

25 MAR 1981

MEMORANDUM FOR MICHAEL J. HOROWITZ
Counsel to the Director
Office of Management and Budget

Re: Funding of Attorneys Fees Awards under the
Equal Access to Justice Act

This responds to your request of February 25, 1981 for our opinion on several issues related to the funding provisions of the Equal Access to Justice Act, Pub. L. No. 96-481, Title II, 94 Stat. 2325 (the "Act"). 1/ Briefly stated, you wish to know whether fees and expenses, including especially attorney fees, awarded under 5 U.S.C. § 504 and 28 U.S.C. § 2412(d), as added to the United States Code, respectively, by §§ 203(a)(1) and 204(a)(1) of the Act, may be paid in the absence of an express appropriation by Congress for that purpose. While you make specific reference in your request only to the payment of awards from what is commonly known as the judgment fund, 2/ our review of the Act suggests that funds appropriated generally to agencies are a potential source of such payment. We have accordingly addressed your inquiry in this context as well.

1/ Section 203(a)(1) of the Act amends Title 5 of the United States Code by adding a new § 504. The funding provision of that section is 5 U.S.C. § 504(d)(1). Section 204(a)(1) of the Act amends 28 U.S.C. § 2412. That section, as amended, contains three funding provisions, 28 U.S.C. §§ 2412(c)(1), (c)(2) and (d)(4)(A). We understand that your request relates only to 5 U.S.C. § 504(d)(1) and 28 U.S.C. § 2412(d)(4)(A) as they are qualified by § 207 of the Act. This opinion will not discuss 28 U.S.C. §§ 2412(c)(1) or (c)(2), neither of which are of concern to you.

2/ By payment from the judgment fund, we assume you mean payment from the Treasury in accordance with the procedures set forth in 28 U.S.C. §§ 2414 and 2517, under the authority of the permanent, indefinite appropriation for judgments against the United States established by 31 U.S.C. § 724a. We use "judgment fund" as a shorthand rendition of that process and source throughout this opinion.

You ask that we advise you on what steps can be taken to limit the expenditures of appropriated funds under the Act, or to make the Act "inoperative."

We start with a disclaimer. The funding provisions of the Act are sui generis and ambiguous. Their legislative history, while somewhat helpful in illuminating their intended meaning, does not definitively answer all of the questions which their ambiguity creates. It is inevitable that they will cause confusion in the agencies and, unless all awards for fees and expenses are promptly and fully paid, litigation in the courts. With this caveat, we conclude, for reason set forth below, as follows: (1) § 207 of the Act prevents payment of awards from the Treasury without a specific advance appropriation; (2) awards may be paid by agencies from unrestricted appropriations; (3) as the law now stands, a reasonable amount from the unrestricted appropriations of an agency must be allocated to the payment of awards for fees and expenses; and (4) Congress is better situated than the Executive Branch effectively to limit expenditures under the Act or to make it inoperative.

At the outset, we would emphasize that uncertainty as to the source of funding for awards under the Act in no way restricts the authority of agency adjudicative officers (under 5 U.S.C. § 504, as added) or judges (under 28 U.S.C. § 2412(d), as added) to make them. Section 504(a) of Title 5 and 28 U.S.C. § 2412(d)(1) are mandatory. Under them, awards for fees and expenses, if sought, must be made to those who qualify. That Congress had not made money available to pay the awards from one source or another, or, indeed, from any source, would not change this since there is nothing in the language of the Act that conditions the authority to make awards under it on the availability of appropriations. Even in the complete absence of appropriations, the law, unless amended or repealed, would require that the awards be made. See generally New York Airways Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966). Once made, they would remain obligations of the United States until satisfied. They could, of course, remain unsatisfied forever if Congress never acted to authorize

their payment, but history suggests that such obligations usually are paid. 3/

The Equal Access to Justice Act, which by its terms becomes effective on October 1, 1981, authorizes the award of attorneys fees and other expenses to parties prevailing against the United States in certain administrative and judicial actions. As relevant here, 4/ fees may be awarded by an agency in an adversary administrative adjudication, 5 U.S.C. § 504(a)(1), or by a court in any civil action brought by or against the United States. 28 U.S.C. § 2412(d)(1)(A). The provisions pertaining to the source for payment of these awards in either case are essentially identical:

Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made pursuant to section 2412 [and 2517] of title 28, United States Code.

5 U.S.C. § 504(d)(1). See also 28 U.S.C. § 2412(d)(4)(A).

3/ We are informed by the General Accounting Office that the instances in this century in which Congress has failed or refused to make the appropriations necessary to pay in full an adjudicated claim against the United States can be counted on the fingers of one hand.

4/ Other provisions of the Act waive sovereign immunity for purposes of common law and statutory exceptions to the "American rule" on fee-shifting, see 28 U.S.C. § 2412(b), and provide that fees awarded against the United States in such cases ordinarily will be paid out of the judgment fund. If an agency is found to have acted in bad faith, the fee award is to be paid by the agency from its own funds. 28 U.S.C. § 2412(c)(2). The provisions of the Act discussed in this opinion extend the government's liability to a fee assessment well beyond the limits imposed by the common law and other existing statutes, and are effective only for a three-year period.

These provisions are qualified by § 207 of the Act, which reads:

The payment of judgments, fee and other expenses in the same manner as the payment of final judgments as provided for in this Act is effective only to the extent and in such amounts as are provided in advance in appropriations Acts.

1. Background

The funding provisions of the Act, as finally adopted, were developed by the House Committee on the Judiciary in response to a prior Senate version of the bill.

In 1979, the Senate passed its version of what ultimately became of the Act. That bill, S. 265, contained funding provisions which were unambiguous. Fees and expenses were to be paid "by the particular agency over which the party prevailed from any sums appropriated to such agency, except that no sums [were to be] appropriated to any such agency specifically for the purpose of paying fees and other expenses." The bill anticipated that, since no monies would be appropriated specifically to pay for awards of fees and expenses (that is, agency budgets would not be augmented for that purpose), agencies would be required to reprogram funds from other activities. S. Rep. No. 253, 96th Cong., 1st Sess. 18 (1979) (hereafter "Senate Report"). "This fiscal responsibility [was] intended to make the individual agencies and department [sic] accountable for their actions." *Id.* at 21. It was also to "provide a quantitative measure of agency error which should encourage review of its practices and its regulations." *Id.* at 18.

Hearings were held on the Act, including the funding provisions, in the House in both the Committee on the Judiciary and the Committee on Small Business. ^{5/} The Committee on Small Business reported out a bill, H.R. 6429,

^{5/} The Committee on the Judiciary held hearings on S. 265. Before the Committee on Small Business, S. 265 was incorporated into H.R. 6429 as Title II of that bill.

in which the funding provisions were substantively identical to those of S. 265. That Committee believed, as had the Senate Committee on the Judiciary, that placing the fiscal responsibility for payment of fees and expenses on the agencies would make them more accountable for their actions. H.R. Rep. No. 1005, 96th Cong., 2d Sess. (pt. I) 11 (1980). The House Committee on the Judiciary, however, took the position that the Senate provision restricting the appropriation of funds for the payment of fees and expenses was "unduly punitive" and believed that it might result in "a forced appropriation." H.R. Rep. 1418, 96th Cong., 2d Sess. 12 (1980) (hereafter "House Report"). Thus, to "insur[e] that the prevailing party will be awarded a fee if it meets the requirements in the bill," id., the House Committee on the Judiciary softened the Senate provision, adopting the language eventually enacted. This language permits appropriations to agencies and access to the judgment fund.

The Act was never considered by the full House as an independent piece of legislation. Rather, it was added, in conference, to a bill to amend the Small Business Act, H.R. 5612, and first reached the House floor as a part of the conference report. During the House debate on the conference report, the Act was subjected to a point of order. The objection on the point of order, that the funding provisions of the Act would open the judgment fund to new burdens and thus would, in effect, be an appropriation on an authorization, was resolved by the addition of § 207. 126 Cong. Rec. H 10214-18 (daily ed. October 1, 1980)

2. § 207

Section 207 of the Act, quoted above, was clearly intended to qualify the second sentence of the funding provisions ("If not paid by any agency, the fees and expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of [Title 28]"). As

mentioned, § 207 was added to the Act on the House floor in response to a point of order to the conference report. 6/ The point of order, which at first was sustained, 126 Cong. Rec. H 10214 (daily ed. October 1, 1980), was overruled only

6/ The point of order, as summarized by the Speaker pro tempore, was

that the conference report on the bill H.R. 5612 contains provisions of the Senate amendment constituting appropriations on a legislative bill in violation of clause 2, rule XX, which prohibits House conferees from agreeing to such provisions without prior authority of the House.

The provisions in title II question authorize appropriations to pay court costs and fees levied against the United States, but also provide that if payment is not made out of such authorized and appropriated funds, payment will be made in the same manner as the payment of final judgments under sections 2414 and 2517 of title 28, United States Code. Judgments under sections of existing law are paid directly from the Treasury pursuant to section 724a of title 31 of the United States Code, which states that there are appropriated out of the Treasury such sums as may be necessary for the payment of judgments, awards, and settlements under section 2414 and 2517 of title 28. Thus the provision in the Senate amendment contained in the conference report extends the purposes to which an existing permanent appropriation may be put and allows the withdrawal directly from the Treasury, without approval in advance by appropriation acts, of funds to carry out the provisions of title II of the Senate amendment.

126 Cong. Rec. H. 1024 (daily ed. Oct. 1, 1980).

after the addition of § 207 to the Act. Id. at H 10218. Contemporaneous discussion on the House floor shows that § 207 was specifically intended to insure that such payments could not be made under the appropriations authority of 31 U.S.C. § 724a, the source of authority for what is commonly known as the judgment fund. The effect of § 207 is, and was intended to be, that the promise of the second sentence may be fulfilled only by additional congressional action. See generally 126 Cong. Rec. H 10218 (remarks of Representative Smith). The conclusion is inescapable that awards for fees and expenses not paid by agencies under the authority of the first sentence of the funding provisions may not be paid from the Treasury under the authority of the second unless Congress passes a law. 7/

3. The Source-of-Funding Provisions

For the sake of convenience and for ready reference, we quote the funding provision(s) again:

Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made pursuant to section 2414 [and 2517] of title 28, United States Code.

The language and structure of the provisions, particularly the words "may," "or otherwise" and "for such purpose" in the first sentence, and the existence of the second sentence, give rise to two legal questions:

1. Which funds appropriated to an agency may be used to pay awards for fees and expenses?

2. Which funds, if any, appropriated to an agency must, as a matter of law, be used to pay awards for fees and expenses?

7/ The law could take the form of an specific appropriation for that purpose or it could repeal or amend § 207 in some way to make 31 U.S.C. § 724a a viable source.

The word "may" in the first sentence clearly, at a minimum, authorizes an agency to pay awards for fees and expenses in some circumstances. The question is whether the phrase "for such purpose," modifying "funds available," restricts those circumstances to instances in which monies have been appropriated to the agency specifically to pay such awards. We think not. The lynchpin of our analysis is the word "otherwise."

As proposed, the Senate and the House Committee on Small Business version of the funding provisions would have required that an agency "shall" pay awards "from any sums appropriated to such agency" and would have prohibited the appropriation of monies to an agency for that specific purpose. To have complied with those provisions, had they been enacted, an agency would have been required to allocate or reprogram monies for that purpose from its general appropriation. The Senate Committee on the Judiciary so recognized. Senate Report, at 18. The House Committee on the Judiciary changed "shall" to "may," permitted appropriations to an agency, and provided for the payment of awards from funds made available, for that purpose, by appropriations, "or otherwise." That Committee explained: "Funds may be appropriated to cover the cost of fee awards or may otherwise be made available by the agency (e.g. through reprogramming)." House Report at 16, 18-19. Thus both Judiciary Committees and the House Committee on Small Business recognized and intended that funds not specifically appropriated for the payment of fee awards would be available to be reprogrammed (or allocated) for that purpose. 8/ This intent was ultimately effectuated through

8/ The funding provisions, as enacted, seem to provide agencies authority to reprogram "any" funds for use to pay fees and expenses. The Senate version had also made reference to "any" funds. The legislative history of the provisions sheds no light on what Congress intended by the use of the word "any." A "plain meaning" reading points to the conclusion that even funds appropriated to an agency for a specific purpose could be reprogrammed to pay fees and expenses. We would question such a reading. Appropriations acts are laws. Line items within them are provisions of law. We would hesitate to read the source-of-funding provisions as superseding, in advance, provisions of law contained in subsequently enacted appropriations acts. Rather, we think Congress intended, by the use of the word "any," to permit agencies to reprogram any amounts from general funds, i.e. those available for more than one designated purpose.

specific inclusion in the funding provisions, as enacted, in the form of the phrase "or otherwise," of authority to allocate or reprogram general appropriations to pay awards for fees and expenses (i.e. for "such purpose").

The more difficult question is whether an agency is obligated, as opposed to authorized, to allocate or reprogram any of its unrestricted, general appropriation for the payment fees and expenses awarded under 5 U.S.C. § 504 and 28 U.S.C. § 2412(d). 9/ The argument against any such obligation is primarily textual. The first sentence of the funding provisions provides that agencies "may" make payments from their own funds, in contrast to the mandatory "shall" of the Senate version. Read together with the second sentence, offering an alternate source of funds to agency budgets, the provision might be viewed as indicative of a flexible system in which complete discretion has been vested in the agencies whether to pay awards from their own funds or to refer them for certification by the Comptroller General and payment from the Treasury. The textual argument is buttressed by reference to the broad principle that when Congress appropriates generally in so-called "lump sum" appropriations it does so with full awareness that it is vesting in agencies complete discretion to allocate the unrestricted funds, including the discretion to "zero-budget" a particular authorized program. Cf. McCary v. McNamara, 390 F.2d 601 (3rd Cir. 1968). See generally Newport News Shipbuilding and Dry Dock Co., 55 Comp. Gen. 812 (1976); LTV Aerospace Corp., 55 Comp. Gen. 307 (1975). However, it is necessary to examine the issue more closely.

The House Judiciary Committee's amendment of the Senate language had two intended effects: first, to authorize specific appropriations to agencies for fee awards; and, second, to permit the payment of awards from the judgment fund in at least some cases. 10/ As a matter of both grammar

9/ It is clear, of course, that funds appropriated specifically to pay awards for fees and expenses would have to be spent by agencies for that purpose unless deferred or rescinded pursuant to the Impoundment Control Act of 1974, 31 U.S.C. § 1400 et seq.

10/ We note that the House Committee on the Judiciary's version was developed before § 207 was added to the Act.

and substance, some element of discretion had to be introduced into the wording of the funding provisions to achieve the latter effect. The introduction of this element of discretion raises three questions related to the argument outlined above. The first is whether, by changing "shall" to "may," the House Judiciary Committee intended that the cases in which the judgment fund would be available would be "any and all in the discretion of the agencies;" or, whether the Committee used "may" to vest some, but not unlimited, discretion in the agencies to pass responsibility for the payment of some, but not all, awards to the general Treasury. The second question is whether the Judiciary Committee's language and the intent behind it are sufficient to overcome the presumption that agencies are free to zero-budget authorized programs within agency programs funded by a lump sum appropriation. The third question is what effect the addition of § 207 has on the ultimate meaning of the Act on this point.

With regard to the first question, nothing affirmative in the legislative history indicates that either the House or the Senate intended or understood that the modifications made by the House Committee on the Judiciary in the funding provisions would vest unlimited discretion in agencies whether to use their funds to pay awards. The only indicators are to the contrary. Representative Kastenmeier, the prime mover behind the modifications, had a restricted view of the purpose for which discretion was vested. He explained on the House floor: "We have changed the funding for attorneys fees to prevent the disassembling of an agency based on one lost case." 126 Cong. Rec. H 10223 (daily ed. 1980). The view of the conferees was equally parsimonious:

The conference substitute directs that funds for an award and [sic] fees and other expenses to come first from any funds appropriated to any agency . . . (emphasis added).

Conference Report at 24, 27. Thus the only statements in the legislative history related to agency discretion indicate that Congress intended that the funding arrangement would insure that the bulk of awards would come from agency funds. The discretion envisioned was to refer prevailing parties to the general Treasury only when making an award out of agency funds would be a very heavy financial blow to the agency (i.e. cause its "disassembly").

The direct, although admittedly sketchy, evidence that Congress intended agencies to have only limited discretion not to pay awards from their own funds is supported circumstantially by one of the major expressed intentions of Congress in adopting the Act. This is the same intent that inspired the original Senate version of the funding provisions. It is an intent which is evident throughout the legislative history in both the House and the Senate, and which was best expressed by Senator Thurmond in his statement on the adoption of the conference report, a report described by Senator Deconcini as not in essence "at variance with the concept and premise of S. 265 as originally passed by the Senate." 126 Cong. Rec. S 13874 (daily ed. September 30, 1980). Senator Thurmond observed:

The second purpose of this legislation is to encourage the agency to be as careful as possible in the exercise of its regulatory powers and to be more responsive to citizen needs. The implicit assumption in the approach taken by this legislation is that affecting the "pocketbook" of the agency is the most direct way to assure more responsible bureaucratic behavior.

Id., at S 13876. There is no indication that the House modifications in the Senate funding provisions were intended to undermine this basic purpose of the Act. Rather, the House Report theorized that "fee shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority." House Report at 12.

We believe that this legislative history demonstrates Congress' belief that the payment of some awards would come from agency funds either specifically appropriated to the agencies or allocated to this program from lump sum appropriations for all an agency's general activities. Thus, we have little reason to doubt that Congress, in accepting the House Judiciary Committee's language on this point, assumed that payment for at least some awards would be available from general lump sums appropriated to the various agencies against whom awards were entered.

Given this apparent intent, the question is whether the intent and the language of the funding provisions is sufficient to overcome the presumption that agencies are generally free to zero-budget authorized programs funded by a lump sum appropriation. Although the answer is not free from doubt, we believe the courts would most likely hold at least some fee awards to be payable from general funds appropriated to the agencies against whom awards were entered. We reach this conclusion for several reasons. First, a conclusion that all awards may be paid from other than an agency's own funds would undermine Congress' declared purpose to encourage agencies to act more responsibly or suffer the consequences. Second, we are aware of no situations in which agency flexibility to zero-budget authorized activities has been thought to include the power to zero-budget actual obligations of agencies which themselves come into existence through the operation of law.

We do not believe that the existence of § 207 in the bill avoids this result. Section 207 merely makes access to the so-called judgment fund contingent on a specific appropriation by Congress. Thus, § 207 does no more than shift to Congress consideration of the payment of fee awards which are, in the opinion of the agency involved, a major drain on the resources of the agency.

Even though we believe that a decision by an agency now to zero-budget the payment of awards made in fiscal year 1982 would not be consistent with the Act, we believe the courts should accord each agency broad discretion to determine, within its otherwise limited financial resources, the level of funds which should be made available for the payment of such awards in fiscal year 1982. Agencies' decisions in this regard should be made known to both authorizing committees and appropriation committees during the presentation of the fiscal year 1982 budget to Congress. By making Congress fully aware of the manner in which this discretion will be exercised, the agency should be able to justify more easily the exercise of that discretion when challenged in court.

4. Limiting the Act

Although we believe an agency's decision to allocate a fixed amount of its appropriation for fiscal year 1982 for the payment of awards would eventually be upheld by the courts, the uncertainty that remains regarding that

issue, suggests that more comprehensive legislative change should be sought. There are in addition policy problems raised by the setting of such a "cap," either by the agency itself or through a limitation on the use of appropriated funds written into an appropriation act. For one thing, funds set aside to pay awards may be exhausted early in a fiscal year, leaving awards made later in that year subject to an appropriation by Congress. Because the persons receiving such awards during the fiscal year would be essentially similarly situated, a policy of treating them differently would not appear to commend itself.

Were spending caps to be set in an appropriation bill for each agency, pressure for supplemental appropriations might prove irresistible given the obligations created by such awards. Moreover, such caps would restrict payments only on a year-to-year basis, leaving the obligations intact. We believe a much more effective solution to this problem would be to repeal the Act in toto or to amend it so that the authority to make awards would itself be dependent on the existence of an advance appropriation. See, e.g., McKay v. Central Electric Power Corp., 223 F.2d 623 (D.C. Cir. 1955).

Larry L. Simms
Acting Assistant Attorney General
Office of Legal Counsel