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Mr. Michael J. Horowitz
Counsel to the Director
Office of Management and Budget
472 Old Executive Office Building
Washington, D.C. 20503

Dear Mr. Horowitz:

I have reviewed your draft memorandum in which you set forth your disagreement with the conclusion in our opinion of March 25, 1981 relating to the availability of agency funds to pay attorney's fee awards under the Equal Access to Justice Act ("Act"). I had understood that you had intended to finalize your memorandum and forward it to me before proceeding further with this subject. However, since you have apparently chosen not to do so, it is necessary for me to respond to your draft.

To recapitulate the subject of this dispute: the Equal Access to Justice Act was predicated on an express Congressional finding that individuals and organizations were deterred from seeking "review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights . . . ." 5 U.S.C. §504 note. Accordingly, the Act allows certain litigants (smaller businesses and associations) to recover attorneys fees and expenses unless it is established that the Government's position which gave rise to the dispute "was substantially justified." Fees awarded pursuant to these provisions of the Act

> "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 judgements is made pursuant to section 2412 of Title 28, United Stated Code."

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

Memo released to Williams and Connolly
on 9|27|95 per Richard Shiffrin.

I do not agree with your conclusion that, under the above funding provision, agencies have no legal authority to pay awards under the Act in the absence of an appropriation by Congress for that specific purpose. Your conclusion would require interpreting this provision as if it read: "may be paid by any agency . . . from any funds made available to the agency, by appropriation[] for such purpose" and interpreting the word "purpose" very narrowly. Our disagreement, if I understand your arguments correctly, relates in part to the extent of an agency's discretion to allocate funds among authorized activities under a lump sum appropriation. 1/ You believe that an agency's legal authority to "reprogram" funds within a lump sum account depends upon there being some explicit reference in the appropriations process to the activity or program sought to be funded. I disagree, for the reasons set forth herein. I note, in passing, the internal inconsistency of your draft on this issue; the legal points developed in part 2 refute your earlier arguments concerning restrictions on the use of lump sum appropriations.

It is a well settled principle of law that a lump sum appropriated for an agency's general programs and activities may be used by the agency for any otherwise authorized purpose, even if the legislative history of the appropriation statute prescribes specific priorities for allocating funds among authorized activities. See e.g. Newport News Shipbuilding and Drydock Co., 55 Comp. Gen. 812, 819-21 (1976); LTV Aerospace Corp., 55 Comp. Gen. 307, 318-19 (1975). The absence of specific limitations or prohibitions in the terms of an appropriations statute implies that Congress did not intend to impose restraints upon an agency's flexibility in shifting funds within a particular lump sum account among otherwise authorized activities or programs -- unless of course Congress has in some other law specified that funds from the appropriation

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1/ You take issue with our use of the term "unrestricted appropriation," which you characterize as a "novel" concept. You do, however, recognize and concede that agencies have discretion to reprogram funds within a "lump sum appropriation." Since our opinion used the terms "unrestricted appropriation" and "lump sum appropriation" interchangeably, that portion of your draft which addresses this subject is based upon a non-existent premise.

in question should be spent (or not, as the case may be) in a particular manner. 2/ By the same token, an agency's legal authority to fund an authorized program from its general operating funds does not depend upon its being able to point to some references to that program in its budget justification or elsewhere in the appropriations process. This is because the lawfulness of an expenditure is tested by the terms of the appropriations statute and any other relevant law, and not with reference to legislative history. Thus, inclusion of an activity or function in the "class of objects" for which an agency's general funds may be spent does not depend upon Congress' affirmative acknowledgement in the appropriations process that the activity or function will be funded or even its being explicitly so informed by the agency. If the activity or function is one which Congress has elsewhere given the agency authority to perform, its funding does not depend upon its being singled out for specific mention each

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2/ See Fisher, "Reprogramming of Funds by the Defense Department," 36 The Journal of Politics 77, 78 (1974):

> The [congressional] committees and the agencies recognize that it is often necessary and desirable to depart from budget justifications. The Department of Defense must estimate months and sometimes years in advance of the actual obligation and expenditure of funds. As the budget year unfolds, new and better applications of money come to light. Reprogrammings are made for a number of reasons, including unforeseen developments, changing requirements, incorrect price estimates, wage-rate adjustments, changes in the international situation, and legislation enacted subsequent to appropriations.

It is significant that Congress has explicitly recognized this flexibility in the Executive Branch. See e.g., H.R. Rep. No. 662, 93d Cong., 1st Sess. 16 (1973); H.R. Rep. No. 1607, 87th Cong., 2d Sess. 21 (1967); H.R. Rep. No. 408, 86th Cong., 1st Sess. 20 (1959).

year in the appropriation process. 3/ Any other interpretation, including the one you suggest, would severely and, I believe, unwisely restrict the flexibility of Executive Branch agencies.

I recognize of course that comity may suggest the desirability of an agency's advising an appropriations committee that money from a lump sum appropriation will be spent for a purpose or on a program which was not mentioned in its budget justification documents but which is otherwise authorized by statute. However, as a matter of law it is clear that the agency has legal authority to make the expenditure in question without any further action by Congress.

The constitutional concern mentioned at pp. 7-8 of your draft is entirely incomprehensible to me, since nowhere in our opinion did we suggest that reprogramming of funds might be done by committees of Congress. As you define that term on p. 6, reprogramming is "an extrastatutory procedure whereby agencies shift the use of available funds within an appropriation account . . . ." (emphasis added). Our opinion neither stated nor implied that the appropriations committees would direct the expenditure of these funds. This portion of

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3/ In an analogous situation, if an agency runs short of funds during the course of a fiscal year, the courts have recognized that an agency head's discretion to reprogram funds among authorized programs under a lump sum appropriation is limited only if a specific statutory directive requires the expenditure or distribution of funds in a particular manner. See e.g., City of Los Angeles v. Adams, 556 F.2d 40, 49-50 (D.C. Cir. 1977):

> If Congress does not appropriate enough money to meet the needs of a class of beneficiaries prescribed by Congress, and if Congress is silent on how to handle this predicament, the law sensibly allows the administering agency to establish reasonable priorities and classifications.

The Supreme Court, in Ruiz v. Morton, 415 U.S. 199, 230-31 (1974) has affirmed an agency head's "power to create reasonable classifications and eligibility requirements in order to allocate the limited funds available to him."

your draft therefore responds to a misunderstanding of our views.

Your draft overlooks a considerable portion of the legislative history addressed in our opinion, including the report of the House Committee on the Judiciary which expressly stated that funds "may be appropriated to cover the cost of fee awards or may otherwise be made available by the agency (e.g., through reprogramming)." H.R. Rep. No. 1418, 96th Cong., 2d Sess. at 16, 18 (1980) [emphasis added]. The Conference report also declared that funds for an award were to "come first from any funds appropriated to any agency." H.R. Rep. No. 1434, 96th Cong., 2d Sess. 24, 27 [emphasis added]. As we noted, Senator Thurmond expressly contemplated that the Act would have an effect on an agency's "pocketbook" -- a view which is irreconcilable with your draft. Your reliance on Congressman Smith's remarks is misplaced since those remarks refer only to §207 of the Act, and not to an agency's obligation under 5 U.S.C. §504(d)(1) and 28 U.S.C. §2412(d)(4)(A).

Your final numbered paragraph makes the argument that if an agency may use any of its funds to pay fee awards, all awards must be paid from such funds. This conclusion is not supported by any authority in your draft and we find no basis for it in the Act or its legislative history.

I might point out that the General Accounting Office has independently reached the same conclusions as this Office with respect to the availability of agency funds to pay awards under the Act. In a letter of May 15, 1981 to the Chairman of the Administrative Conference of the United States, Acting Comptroller General Socolar opined that payment of awards from agency funds under the Act would require neither a specific appropriation nor even a specific budget request by the agency. In support of this conclusion, he stated that "the purpose of the Act would be frustrated by an interpretation which would permit an agency to avoid payment merely by failing to include an appropriate item in its budget justifications." I have attached a copy of the Acting Comptroller General's letter for your convenience. 4/

4/ We do not, of course, regard the Comptroller General's views as dispositive, but his views on issues intimately related to the budget/appropriation process are entitled to some respect due to his institutional expertise in this area.

In conclusion, we have found nothing in your draft opinion to cause us to change our views. In fact, the independent conclusion reached by the Comptroller General tends to reinforce them. Your conclusion, that these awards cannot be paid by an agency from a lump sum account in the absence of some reference to them in the appropriations process, is inconsistent with the appropriations process and the law relative to it, and at odds with this Act and its legislative history.

Sincerely,

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel