate "in cases of protracted litigation where a party's ability to obtain redress . . . would be imperiled without such an

have permitted an interim fee award only when the plaintiff has shown that he "cannot otherwise afford to continue litigating" the lawsuit.²⁷¹ This argument can bear only so much weight. Trial judges have an arsenal of weapons at their disposal by which they can manage litigation so that one party cannot take advantage of another through unjustified and unreasonable delay.²⁷² Only if such means fail or the lawsuit is unavoidably complex and lengthy in nature should a judge consider resorting to interim awards of fees to provide the immediate infusion of cash necessary for a party to continue the litigation.

One district court has articulated four guidelines for determining whether sufficient indicia of hardship are present in a case to warrant an interim fee award against the government. This court in *Powell v. Department of Justice*²⁷³ stated the guidelines as follows:

First, the court should consider the degree of hardship which delaying a fee award until the litigation is finally concluded would work on plaintiff and his or her counsel. . . .

Second, the court should consider whether there is unreasonable delay on the government's part. When delay is present, an award of interim fees would serve the Congress' aim to discourage the use of illegitimate tactics.

Third, the court should consider the length of time the case has been pending prior to the motion, and

Fourth, [the court should consider] the period of time likely to be required before the litigation is concluded.²⁷⁴

The most important of these factors is the degree of hardship upon a party and counsel that would follow denial of an interim award. This standard requires some concrete showing of financial distress in order to justify an award of fees.²⁷⁵ A party and the party's counsel need not demonstrate that they are on

award." *Yakowicz v. Pennsylvania*, 683 F.2d 778, 781 (3d Cir. 1982); see also *Walters v. City of Atlanta*, 652 F. Supp. 755, 761 (N.D. Ga. 1985) (citing a party's inability to continue to litigate without an interim award as a relevant factor), *rev'd in part*, 803 F.2d 1135 (11th Cir. 1986).

271. *Powell*, 569 F. Supp. at 1199.

272. Most importantly, Federal Rule of Civil Procedure 16 confers broad authority on district judges to issue scheduling orders to set deadlines for completion of certain steps in the litigation and to hold pretrial conferences to simplify the issues, clarify factual disputes, and generally establish "early and continuing control so that the case will not be protracted because of lack of management." FED. R. CIV. P. 16(a)(2). See generally 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1521-30 (1971 & Supp. 1988) (discussing FED. R. CIV. P. 16).

273. 569 F. Supp. 1192 (N.D. Cal. 1983).

274. *Id.* at 1200. Unfortunately, while the *Powell* court spelled out a thoughtful and careful approach to guide interim fee determinations, it is not clear that this court has given teeth to this approach in practice. In both *Powell* and the same court's subsequent order in *Rosenfeld v. Department of Justice*, Nos. C-85-2247 MHP & C-85-1709 MHP, slip op. at 6 (N.D. Cal. Oct. 1, 1987), *appeal dismissed and mandamus denied*, 859 F.2d 717 (9th Cir. 1988), the court accepted largely conclusory pleas of hardship by plaintiffs' counsel without any concrete showing of actual financial dislocation that would have prevented plaintiffs' counsel from continuing to pursue the claim vigorously. Indeed, in the *Rosenfeld* case, although payment of the interim award was delayed for more than a year while an appeal was pending, plaintiff's counsel completed briefing and argument of the case before the district court. Opposition of Appellants/Petitioners to Application of Appellees/Real Party in Interest for Interim Award of Attorney's Fees on Appeal at 12-14, 17, *Rosenfeld v. United States*, 859 F.2d 717 (9th Cir. 1988) (No. 87-2975). The plaintiff's contention that the litigation could not be continued absent an immediate award was thus belied by subsequent events.

275. Presumably, the government would be entitled to at least some minimal discovery concern-

the verge of bankruptcy or that continuing the litigation without an award will pauperize them. However, the party and the party's counsel must adduce some specific evidence, beyond conclusory allegations of hardship, demonstrating that they cannot reasonably prosecute the litigation without sacrificing financial stability. A fee applicant could make this showing with evidence of heavy indebtedness, expenses that would go unmet, or significant depletion of individual or law firm resources in order to bankroll the litigation.

The other factors in the *Powell* test focus upon the protracted nature of the litigation and assessment of blame, if any, for the extended length of the proceedings. A party should not be able to assert financial hardship in a case of ordinary complexity that has proceeded at a routine pace. Nor can a party demonstrate need for an interim award when the litigation is nearly complete and a fee petition fairly could be postponed until after an imminent final judgment. A court should not consider a party's financial hardship as anything other than the normal and expected incident of ordinary litigation unless the litigation has been unduly protracted and is likely to continue for a substantial period of time.²⁷⁶

Although no interim award should be permitted when the litigation has not been protracted, the length of proceedings alone is not conclusive. The fee applicant also must demonstrate concrete financial distress that is attributable to the unusual length of the litigation. In other words, the protracted nature of litigation is a necessary, but not sufficient, prerequisite for an interim award of fees against the government.

Finally, there is the question of culpability for the protracted nature of the proceedings. When the litigation has been ongoing for a substantial length of time and the party and counsel have established significant financial hardship, the fact that the government has not engaged in any egregious delay should not prevent an award of fees when necessary for the plaintiff to continue the litigation. If, on the other hand, the government has engaged in dilatory conduct that has added greatly to the length of the litigation, an interim award of fees may be warranted in what would otherwise be a close case on the question of hardship. Courts should be careful, however, not to deny the government its right to defend itself vigorously in good faith. If the government has conducted a legitimate and active defense, its actions should never be accounted as egregious or bad faith behavior justifying the award of interim fees.²⁷⁷

ing the claims of financial hardship alleged by the party and counsel. Although the district court should prevent such discovery from becoming overly intrusive, the government should be permitted sufficient latitude to investigate reasonably the party and counsel's financial stability and resources for continued litigation.

276. One court has suggested that the protracted nature of litigation is the "controlling factor" in considering whether to award interim fees. *Hameed v. International Ass'n of Bridge, Structural, and Ornamental Iron Workers, Local 396*, 637 F.2d 506, 523 (8th Cir. 1980). Other courts have recognized the importance of this factor in adjudging interim fee requests. See, e.g., *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 633 (5th Cir. 1983); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 358 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978); *Walters v. City of Atlanta*, 652 F. Supp. 755, 761 (N.D. Ga. 1985).

277. Because interim fees for litigation work are at issue here, allegedly obdurate conduct by the government prior to the filing of the lawsuit is not relevant and should not be considered. The court

The court also must consider the delays in the litigation that are attributable to the conduct of the party seeking an award of fees. If the fee applicant has lengthened the litigation by unnecessarily multiplying the claims made and the pleadings filed, by obtaining extensions of time for filing litigation papers, or by otherwise litigating in an unduly time-consuming manner, the court should deny an interim award. No party can legitimately assert hardship in litigation that has become protracted because of that party's own conduct.

C. Security for Recoupment of Interim Awards

If an interim award is entered against the federal government, the court is obligated to protect the government's right to recoup those fees if the court's order later is overturned in whole or in part.²⁷⁸ In most cases, "the simple device of requiring the party recovering interim fees to post a bond guaranteeing repayment in the event of reversal" should suffice to provide such protection.²⁷⁹

If for some reason, however, the posting of a bond is not feasible, the court either should decline to grant the interim award or take all appropriate actions to facilitate an immediate appeal of the award. The district court could certify the interim fee ruling for appeal under 28 U.S.C. § 1292(b)²⁸⁰ or Federal Rule of Civil Procedure 54(b).²⁸¹ At the very least, the district court could draft the interim fee order to enhance the prospects that an interlocutory appeal would be accepted by the court of appeals under exceptions to the final judgment rule.²⁸² In the event of an appeal, the government is entitled to an automatic stay of the interim fee order under Federal Rule of Civil Procedure 62(e).

D. Appealability of Interim Fee Awards Against the Government

Interim attorney's fee awards are not usually appealable under any of the exceptions to the general rule that appellate review must wait until after the trial court has entered a final decision within the meaning of 28 U.S.C. § 1291.²⁸³

should consider only whether the government's conduct of the litigation since its commencement has resulted in unreasonable delay.

278. On recoupment of and security for interim fee awards, see generally 1 M. DERFNER & A. WOLF, *supra* note 1, § 9.03[2][d], at 9-46.2 to 9-48.

279. Green, *supra* note 3, at 271 (footnote omitted); see also Feher v. Department of Labor & Indus. Relations, 561 F. Supp. 757, 768 (D. Haw. 1983) (requiring posting of bond to ensure recovery of interim fee award if later overturned); Howard v. Phelps, 443 F. Supp. 374, 377 (E.D. La. 1978) (same); Nicodemus v. Chrysler Corp., 445 F. Supp. 559, 560 (N.D. Ohio 1977) (same); 1 M. DERFNER & A. WOLF, *supra* note 1, § 9.03[2][d], at 9-47 ("In statutory fee cases, . . . the courts have frequently conditioned the award of interim fees on the recipient's posting of security adequate to assure repayment should the award be reduced or reversed.").

280. 28 U.S.C. § 1292(b) (1982).

281. On certification of interim awards for appeal, see generally 2 M. DERFNER & A. WOLF, *supra* note 1, § 18.07[2][c], at 18-78. Some courts, however, have suggested that attorney's fee issues may not be certified under Rule 54(b), which they believe is directed only toward determination of the parties' claims on the merits. Seigal v. Merrick, 619 F.2d 160, 164 n.7 (2d Cir. 1980); Swanson v. American Consumer Indus. Inc., 517 F.2d 555, 560-61 (7th Cir. 1975). But see 2 M. DERFNER & A. WOLF, *supra* note 1, § 18.07[2][c], at 18-78 ("There is no reason why fee determinations should be treated differently under Rule 54(b).").

282. See *infra* notes 283-310 and accompanying text.

283. 28 U.S.C. § 1291 (1982); see, e.g., Thompson v. Potashnick Constr. Co., 812 F.2d 574, 576

Most attempts to appeal interim fee awards have been made pursuant to the "collateral order doctrine" of *Cohen v. Beneficial Industrial Loan Corp.*²⁸⁴ This rule permits an interlocutory appeal of a "small class" of orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent from the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."²⁸⁵ To fall within this collateral order exception, the order sought to be appealed must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment."²⁸⁶

Although the Supreme Court has stated that attorney's fees issues are collateral and separate from the merits of the action,²⁸⁷ it may be difficult in many

(9th Cir. 1987) (interim fee award is not appealable); *Baskin v. Hawley*, 810 F.2d 370, 372 (2d Cir. 1987) (same); *Hastings v. Maine-Endwell Cent. School Dist.*, 676 F.2d 893, 895-96 (2d Cir. 1982) (same); *Bradford Exch. v. Trein's Exch.*, 644 F.2d 682, 682 (7th Cir. 1981) (same); *Ruiz v. Estelle*, 609 F.2d 118, 119 (5th Cir. 1980) (same). But see, e.g., *Webster v. Sowders*, 846 F.2d 1032, 1035 (6th Cir. 1988) (allowing appeal of an interim fee award); *Palmer v. City of Chicago*, 806 F.2d 1316, 1320 (7th Cir. 1986) (same), *cert. denied*, 481 U.S. 1049 (1987). On appealability of interim fee determinations, see 2 M. DERFNER & A. WOLF, *supra* note 1, § 18.07[2][c], at 18-75 to 18-78, and Green, *supra* note 3, at 268-273.

The question whether a party may appeal a particular interim attorney's fee award is distinct from the question whether the federal government may seek immediate appellate review of the district court's jurisdictional authority to enter such an order requiring the government to pay an interim award. See *supra* note 98 (discussing appealability of interim fee award in *Rosenfeld v. United States*, 859 F.2d 717 (9th Cir. 1988)). If a court of appeals is unwilling to accept jurisdiction over such an appeal, it could leave the federal government in the anomalous situation of unlawfully being compelled to violate an express statutory prohibition on payment of a nonfinal award without any avenue of appellate relief. If the Judgment Fund finality requirement is at issue, the immediate payment itself would constitute an irreparable harm to the sovereign immunity of the United States; therefore, the denial of interlocutory appellate review would effectively deny the government any right to meaningful review. The vital question whether interim awards are available against the federal government under certain statutory schemes would be insulated forever from appellate review. See *Abney v. United States*, 431 U.S. 651, 658 (1977) (immediate appeal is allowed when the order concerns "an important right which would be 'lost, probably irreparably,' if review had to await final judgment") (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)); see also *Midland Asphalt Corp. v. United States*, 109 S. Ct. 1494, 1498 (1989) (same). Even the Ninth Circuit, which otherwise disagreed with the government's position in *Rosenfeld v. United States*, recognized the importance of this issue and exercised supervisory mandamus jurisdiction to address the government's challenge to an interim fee award as unauthorized. *Rosenfeld*, 859 F.2d at 722-23.

284. 337 U.S. 541 (1949).

285. *Id.* at 546; see also 2 M. DERFNER & A. WOLF, *supra* note 1, § 18.07[2][c], at 18-76 (the *Cohen* collateral order "doctrine permits courts of appeals to treat as 'final' certain collateral orders so that appellate review may be had immediately, without awaiting a final judgment for the entire case").

286. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (citations omitted).

287. *Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717, 1720-21 (1988); *White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445, 451-52 (1982); see also *Haitian Refugee Center v. Meese*, 791 F.2d 1489, 1494 (11th Cir.) (interim fee award is collateral for purposes of *Cohen* rule), *as modified on reh'g*, 804 F.2d 1573 (11th Cir. 1986). In *Rosenfeld*, the Ninth Circuit suggested that an interim award was not collateral to the merits because the purpose of the award was to enable the litigation to continue, and an appeal of the award "by freezing the progress of the ongoing litigation, thwarts that purpose." *Rosenfeld*, 859 F.2d at 721. This reasoning is circular because one can anticipate that the ongoing litigation will be frozen only if one first assumes that the challenged interim award was necessary because the fee applicant indeed was suffering serious financial hardship—that is, if one assumes the merits of the appeal. Moreover, this reasoning treats a factor tangential to the legal issues in the case—the existence of resources to fund litigation—as relevant to the question whether an order falls within the collateral order doctrine. Every interlocutory appeal, no

cases to argue that an interim award constitutes a conclusive ruling, because the court presumably intends to consider fee issues again as the case progresses,²⁸⁸ or that objections to the fee award cannot be raised effectively upon a subsequent appeal. *Cohen* does not lay down a rigid test, however; each prong of the test applies in light of the general purposes of the final judgment rule. In this regard, the Supreme Court has observed that "in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'"²⁸⁹ It is also quite significant that "an early case permitting appeal from an order awarding [attorney's] fees before conclusion of the underlying litigation was a precursor of the *Cohen* collateral order doctrine."²⁹⁰

Even when courts have ordered interim fee awards against parties other than the federal government—situations in which the public interest in protecting public assets is not implicated—the courts of appeals have begun to break down the absolute bar against immediate appeal of such awards. In *Palmer v. City of Chicago*,²⁹¹ the United States Court of Appeals for the Seventh Circuit held that an interim award should be subject to immediate appeal under the collateral order doctrine when the party required to pay the award was unlikely to be able to recover the money if the award were later overturned on appeal after the litigation was concluded.²⁹² The denial of an immediate avenue of appellate review effectively would have left the party without any recourse to challenge the award.²⁹³

matter how collateral, will have some practical, if incidental, effect upon the district court proceedings, if only because the litigants must devote time and attention to the appeal. For purposes of the second prong of the collateral order doctrine, however, the crucial question is whether, as a matter of law, the issues on appeal are separate from and collateral to the merits of the case.

288. *Rosenfeld*, 859 F.2d at 721; *Hastings v. Maine-Endwell Cent. School Dist.*, 676 F.2d 893, 896 (2d Cir. 1982). Interim fee awards, by their very nature, usually are not intended as the final disposition of all attorney's fees matters in the case. The district court always retains the authority to modify that award, although it will presumably be modified upward, not downward. *Green*, *supra* note 3, at 272 n.350. However, the award is conclusive as an interim fee award; it definitively establishes liability to pay fees on an interim basis. *See id.* (when an interim award is granted, "the right to fees and the amount awarded to that point ha[s] been fixed and [is] not likely to be adjusted"). That should be sufficient for purposes of the collateral order doctrine. Particularly when the court contemplates immediate payment of the award, as is usually the case, the term "interim order" is a "misnomer"; the immediate duty to pay the award is not tentative or uncertain. *Palmer v. City of Chicago*, 806 F.2d 1316, 1320 (7th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987).

289. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964) (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)).

290. *Seigal v. Merrick*, 619 F.2d 160, 164 n.7 (2d Cir. 1980) (citing *Trustees v. Greenough*, 105 U.S. 527, 531 (1882)); *see also Swanson v. American Consumer Indus., Inc.*, 517 F.2d 555, 560 (7th Cir. 1975) (same).

291. 806 F.2d 1316 (7th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987).

292. *Id.* at 1320; *see also Rosenfeld*, 859 F.2d at 721-22 (interim award is appealable under collateral order doctrine only when "the government bears the burden of showing that ultimately it could not obtain repayment").

293. *Palmer*, 806 F.2d at 1319-20; *see also Green*, *supra* note 3, at 270-72 (*Cohen* collateral order doctrine should permit appeal of interim attorney's fee award where recoupment is uncertain). A similar doctrine, derived from the Supreme Court's decision in *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848), permits immediate appeal of orders that "direct immediate execution of judgment or delivery of property to an opposing party in circumstances that threaten irreparable harm." 15 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3910, at 457 (1976). In *Piambino v. Bailey*, 610 F.2d 1306, 1327 (5th Cir. 1980), *cert. denied*, 449 U.S. 1011 (1981), the

For similar reasons, the United States Court of Appeals for the Sixth Circuit in *Webster v. Sowders*²⁹⁴ also accepted an interlocutory appeal of an interim fee award. The court held that a "combination of features," consisting of "the weight of the prospective burden" of the district court's order requiring future payment of monthly fees for an indeterminate period and "the likelihood of irreparable harm due to nonrecovery" of the fees, made the award appealable as a collateral order.²⁹⁵

As the Sixth Circuit ruled in *Webster*, the courts of appeals also have jurisdiction under 28 U.S.C. § 1292(a)(1)²⁹⁶ to review district courts' interlocutory orders granting or denying injunctions. Although other courts have rejected this basis for appeal of interim awards,²⁹⁷ it may be possible to view those interim fee orders that affirmatively command immediate payment as tantamount to injunctions.²⁹⁸ Leading commentators on civil procedure have suggested that interlocutory orders directing the immediate payment of money should be immediately appealable under Section 1292(a)(1).²⁹⁹ Thus, when a district court orders immediate payment of an interim fee award, on penalty of contempt, a party should have recourse to an immediate appeal, at least when the party can demonstrate that it would otherwise suffer serious or irreparable harm. Any uncertainty about whether the fees paid could later be recouped certainly would constitute a showing of irreparable harm meriting an interlocutory appeal under this injunction theory.

If courts adhere to the standards outlined earlier³⁰⁰ for interim awards of fees against the government, the government would invariably be entitled to an interlocutory appeal, at least in the absence of security to guarantee recoupment. Because a party should have to establish substantial financial hardship to qualify for such an award, courts should presume that the party would be unable to refund the fees if an appellate court later overturns the award. When a court grants an interim award for the purpose of allowing the party to continue the litigation, the court must expect that the litigant will draw on the payment immediately and the money therefore will be unavailable for prompt repayment later.

Fifth Circuit permitted an interlocutory appeal under the *Foray-Conrad* rule when a district court had directed immediate payment of attorney's fees out of settlement proceeds. See also *Green*, *supra* note 3, at 272-73 (*Foray-Conrad* rule "appear[s] applicable to an interim fee award [if] recoupment is in doubt").

294. 846 F.2d 1032 (6th Cir. 1988).

295. *Id.* at 1035 (citing *Palmer*, 806 F.2d at 1319).

296. 28 U.S.C. § 1292(a)(1) (1982).

297. *Rosenfeld v. United States*, 859 F.2d 717, 722 (9th Cir. 1988); *Hastings v. Maine-Endwell Cent. School Dist.*, 676 F.2d 893, 896 (2d Cir. 1982).

298. See *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981) (an order that has the "practical effect" of granting or denying an injunction is subject to interlocutory appeal if the order will have a "serious, perhaps irreparable, consequence").

299. 16 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3922, at 46 (1977); see also *Robbins v. McNicholas Transp. Co.*, 819 F.2d 682, 685 (7th Cir. 1987) ("order compelling payment of interim liability" had "consequences similar to an injunction" and therefore was subject to interlocutory appeal if irreparable harm was established).

300. See *supra* notes 243-77 and accompanying text.

The Seventh Circuit in *Palmer*³⁰¹ and the Ninth Circuit in *Rosenfeld v. United States*³⁰² stated that district courts could alleviate concerns about recoupment of interim fees if they ordered payment of the fees directly to the lawyers rather than the parties. It is far from clear, however, that a court has the authority to order payment to a nonparty; counsel's interest in attorney's fees is entirely derivative of the litigant's.³⁰³ And, even if fees are paid directly to the attorneys, doubts about recoupment may persist.³⁰⁴ Under the standards set forth earlier to govern interim awards against the government, the hardship that a party must show applies equally to counsel. Moreover, simply because the money will go into the lawyer's pocket hardly removes the danger that "the fees [will] disappear into insolvent hands."³⁰⁵

Finally, although the Ninth Circuit in *Rosenfeld*³⁰⁶ held the government to a strict standard for interlocutory appeals from interim fee awards,³⁰⁷ another court of appeals has reached a contrary conclusion. The United States Court of Appeals for the Eleventh Circuit in *Haitian Refugee Center v. Meese*³⁰⁸ held that an interim award of attorney's fees against the federal government under the EAJA³⁰⁹ was appealable under the *Cohen* collateral order rule.³¹⁰ The court's ruling did not turn upon, nor did the court consider, whether the interim fee could be recovered if appellate review was delayed. The Eleventh Circuit's decision may set the stage for an approach that grants more generous appellate rights to the government when challenging an order that constitutes a charge against public funds.

IV. CONCLUSION

Because of the United States' traditional immunity from having to pay monetary awards prior to appellate review, courts properly have been reluctant to entertain petitions for interim attorney's fees against the federal government. However, the recent trickle of decisions granting such interlocutory awards against the government seems bound to grow. In particular, the Ninth Circuit's

301. 806 F.2d 1316, 1319 (7th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987).

302. 859 F.2d 717, 721 (9th Cir. 1988).

303. See, e.g., *Evans v. Jeff D.*, 475 U.S. 717, 730-32 (1986) (fee-shifting statute bestows eligibility for fee awards on the party, not on the attorney, and the party may waive eligibility for fees as part of a settlement of the case); *Brown v. General Motors Corp.*, 722 F.2d 1009, 1011 (2d Cir. 1983) (under 42 U.S.C. § 1988 (1982), "it is the prevailing party rather than the lawyer who is entitled to attorney's fees"); *Oguachuba v. INS*, 706 F.2d 93, 97-98 (2d Cir. 1983) (same rule under EAJA); *Smith v. South Side Loan Co.*, 567 F.2d 306, 307 (5th Cir. 1978) ("an award [of attorney's fees] is the right of the party suing not the attorney representing him").

304. In *Webster v. Sowders*, 846 F.2d 1032, 1035 (6th Cir. 1988), the court found the possibility of irreparable injury justified an interlocutory appeal when there were no "assurances that in the event of appellate reversal on the merits the State could recover [the interim fee award] from plaintiffs' counsel."

305. See *Palmer*, 806 F.2d at 1319.

306. 859 F.2d 717 (9th Cir. 1988).

307. *Id.* at 719-22.

308. 791 F.2d 1489 (11th Cir.), *as modified on reh'g*, 804 F.2d 1573 (11th Cir. 1986).

309. 28 U.S.C. § 2412 (1982 & Supp. V 1987).

310. *Haitian Refugee Center*, 791 F.2d at 1493-94.

expansive reading of a fee-shifting statute in *Rosenfeld v. United States*³¹¹—especially the court's willingness to leap over the finality requirement in the Judgment Fund statutes³¹²—undoubtedly will encourage other courts to improvise in this area.

As with any movement to break down the barriers of federal sovereign immunity, however, the courts should defer the lead to Congress. Unless the statutory language or the legislative history of a particular fee-shifting statute provides direct evidence that Congress contemplated interim fee awards against the government, courts should long hesitate before implying such an exceptional remedy against the sovereign.³¹³ Certain fee-shifting statutes, such as the Equal Access to Justice Act,³¹⁴ will be susceptible to such an interpretation. Others, including those for which awards are payable from the Judgment Fund, will not admit such an approach.³¹⁵ Courts should adhere faithfully to the longstanding principle that waivers of sovereign immunity are to be construed strictly and narrowly in favor of the government.³¹⁶ Courts should also heed the Supreme Court's admonition that they be careful "to observe the conditions defined by Congress for charging the public treasury."³¹⁷

In the end, litigants doing battle with the government may be able to obtain necessary interim relief under an approach that also protects the public interest in preventing premature raids upon the public Treasury. This Article has attempted to plot a course that responds to these conflicting concerns by allowing for interim fee awards when necessary but also establishing strict safeguards.³¹⁸ If and when Congress again turns its attention to this area, it should prescribe clear statutory rules and standards to guide courts when they consider whether to grant interim relief in the form of attorney's fees.³¹⁹ Until then, the watchword of the courts should be caution.

311. 859 F.2d 717 (9th Cir. 1988).

312. 28 U.S.C. § 2414 (1982); 31 U.S.C. § 1304 (1982).

313. In *Letelier v. Department of Justice*, 1 Gov't Disclosure Serv. (P-H) ¶ 80,252 (D.D.C. Oct. 2, 1980), the court denied a petition for an interim fee award under the Freedom of Information Act, stating:

[i]n light of the absence of any clear direction from Congress, the lack of case support for an award of interim fees, and the practical difficulties which a rule allowing such fees would engender, the court feels constrained not "to fashion drastic new rules with respect to the allowance of attorneys' fees."

Id. (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269 (1975)). Other courts should follow this lead.

314. See *supra* notes 139-64 and accompanying text.

315. See *supra* notes 14-131 and accompanying text.

316. *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983).

317. *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981) (quoting *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947)).

318. See *supra* notes 232-310 and accompanying text.

319. See *supra* note 232 (introducing standards Congress should consider when amending fee-shifting statutes to allow interim awards).