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THE ROLE OF THE FEDERAL GOVERNMENT IN DEFENDING PUBLIC INTEREST LITIGATION

Daniel S. Jacobs*

I. INTRODUCTION

Civil suits against the United States, its agencies, and officers provide an important vehicle for the public at large to redress individual wrongs and systemic injustices for which the federal government is responsible. Suits against the federal government are part of the very bedrock of American legal tradition, dating back to *Marbury v. Madison*, the case that established the principle of judicial review.

When a civil action brought against the federal government challenges a program, policy, or action as unlawful, and seeks remedies intended to inure to the benefit of the a broad class of persons rather than simply the individual plaintiff(s), the case can be considered public interest litigation. This article studies the role of the federal government in defending such suits. At present, the government may too readily interpret its role to include the defense of the parochial interests of federal agencies, bureaucracies, and officials, without

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1. 5 U.S. 137 (1803). In *Marbury*, the plaintiff, William Marbury, was one of President John Adams' "eleventh hour" nominees for a judicial appointment (justice of the peace). Marbury sued for an order compelling James Madison, then the Secretary of State, for the delivery of his commission.

2. It must be conceded at the outset that a hard and fast definition of "public interest" litigation is elusive. See discussion *infra* Part IV.A.
sufficient regard to the validity of the claims. The government should reassess and redefine its role in public interest cases to ensure that it does not stifle legitimate challenges to government programs, policies, and actions.

The article has three parts. The first part examines the limited potential of existing external controls to affect the government's role in defending public interest litigation. The second part provides an extensive case study of a historic public interest class action where a federal court repeatedly has found the federal government to have overzealously defended a fundamentally flawed program. The third part explores the factors that account for the government's perception of its role in public interest cases, and proposes systemic changes designed to promote the resolution of meritorious cases.

II. POTENTIAL CONSTRAINTS ON THE GOVERNMENT IN DEFENDING PUBLIC INTEREST LITIGATION

Federal court decisions, the Equal Access to Justice Act (EAJA), and ethical precepts conceivably influence to some degree the role the federal government plays in defending public interest litigation. Federal courts have addressed the duties of the government and its attorneys in litigation, and have imposed sanctions for misconduct. EAJA penalizes the government monetarily when it defends a civil case without sufficient justification. Ethical precepts generally prescribe the loyalties an attorney owes his client and proscribe certain forms of attorney conduct. These potential constraints serve as limited external controls on the government's role in defending public interest litigation.

A. The View from the Bench: Setting the Bar for the Government's Conduct in Litigation

Federal courts often have high expectations of the federal government when it is a party in litigation. Whether their expectations are rooted in formal ethical precepts or more esoteric notions of fairness, at least some courts operate under the underlying assumption that the government and its lawyers have a higher duty to the judicial process than mem-

bers of the private bar. Both in the context of making decisions on substantive questions of law and in the application of sanctions for litigation misconduct, many courts have opined that this duty includes serving the public interest in a given case. Although the government no doubt takes such decisions seriously, it is difficult to gauge the extent to which they have had a practical effect in terms of influencing the government's role in defending public interest litigation in general.

In *Freeport-McMoran Oil & Gas Co. v. FERC*, the D.C. Circuit drew upon the Supreme Court's pronouncement that the government bears the obligation of seeing "that justice shall be done" in prosecuting criminal cases, to prescribe an individual federal government lawyer's duties in defending a civil action. The court held that the government lawyer must meet higher standards than private counsel, an obligation derived from the government lawyer's position as a representative not of a private party but of the sovereign. Indeed, when a federal agency lawyer objected to the higher standard in oral argument, he was soundly corrected and rebuked in an opinion (written by the chief judge) published for the purpose of highlighting the standard.

In *In re Lindsey*, the D.C. Circuit expanded on that theme in its historic decision limiting the assertion of the at-

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5. Some courts have focused on the duties of the government while others have put the onus on its lawyers. See RESTATMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. f (2000) (observing that the more stringent legal duties courts have sometimes placed on government attorneys are best understood as being based on the obligations of governmental agencies, not individual government lawyers).
9. Id. (quoting Berger v. United States and Model Code of Professional Responsibility EC 7-14 (1981) (relating to the "responsibility to seek justice" in civil cases); see also United States v. Williams, 952 F.2d 418, 421-22 (D.C. Cir. 1992) ("That the Government made these misstatements renders the conduct here even more egregious. The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.").
10. See Freeport-McMoran, 962 F.2d at 46 ("Ordinarily, we would handle such a matter in an unpublished order.").
11. 158 F.3d 1263 (D.C. Cir. 1998).
torney-client privilege by White House counsel to justify his refusal to answer questions before a federal grand jury in the Independent Counsel’s investigation of President Clinton (“Whitewater”). The court found that the loyalties of the government lawyer (who, it noted, takes an oath of office to faithfully execute the laws) “cannot and must not lie solely with his or her client agency,” but rather with a higher order—the public or public interest.12 Although the court primarily focused on criminal law precedents,13 it opined that “the government lawyer in a civil action must ‘seek justice.’”14

In re Grand Jury Subpoena Duces Tecum,15 another case on attorney-client privilege that grew out of the Whitewater investigation, is also instructive. The Eighth Circuit went even further than the D.C. Circuit in distinguishing government from private sector lawyers by failing to even acknowledge the existence of an attorney-client privilege in the governmental context.16 The court referred to the “general duty of public service,”17 and “the strong public interest in honest government and in exposing wrongdoing.”18

Other circuits have also set the bar high for government lawyers. The Seventh Circuit has written that:

District judges rightfully expect that Justice Department lawyers would be the last attorneys from whom they would need to cajole and pry out information relevant to matters of obvious concern. So, too, as the inscription on the Attorney General’s Rotunda reads, ‘the United States

12. Id. at 1273. The court also quoted with approval a Federal Bar Association ethics opinion with a similar conclusion. Id.; see also Federal Bar Association Ethics Committee, The Government Client and Confidentiality: Opinion 73-I, 32 FED. CIR. B.J. 71, 72 (1973) (“The lawyer’s employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part.”); FBA MODEL RULES, Preamble (1990) (“In addition to the high standards of conduct expected of all Federal lawyers, the Government lawyer has a specific responsibility to strive to promote the public interest.”).

13. See In re Lindsey, 158 F.3d at 1273 n.4 (citing Brady v. Maryland, 373 U.S. 83 (1963) and Berger v. United States, 295 U.S. 78 (1935)).

14. Id. (noting that “[i]ndeed, the responsibilities of government lawyers to the public have long governed the actions they can take on behalf of their ‘client.’”).

15. 112 F.3d 910 (8th Cir. 1997).

16. See id. at 915 (refusing to recognize that an attorney-client privilege extended to notes taken by White House counsel of meetings with Hillary Rodham Clinton).

17. Id. at 920.

18. Id. at 921.
wins its point whenever justice is done its citizens in the
courts,' not when witnesses are sent home because of
technical deficiencies in service.19

The Fifth Circuit has written that "[g]overnmental attorneys
should model the ideals of integrity and ethics rather than at-
ttempt to circumvent them."20 And, the Ninth Circuit has
written that "the government has an interest only in the law
being observed, not in victory or defeat in any particular litiga-
tion."21

In addition to opining generally on the role of the gov-
ernment in civil litigation, courts have been known to impose
a broad range of sanctions when they find that the govern-
ment has crossed the bounds of acceptable conduct.22 A
court's authority to sanction a party and/or its counsel is de-
rivered both from the Federal Rules of Civil Procedure23 and the
court's inherent powers.24 As a general proposition, the gov-
ernment is subject to the full range of sanctions as would be
any other litigant.25

19. Barnhill v. United States, 11 F.3d 1360, 1371 (7th Cir. 1993) (involving
sanctions); see also In re Witness Before the Special Grand Jury, 288 F.3d 289,
293 (7th Cir. 2002) (noting that the compensation of state government lawyers
"comes not from a client whose interests they are sworn to protect from the
power of the state, but from the state itself and the public fisc.").
20. Chilcutt v. United States, 4 F.3d 1313, 1327 n.36 (5th Cir. 1993) (involv-
ing attorney sanctions).
21. Reid v. INS, 949 F.2d 287, 288 (9th Cir. 1991) (complimenting an agency
attorney for properly understanding his role in confessing error on the part of
the government).
22. As the ensuing discussion reveals, litigation misconduct often (albeit not
exclusively) takes the form of discovery abuse of some sort in cases where the
government is the defendant and therefore at least arguably has a heightened
temptation to be less than forthcoming in the course of discovery.
23. See FED. R. Civ. P. 11(c), 16(f), 37. See generally United States v. Pro-
tor & Gamble Co., 356 U.S. 677 (1958); Bank Line, Ltd. v. United States, 163
F.2d 133 (2d Cir. 1947).
District of Columbia, 146 F.3d 964, 971 (D.C. Cir. 1998).
25. See Chilcutt, 4 F.3d at 1325-27 (discussing the effect of the passage of
EAJA, 28 U.S.C. § 2412 (2003), and the concomitant repeal of FED. R. Civ. P.
37(f), which previously had exempted the federal government from discovery
sanctions). Some courts are hesitant to find a waiver of sovereign immunity,
however, when it comes to the use of the contempt power to impose monetary
damages (as distinct from discovery sanctions). See United States v. Horn, 29
F.3d 754, 762 (1st Cir. 1994) (collecting cases); see also Armstrong v. Executive
Office of the President, 1 F.3d 1274, 1290 n.13 (D.C. Cir. 1993) (declining to
reach sovereign immunity issue with respect to contempt fines).
A federal court's inherent power to impose sanctions for litigation misconduct is expansive:

The inherent power encompasses the power to sanction attorney or party misconduct, and includes the power to enter a default judgment. Other inherent power sanctions available to courts include fines, awards of attorneys' fees and expenses, contempt citations, disqualifications or suspensions of counsel, and drawing adverse evidentiary inferences or precluding the admission of evidence.26

A brief survey of sanctions cases suggests that, as a general rule, courts are more likely to impose sanctions for litigation misconduct that fall towards the less severe end of the scale, and to apply them to the government attorneys who have entered appearances in the case rather than more senior officials. Perhaps the most common sanction is the imposition of a fine against the government's staff attorney(s).27 Such a sanction, particularly when it includes the proviso that the fine not be reimbursed by the government, places the blame squarely on the attorney himself.28 Alternatively, if a court wishes to hold both the attorney and the government responsible for the breach, it may impose the fine jointly against the government and its staff attorney.29 Other courts have also focused on the staff attorneys by chastising, but not actually fining, them.30 One such case assumed a particularly

27. See, e.g., Chilcutt, 4 F.3d at 1325-26 (affirming monetary sanctions against a government attorney); United States v. Shaffer Equip. Co., 158 F.R.D. 80, 87 (S.D.W. Va. 1994) (imposing monetary sanctions against the government counsel after remand from United States v. Shaffer Equip. Co., 11 F.3d 450 (4th Cir. 1993), which expressly affirmed the district court's finding that a breach of ethical conduct had occurred and reversed only for the purposes of requiring the lower court to impose a remedy short of outright dismissal).
28. In both of the cases cited in the preceding footnote, the fines were imposed with such a proviso. See Chilcutt, 4 F.3d at 1325-26; Shaffer Equip. Co., 158 F.R.D. at 87.
30. See, e.g., Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346 (Fed. Cir. 2003) (affirming reprimand of a government attorney for misquoting and selectively quoting opinions in a motion); In re Williams, 156 F.3d 86 (1st Cir. 1998) (dismissing an appeal of government attorneys who had been found by a bankruptcy judge to have committed misconduct for failing to timely produce documents), cert. denied sub nom. Cannon v. Williams, 525 U.S. 1123 (1999).
unusual procedural posture when the government attorney personally appealed the reprimand with the support of the government as amicus curiae.\textsuperscript{31} In that case, the appellate court took umbrage at the government's position on appeal, noting that "[t]he ultimate responsibility for the completeness and accuracy of papers that are filed by the Department of Justice lawyers rests with the Department itself."\textsuperscript{32}

High-level contempt citations, which occasionally are issued for a violation of an injunction issued on the merits,\textsuperscript{33} are very rarely imposed for litigation misconduct.\textsuperscript{34} If such cases are reviewed by an appellate court, they are likely to be very closely scrutinized. For example, in \textit{In re Attorney General of the United States},\textsuperscript{35} the Second Circuit granted a writ of mandamus and reversed a contempt order issued by the district judge holding the Attorney General in contempt for failing to comply with a discovery order.\textsuperscript{36} The appellate court

\begin{itemize}
\item \textsuperscript{31} \textit{See} Precision Specialty Metals, 315 F.3d at 1350.
\item \textsuperscript{32} \textit{Id.} at 1358.
\item \textsuperscript{33} \textit{See}, e.g., McBride v. Coleman, 955 F.2d 571, 576-77 (8th Cir. 1992) (upholding a civil contempt order against the Secretary of Agriculture and two Department of Agriculture employees for violating an injunction and upholding attorney's fees and cost, but not compensatory damages as a sanction); Am. Rivers v. U.S. Army Corps. of Engineers, 274 F. Supp. 2d 62 (D.D.C. 2003) (entering a conditional finding of civil contempt against an agency for violation of an injunction; $500,000/day fine to be imposed if the government did not come into compliance); Sierra Club v. Ruckelshaus, 602 F. Supp. 892, 904 (D.C. Cal. 1984) (holding the EPA Administrator and agency itself in civil contempt for violating a court order requiring it to comply with the Clean Air Act requirements for the promulgation of emission standards and ordering specified actions).
\item \textsuperscript{34} \textit{See} Landmark Legal Foundation v. EPA, 272 F. Supp. 2d 70 (D.D.C. 2003) (adjudging agency to be in civil contempt after erasing and reusing backup e-mail tapes and deleting e-mails in violation of injunction; legal fees and costs imposed as sanction); Cobell v. Babbitt ("Cobble\textsuperscript{II}"), 37 F. Supp. 2d 6 (D.D.C. 1999) (cabinet secretaries held in contempt for discovery misconduct); \textit{see also} Cook v. Rockwell Int'l Corp., 907 F. Supp. 1460 (D. Colo. 1995) (finding the Department of Energy in contempt for failure to comply with a stipulated discovery order).
\item \textsuperscript{35} 596 F.2d 58 (2d Cir. 1979), \textit{cert. denied sub nom.} Socialist Workers Party v. Attorney General of the United States, 444 U.S. 903 (1979).
\item \textsuperscript{36} \textit{In re Attorney General}, 596 F.2d at 60-61. The Social Workers Party sued the United States, several high public officials in their official capacities (including the Attorney General), and former officials in their personal capacities, for engaging in an allegedly unlawful FBI investigation of the Party and an affiliate with the intention of disrupting or destroying them. \textit{Id.} at 60. After discovery had revealed that the FBI had falsely answered an interrogatory with respect to an individual informant's activities, the district court ordered FBI files and summaries regarding additional informants to be made available \textit{in camera} to plaintiffs' attorneys. \textit{Id.} at 60-61. The Attorney General refused,
vacated the contempt order on the grounds that the district judge should have considered less severe sanctions: "holding the Attorney General of the United States in contempt to ensure compliance with a court order should be a last resort, to be undertaken only after all other means to achieve the ends legitimately sought by the court have been exhausted." While on the one hand, the court "unequivocally affirmed the principle that no person is above the law," the court also gave significant consideration to the high office held by the Attorney General. In Cobell v. Norton, the D.C. Circuit reversed a district court order holding the Secretary of the Interior in civil contempt for litigation misconduct (described as a failure to comply with a court order) and commission of a fraud upon the court.

Both the Second and D.C. Circuits have been more reluctant, however, to afford special consideration to officials less senior than a cabinet officer when confronted with discovery issues. Other circuits have also made the same distinction.

whereupon the district judge held him in contempt. *Id.* at 65. The court cited to—and in a lengthy footnote quoted verbatim from—the various sanctions allowed under Fed R. Civ. P. 37(b)(2). *See In re Attorney General,* 596 F.2d at 65 n.14.

38. *In re Attorney General,* 596 F.2d at 64.

39. By contrast, a century earlier, in Mississippi v. Johnson, 71 U.S. 475 (1866), the Supreme Court perceived a cabinet official to be relatively expendable:

In the case of a mere subordinate officer the court may very well enforce its authority, even to the point of imprisoning him for contempt; because, taking a Secretary from the head of his department, or an Attorney-General from his office, or a Postmaster-General from his department, does not stop the government, does not interfere with any great branch or department of the government. The President is there to make another Attorney-General, or another Postmaster-General, or another Secretary. That does not interfere with the public interests. The government goes on just as well whether one officer is there or another officer is put in his place. But, notwithstanding that, as I have said, this court have exercised that sort of jurisdiction very carefully. I have not, however, found a case like this, a case in which a suit has been entertained by this court against an executive officer as such officer, or an injunction allowed against him, against the performance of his duty as an executive officer.

*Id.* at 490.

40. Cobell v. Norton (*Cobell VII*), 334 F.3d 1128 (D.C. Cir. 2003); *see also discussion infra* Part III.

41. *See In re United States,* 680 F.2d 9 (2d Cir. 1982) (refusing to issue writ of mandamus seeking review of a discovery order, and distinguishing *In re Attorney General* on the grounds that the Attorney General had not been cited for contempt in an action brought by a participant in the first Freedom Ride who
In short, the courts often have viewed the loyalties and obligations of the government in civil litigation to include a public interest component and put the government on a higher plane than private litigants in terms of its obligations to the Bar. The courts will also hold the government accountable for litigation misconduct, although they are more likely to impose relatively mild sanctions on staff attorneys directly involved in the representation of the government party than to impose harsh measures on the government as a whole or a senior officer. Any court decision which speaks to the government’s duties and integrity is bound to get its undivided attention. Whether such isolated decisions have a systemic impact on how the government conducts itself in defending public interest litigation, however, remains to be seen.

B. Penalizing the Government for Unjustifiably Defending a Civil Action: The Equal Access to Justice Act

EAJA, passed by Congress in 1981, requires the federal government to pay attorney’s fees to prevailing parties when the government’s position in a civil case is unjustified. Because the federal government is named as a defendant in a large percentage of federal civil actions filed each year, EAJA at least theoretically could provide an important finan-

claimed that the FBI had advance knowledge of an attack on that participant); In re Kessler, 100 F.3d 1015 (D.C. Cir. 1996) (denying writ of mandamus sought to vacate discovery order that would require the deposition of the Commissioner of the Food and Drug Administration, noting that the Commissioner was not a cabinet officer).

42. See In re Shalala, 996 F.2d 962 (8th Cir. 1993) (denying writ of mandamus seeking review of discovery order, but noting that a writ might be appropriate if the Secretary—a cabinet officer—is cited for contempt); United States v. Hemphill, 369 F.2d 539 (4th Cir. 1966) (issuing writ of mandamus where the district court ordered the Secretary of Labor to show cause why he should not be held in contempt for failure to comply with discovery).


44. See id. Although EAJA generally provides for the compensation of prevailing private party litigants who meet certain net worth limitations, whether plaintiff or defendant, the focus here is on the government as defendant.

45. See Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2001 Annual Report of the Director, at 136, Table C-3 (2001). In the twelve-month period ending September 30, 2001, a total of 63,324 civil cases were filed by or against the United States in U.S. district courts, representing roughly a quarter of the civil cases filed in that fiscal year. See id. The federal government is the defendant in roughly two-thirds of these cases. See id. at 24, Table 5.
cial incentive to the government to refrain from unjustifiably defending such cases. Judging from the available evidence, however, EAJA has not served as a particularly meaningful deterrent.

Unfortunately, there is a paucity of publicly-available empirical data from which to currently assess the frequency of the government’s unjustified defense of civil actions and the costs associated therewith because all routine centralized public reporting of EAJA cases ceased in fiscal year 1994.46 A study published in 1993, however, concluded that the government’s position was substantially justified in only twenty percent of non-social security court cases, meaning that at the time the government was unjustifiably defending a strikingly high eighty percent of civil cases.47 Moreover, the groundswell of EAJA litigation since passage of the Act gives little comfort that the Act has successfully curbed the government’s unjustified defense of civil actions.48 The case law suggests that the government is devoting substantial resources not only to the unjustifiable defense of the underlying legal issues involved, but also to the exhaustive litigation of the fee issues themselves.49

Prior to passage of EAJA, sovereign immunity generally protected the government from liability for attorney’s fees

46. First tracked by the Administrative Conference of the United States, then by the Administrative Office of the United States Courts, and finally by the Justice Department, government-wide reporting of EAJA cases finally ceased with The Federal Reports Elimination and Sunset Act of 1995. See U.S. General Accounting Office, Equal Access to Justice Act: Its Use in Selected Agencies, GAO/HEHS-98-58R, at 4. Since that time, only limited data, collected for selected agencies at the request of Congress, has been made available. Id. Thus, there is virtually no recent data available with which to conduct an empirical study of statistical significance. There also appears to be no publicly-available information from which to attempt to gauge how much the government spends on its own fees and costs to defend indefensible actions. In short, the evidence is necessarily more impressionistic than scientific.


49. See Sisk Part I, supra note 48; Sisk Part II, supra note 48.
unless the case was brought under a statute expressly providing for fees. EAJA waived the government’s sovereign immunity, replacing it with the general rule that one-way fee-shifting applies in civil litigation by small parties against the government.

As the Supreme Court has observed, passage of EAJA reflected an explicit recognition on the part of Congress that the federal government’s actions sometimes deserve to be challenged in court. The Court has also noted that EAJA “rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy.” Moreover, Congress believed that “[t]he Govern-

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52. See INS v. Jean, 496 U.S. 154 (1990). In its review of the legislative history of the Act, the Supreme Court noted that “the specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable government actions.” Id. at 163; see also Spencer v. NLRB, 712 F.2d 539, 549-50 (D.C. Cir. 1983):

The central objective of the EAJA, and of section 2412(d)(1)(A) in particular, was to encourage relatively impecunious private parties to challenge unreasonable or oppressive governmental behavior by relieving such parties of the fear of incurring large litigation expenses. Achievement of that end, it was believed, would promote three more general goals. First, Congress hoped to provide relief to the victims of abusive governmental conduct, to enable them to vindicate their rights without assuming enormous financial burdens. Second, it sought to reduce the incidence of such abuse; it anticipated that the prospect of paying sizable awards of attorney’s fees when they overstepped their authority and were challenged in court would induce administrators to behave more responsibly in the future. Third, by exposing a greater number of governmental actions to adversarial testing, Congress hoped to refine the administration of federal law—to foster greater precision, efficiency and fairness in the interpretation of statutes and in the formulation and enforcement of governmental regulations.

Id.
53. Jean, 496 U.S. at 165 n.14; see also, Roanoke River Basin Ass’n v. Hudson, 991 F.2d 132, 138 (4th Cir. 1993).

It was anticipated that, by providing a mechanism for leveling the playing field, not only would access by private litigants to the courts and administrative proceedings be facilitated, but also the public interest would be served by insuring, through a more balanced adversarial process, that only reasonable governmental positions on policy and rules would be enforced. Moreover, it is clear that Congress intended to address governmental misconduct whether that conduct preceded litigation, compelling a private party to take legal action, or occurred in the context of an ongoing case through prosecution or defense of unrea-
ment's general interest in protecting the federal fisc is subordi-
nate to the specific statutory goals of encouraging private
parties to vindicate their rights and 'curbing ... the unrea-
sonable exercise of Government authority.'

The statutory scheme works as follows. Subsection
2412(b) of EAJA provides that attorney's fees can be recov-
ered to the extent that the common law otherwise permits
them. Subsection 2412(d) of EAJA provides that a prevail-
ing party is generally eligible to recover its attorney's fees
when the government takes a position that was not substanci-
ally justified. Whereas there is no hourly rate ceiling on
attorney's fees awarded under subsection (b), attorney's fees
awarded under subsection (d) are capped at $125 per hour,
unless the court determines that an increase in the cost of liv-
ing or a special factor justifies a higher award.
The EAJA attorney's fees provisions functionally tie the amount an eligible prevailing party can recover to the strength of the federal government's position in litigating the case. In a nutshell, the three levels and standards for potential recovery of fees and costs are as follows: (1) if the government's position was substantially justified, the prevailing party does not recover; (2) if the government's position was not substantially justified, the prevailing party may recover its costs and capped attorney's fees; and (3) if the government litigated in bad faith, the prevailing party may recover its costs and full "market rate" attorney's fees.58

Because awards under subsection (b) must meet a higher threshold than under subsection (d), most EAJA awards (and, concomitantly, most of the case law) arise under subsection (d). Although not automatic,59 an award under subsection (d) is generally the rule rather than the exception, unless the government's position had a "reasonable basis both in law and fact."60

Under subsection (b), a court has discretion to award full market rate fees, but only to the extent that attorney's fees would otherwise be awardable as an exception to the so-called "American Rule," under which prevailing parties are barred from recovering their fees.61 Under Alyeska Pipeline Co. v.
Wilderness Society, the American Rule does not apply—and fees can be shifted—when the loser "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."

Notwithstanding the oft-quoted Supreme Court admonition that "[a] request for attorney’s fees should not result in a second major litigation," the government has conceded that the "substantial justification exception to fee litigation theoretically can spawn a ‘Kafkaesque judicial nightmare’ of infinite litigation to recover fees for the last round of litigation over fees." Just such a Kafkaesque nightmare arose in Hyatt v. Heckler, a case with broad public interest implications that was first filed in 1983. Hyatt was a class action that sought to require the Secretary of Health and Human Services to follow Fourth Circuit precedent in adjudicating Social Security disability cases, particularly insofar as pain is concerned. The substance of the case was finally settled on the merits in 1994, but, as discussed below, the fees issues applicable to the government the ‘bad faith’ and ‘common benefit’ exceptions to the American Rule." Id. at 545. The legislative history of EAJA confirms the plain language indication that Congress intended to make the bad faith attorney’s fee exception applicable to the United States and its agencies.


63. Id. at 258. A number of EAJA cases arising in the D.C. Circuit have further addressed the circumstances under which full market awards are permitted. See Am. Employers Ins. Co. v. Am. Sec. Bank, 747 F2d 1493, 1502 (D.C. Cir. 1984) (applying an exception where a party has been forced to sue to enforce a plain legal right); Am. Hosp. Assoc. v. Sullivan, 938 F.2d 216, 220 (D.C. Cir. 1991) (“Bad faith giving rise to the lawsuit may be found where a party, confronted with a clear statutory or judicially-imposed duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake otherwise unnecessary litigation to vindicate a plain legal right.”) (quoting Fitzgerald v. Hampton, 545 F. Supp. 154, 163 (D.D.C. 1982)).


65. Id. at 163 (quoting the government’s brief).

66. For the published district court opinions, see Hyatt v. Heckler, 579 F. Supp. 985 (W.D.N.C. 1984); Hyatt v. Heckler, 586 F. Supp. 1154 (W.D.N.C. 1984); Hyatt v. Heckler, 618 F. Supp. 227 (W.D.N.C. 1985); Hyatt v. Bowen, 118 F.R.D. 572 (W.D.N.C. 1987); Hyatt v. Sullivan, 757 F. Supp. 685 (W.D.N.C. 1991). While Hyatt has remained the lead plaintiff throughout the duration of the long-lived case, the names of the defendants have changed as various Health and Human Services Secretaries (as well as a Social Security Commissioner) have been substituted, accounting for the various case captions.


continued to be litigated through 2003. Of the six appellate court opinions alone, five related at least in part—and some entirely—to the EAJA fees issue.69

The 1993 circuit court fees opinion, *Hyatt IV*, affirmed the district court's holding that plaintiffs could recover full market rate attorney's fees on the basis of bad faith.70 In rejecting the government's appeal in toto, the Fourth Circuit cited its own earlier appellate opinions as well as the district court's orders, and concluded that “[t]he record and history of this case reflect a refusal to comply with circuit precedent with respect to the pain standard and support the district court's finding of bad faith.”71

As the fees litigation continued, the government fared somewhat better. In *Hyatt V*, the 1999 circuit court fees opinion, the government was held liable for bad faith fees through March 30, 1990 under EAJA subsection (b),72 but succeeded in obtaining a finding that it was not liable for EAJA fees for the ensuing four years (except for the plaintiffs' fee petitions) be-


70. *Hyatt IV* affirmed the fourth and fifth motions for attorney's fees, which were predicated on bad faith. See *Hyatt IV*, 6 F.3d at 256-57. Earlier motions had been adjudicated on the "not substantially justified standard." See *Hyatt V*, 195 F.3d at 189-90.

71. *Hyatt IV*, 6 F.3d at 255-56 (footnote omitted).

We also recognized the Secretary's continued non-acquiescence in the pain standard in this circuit. In *Hyatt II* we stated, "(t)he evidence did not reveal mere irregularities or errors in individual cases. Instead, it depicted a systematic, unpublished policy that denied benefits in disregard of the law." 807 F.2d at 381. In *Hyatt III*, we again recognized this continued policy of non-acquiescence by stating, "the district court's impression of the whole case is correct; the Secretary has not acquiesced in Fourth Circuit law on pain." 899 F.2d at 335. We went on to find in that case that the Secretary had demonstrated "little diminution in the continuation of [his system-wide, unrevealed policy]" even after our decision in *Hyatt II*. *Hyatt III*, 899 F.2d at 335.

Plainly, the history of this case shows that the Secretary continued to stand by his initial standard of pain in disability petitions, from the original decision by the district court to the final conclusion on the merits by this court in *Hyatt III*.

Id. at 255.

cause the government had finally conformed its position to the law and therefore was substantially justified in the latter period.\textsuperscript{73} In a 2002 opinion, the Fourth Circuit noted that the litigation was "rapidly approaching the two-decade mark."\textsuperscript{74} By that point in time, the government was appealing the district court's award of over $1 million in EAJA fees and costs arising "largely from litigation that arose after the Settlement Agreement was executed in the class action lawsuit."\textsuperscript{75} The circuit court affirmed the district court's finding that the government's position again had not been substantially justified in narrowly construing the settlement agreement to exclude potential claims and claimants.\textsuperscript{76} After remand to the district court, in 2003, the parties finally settled what was presumably the last fee issue.\textsuperscript{77}

Notwithstanding EAJA's potential to curb the frequency with which the government unjustifiably defends civil actions, the available data suggest that the Act has not been successful in this regard (although it has provided a form of compensatory remedy). If \textit{Hyatt} is any indication, there also may be cause for particular concern in public interest cases.

\textbf{C. Ethical Precepts}

Many ethical rules and treatises speak generally to the duties attorneys owe their clients, and to attorneys' permissi-

\textsuperscript{73} See \textit{Hyatt V}, 195 F.3d at 192.
\textsuperscript{74} \textit{Hyatt VI}, 315 F.3d at 242.
\textsuperscript{75} Id. at 243-44 (emphasis in original). By that time, the plaintiffs had filed eight motions for attorney's fees and costs under EAJA. \textit{Id.} at 243.
\textsuperscript{76} \textit{Id.} at 247-48. The court held:
Given the long history of the SSA's [Social Security Administration's] fight to deny claimants the benefit of this circuit's pain standard, its effort to ignore the prior decisions of the courts in this case, the fact that its construction of the provisions in question was unnecessarily narrow so as to cause the denial of proper consideration yet again to intended beneficiaries, and the district court's familiarity with the parties and the tortured path of their litigation, we cannot say that the district court's ruling was as an abuse of discretion. Accordingly, because plaintiffs were the prevailing parties in the Settlement Agreement litigation and the SSA's interpretation of the pertinent portions of that Agreement was not substantially justified, plaintiffs are entitled to attorney's fees and expenses allowed under § 2412(d)(1) of the EAJA.
\textit{Id.} at 248. The court of appeals remanded the case for an adjustment of the fees in certain specified narrow categories. \textit{Id.} at 256.
ble conduct in litigation. The precepts relating to the attorney-client relationship offer relatively little definitive guidance when the government is a party, however, because of the uniqueness of that relationship in the government setting. The precepts governing the litigation conduct of individual government lawyers appearing may lack sufficient clarity and force to effectively circumscribe the conduct of the government itself on a broad scale. Thus, ethical precepts may have limited influence on the government's role in defending public interest litigation.

Commentary on the duties and loyalties of federal attorneys appearing on behalf of the government often examines ethical precepts governing the attorney-client relationship. Such analyses usually take for granted that the "attorney" for a government defendant is the individual government lawyer, without considering whether the attorney actually should be deemed to be the government agency responsible for defending the action. However, the agency controls the lawyer's actions through, inter alia, standing orders; directions (explicit or implicit) from managers and supervisors; training; and policies, procedures, and practices (official and/or unofficial). The government lawyer is expected to follow these mandates, unless they are improper. Consequently, except in the rare instance where the government lawyer acts ultra vires, he acts in an official capacity in accordance with his employer's dictates.

In a very real sense, then, the government lawyer is ac-

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79. In most cases brought against the United States, the Justice Department is the agency responsible for the conduct of the litigation. See 28 U.S.C. § 516 (2003) ("Except as otherwise provided by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence thereof, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

tually no more than a conduit for the agency's actions. It follows that the agency may be considered the true "attorney" in terms of the attorney-client relationship.

Defining the "client" in the government litigation setting, an age-old exercise, can be similarly perplexing. Identifying the client normally is an important prerequisite to setting the course and gauging the success of litigation. Because it is often debatable who the actual client is when the government is the represented party, however, the lines of loyalty—and the proper direction of the case—are commonly blurred.

Indeed, establishing a uniform and unequivocal definition of the client in the government representation setting is sufficiently complex that leading sources of ethical precepts do not generally provide one. For example, while offering some guidance, the ABA's Model Rules of Professional Conduct ultimately sidestep the question as beyond their scope.

81. See Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1358 (Fed. Cir. 2003) (sanctioning the government's staff attorney, but expressly noting that ultimate responsibility for the attorney's conduct rests with the government agency itself).

82. A similar argument may be made with respect to the control a law firm has over its employees, yet few state ethics codes purport to regulate the conduct of the firms themselves. But see New York State Bar Association, The Lawyer's Code of Prof'l Responsibility, DR 1-102 (2002) (proscribing misconduct by a lawyer or law firm).

83. In considering who is the client of the government lawyer, Professor Cramton has discussed the following possibilities: "(1) the public (also referred to as the 'public interest'); (2) the government as a whole; (3) the branch of government in which the lawyer is employed; (4) the particular agency or department in which the lawyer works; and (5) the responsible officers who make decisions for the agency." Cramton, supra note 80, at 296. A sixth possibility is that the client is perceived to be the agency that is the focus of the action, regardless of the employing agency. Id. For example, when the Justice Department defends an action brought against another agency, that agency is often referred to as the "client agency."

84. Model Rules of Prof'l Conduct R. 1.13 cmt. 6 (2003) (defining a lawyer's duties when the client is an organization, and including provisions relating to measures the lawyer should take when he surmises that an individual associated with the organization violates a legal obligation to it or violates the law). The rule provides as follows:

The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a
Notably, the ABA's action (or inaction) was not for want of effort, but after due consideration—and revision—of earlier language addressing the issue.\(^5\) Similarly, the American Law Institute observes in its Restatement (Third) of the Law Governing Lawyers that "[n]o universal definition of the client of a governmental lawyer is possible."\(^6\)

In short, the inherent ambiguity in identifying both of the real actors in the attorney-client relationship in the government setting means that ethical precepts based on that relationship provide little concrete basis for establishing the government's duties in defending public interest litigation.\(^87\)

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part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority.

\(^85\) After a nearly five-year comprehensive review, in February 2002, the ABA's Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") formally amended the Model Rules. \(^86\) See id. at vii. The previous version of the applicable comment to the rule included some of the same general guidance, but did not include the italicized disclaimer in the preceding footnote. \(^87\) Id. at R. 1.13 cmt. 6.

\(^86\) RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. c (2000). By contrast, organizations such as the District of Columbia Bar, as well as the Federal Bar Association, both based in the home jurisdiction of most federal agency headquarters, have generally defined the "client" of the government lawyer to be the employing agency. \(^85\) See D.C. BAR, RULES OF PROF'L CONDUCT, R. 1.13 cmt. 7 (2000); FEDERAL BAR ASSOCIATION, MODEL RULES OF PROF'L CONDUCT FOR FEDERAL LAWYERS, R. 1.13 [hereinafter FBA MODEL RULES]. Note, however, that most federal government lawyers based in Washington, D.C. do not have an obligation to belong to the D.C. Bar, and never practice in courts where its rules are applicable. The Federal Bar Association is a voluntary professional association with no officially-sanctioned status.

\(^87\) Although the "client" is usually easier to identify in a private attorney-client relationship, some confusion of interests on occasion can also occur in the context of private representation. For example, an attorney representing a corporation ultimately owes his allegiance to its shareholders, not to an individual officer. The subject of an attorney's duties to corporate clients is especially topical of late in view of the scrutiny being paid to the role of attorneys in the wake of the major corporate scandals of 2001-02. In section 307 of the Sarbanes-Oxley Act of 2002, P.L. 107-204, 116 Stat. 745 (codified at 15 U.S.C. § 7245), Congress mandated that the Securities and Exchange Commission (SEC) issue rules prescribing minimum standards of professional conduct for attorneys ap-
There is no doubt that litigation conduct precepts apply to the individual government lawyer appearing on behalf of the government. Indeed, it is now a matter of law that government lawyers are uniformly subject to the ethical rules in the jurisdictions in which they practice. Although the Justice Department engaged in a longstanding effort to challenge that general proposition, at least insofar as it related to government lawyers’ contacts with represented persons, that effort eventually was rebuffed first by a federal court of appeals, and then by Congress’ passage of the so-called McDade Amendment. Consequently, at a minimum, state authorities can subject individual federal government lawyers practicing in their jurisdictions to discipline in the event of violations of state laws and rules.


89. That effort spanned multiple administrations. A formal policy governing government lawyers’ contacts with represented persons was first incorporated in what was known as the “Thornburgh Memorandum,” then proposed by Attorney General Barr, and ultimately published as a final rule by Attorney General Reno. See 57 Fed. Reg. 54737 (Nov. 20, 1992); 59 Fed. Reg. 39910 (Aug. 4, 1994).


91. The McDade Amendment settled the issue by mandating that government attorneys are subject to state law and rules, as well as local federal court rules. See 28 U.S.C. § 530B. Enacted as a section of law entitled “Ethical Standards for Federal Prosecutors,” and included as a rider to a general appropriations bill, Pub. L. No. 105-277, 112 Stat. 2681 (1998), the McDade Amendment was a substantially pared down version of a more expansive “Citizens Protection Act,” which was passed by the House. See H.R. 4276, 105th Cong. (1998). After passage of the McDade Amendment, the Justice Department issued a revised “interim final rule,” which superseded its earlier rule. See generally 64 Fed. Reg. 19273 (Apr. 20, 1999). The first section of the interim final rule also states that “[t]he Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards.” Id. at § 77.1(a). For an in-depth discussion of the McDade Amendment, see Jesselyn A. Radack, The Big Chill: Negative Effects of the McDade Amendment and the Conflict Between Federal Statutes, 14 GEO. J. LEGAL ETHICS 707 (2001); Fred C. Zacharias & Bruce A. Green, The Uniqueness of Federal Prosecutors, 88 GEO. L.J. 207, 215-24 (2000).

92. As an internal Justice Department matter, the job of investigating re-
Whether litigation misconduct by the government can be controlled effectively through state bar disciplinary proceedings, however, is another matter. The efficacy of the professional disciplinary process as a means of curbing litigation misconduct by attorneys in general is questionable. Moreover, in light of the focus of ethical precepts and the McDade Amendment on the individual government lawyer, a jurisdiction would likely face an uphill battle trying to enforce its rules against a government entity as such. Thus, ethical precepts governing litigation conduct may not have a demonstrably significant effect on the federal government’s role in defending public interest litigation.

In sum, although undoubtedly influenced to some extent by the courts, EAJA, and ethical precepts, the government is largely free to conduct its defense of public interest litigation with relatively limited external constraints. The next part of this article, by way of a case study, illustrates the possible consequences of the absence of more effective controls.

III. **COBELL v. NORTON: TESTING THE GOVERNMENT’S ROLE**

A. Cobell in a Nutshell

*Cobell v. Norton* is a poignant example of a public inter-


93. See Roger C. Cramton, What Does It Mean to Practice Law “In the Interests of Justice” in the Twenty-First Century?: Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable, 70 FORDHAM L. REV. 1599, 1611 (2002) (“Under present resource limitations and the often ambiguous standards of ethics rules, professional discipline has little or no role in preventing misconduct in litigation.”).


95. The clearer path of subjecting the individual government lawyer to career-threatening discipline for actions taken on behalf of an agency raises questions of fairness.

est case where the federal government's role as defendant truly has been put to the test. *Cobell*, simply stated, is a class action by Native Americans against the federal government for delineation and performance of trust obligations relating to lands the government has held in trust for Native American beneficiaries for well over a century.\(^97\) According to the district judge presiding over the case since 1996, the federal government has failed abysmally both in its role as trustee and as defendant-litigator.\(^98\) Although the implications of either such a failure are troubling, the primary focus here is the court's repeated findings that the government engaged in litigation misconduct in defending the case.

As the D.C. Circuit noted in *Cobell VI*, "[s]ince the founding of this nation, the United States' relationship with the Indian tribes has been contentious and tragic."\(^99\) Having forced the tribes off their land and onto reservations in the first half of the nineteenth century, the federal government proceeded in the second half of the century to divide the lands it had set aside for the tribes and "allot" them to individual tribe members.\(^100\) The allotment scheme officially purported to be part of a so-called "assimilationist" policy, but, as the district court recounted, in reality was "[d]riven by a greed for the land holdings of the tribes" (since allotted lands could be sold to white settlers) and was "the product of the United States' ef-

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\(^98\) *See Cobell VI*, 240 F.3d at 1086.

\(^99\) *See Cobell VII*, 226 F. Supp. 2d at 11. Judge Royce C. Lamberth, the district judge who has presided over the *Cobell* litigation since its inception, was appointed to the bench by President Reagan. Prior to his appointment, he was a career civil servant, who served as an Assistant U.S. Attorney in the U.S. Attorney's Office for the District of Columbia from 1974-1987, rising to the position of Chief of its Civil Division. *See FEDERAL COURT GUIDELINES*, DC-20 (2001 & 2003 Supp.). He was chairperson of the Federal Bar Association's Professional Ethics Committee when it issued its Model Rules of Professional Conduct for Federal Lawyers in 1990. *See FBA MODEL RULES*, inside cover.

\(^100\) *Cobell VI*, 240 F.3d at 1086. Although a discussion of the various forms of legendary mistreatment of Native American Indians over the centuries is far beyond the scope of the case (and this article), a basic historical foundation, which relies on selected *Cobell* opinions, is provided here to facilitate an understanding of the genesis of the litigation and to help contextualize the federal government's response.

\(^100\) *Id.* at 1086-87. The Office of Indian Affairs, the predecessor of the Interior Department's Bureau of Indian Affairs ("BIA"), was created in 1824 as part of the Department of War, to effectuate the dislocation. *Cobell V*, 91 F. Supp. 2d at 7 & n.2.
fort to eradicate Indian culture."\textsuperscript{101} Under the allotment scheme, beneficial title to the allotted lands vested in the United States, as trustee for individual Indians.\textsuperscript{102} Ostensibly, the federal government would manage these lands for the "legally incompetent" Indians, and ensure that they would receive the income generated by the lease of their lands' grazing, farming, timber, and mineral rights.\textsuperscript{103} That income was supposed to be placed in the Individual Indian Money ("IIM") accounts that "are at the heart of this case."\textsuperscript{104}

The federal government continues today to hold a significant amount of individual Indian land allotments in trust—approximately 11 million acres—and there are over 300,000 IIM trust accounts on the Interior Department's system.\textsuperscript{105} While the Interior Department carries the lion's share of the federal government's trust duties,\textsuperscript{106} the Treasury Department has substantial responsibilities as well,\textsuperscript{107} and, as a matter of

\begin{footnotes}
\item[101] Cobell V, 91 F. Supp. 2d at 7-8 (noting that between 1887 and 1934 about sixty-five percent of Indian land left Indian ownership).
\item[102] Cobell VI, 240 F.3d at 1087.
\item[104] Cobell VI, 240 F.3d at 1087; see also Cobell IX- Historical Accounting, No. CIV.A.96-1285(RCL), 2003 WL 22211405, *58 (D.C. Cir. Sept. 25, 2003) ("A large portion of its beneficiaries depend on their fund disbursements in order to live at subsistence level. For many, their disbursements represent their sole means of purchasing food for themselves and their families."); id. at *151 ("Although they are citizens of the greatest and most prosperous nation in the world today, the beneficiaries of the IIM trust live under conditions that would not be alien to citizens of the poorest Third World nations. Many of them live in abject poverty.").
\item[105] Cobell VI, 240 F.3d. at 1089. However, "[n]ot only does the Interior Department not know the proper number of accounts, it does not know the proper balances for each IIM account, nor does Interior have sufficient records to determine the value of IIM accounts." Id.; see also Cobell V, 91 F. Supp. 2d at 10 ("Of course, it is a farce to say that these accounts actually contain any given amount.").
\item[106] In describing its mission, the Interior Department includes the obligation to "honor our trust responsibilities to Indian tribes . . . ." U.S. Dep't of Interior, Mission Statement, Quarterly Update, July 31, 2003, available at http://www.doiu.nbc.gov/orientation/mission.cfm.
\item[107] The Treasury Department's responsibilities "include holding and investing IIM trust funds at the direction of Interior, as well as maintaining central records related to these functions." Cobell V, 91 F. Supp. 2d at 11.
\end{footnotes}
law, both the Secretary of the Interior and the Secretary of the Treasury are designated trustees. The federal government’s trust responsibilities were most recently clarified and enumerated by Congress in the Indian Trust Management Reform Act of 1994, passed after universal concern over mismanagement of the IIM.

The original complaint in Cobell was filed as a putative class action on June 10, 1996 “to compel performance of trust obligations” relating to land trust accounts to which they were beneficiaries. The plaintiffs alleged that the federal government’s trustee-delegates breached their fiduciary duty to the plaintiffs by mismanaging the IIM. On February 4, 1997, the court certified the class. On May 5, 1998, the court bifurcated the proceedings into two phases, which it identified as Phase I (“fixing the system”) and Phase II (“correcting the accounts”). On November 5, 1998, the court de-

108. Cobell VI, 240 F.3d at 1088.


111. Cobell VII, 226 F. Supp. 2d at 15. The five original Indian plaintiffs, suing on behalf of themselves and all others similarly situated, named as defendants the Secretary of the Interior, the Secretary of the Treasury and the Assistant Secretary of the Interior for Indian Affairs. See Cobell V, 91 F. Supp. 2d at 9.

112. Cobell VII, 226 F. Supp. 2d at 15. The plaintiffs alleged that in the process of grossly mismanaging the IIM trust accounts, the federal government failed to keep adequate records and install an adequate accounting system; destroyed records; failed to account to the trust beneficiaries; lost, dissipated, or converted to its own use the money of the trust beneficiaries; and prevented the Special Trustee for American Indians from correcting unlawful practices. See Cobell I, 30 F. Supp. 2d at 29 nn.3-4; Complaint, ¶ 3 Civil Action No. 96-1285 (RCL), U.S. District Court for the District of Columbia [hereinafter Complaint]. The court struck from the Complaint the “lost, dissipated, or converted” allegation. Cobell I, 30 F. Supp. 2d at 48.

113. See Cobell I, 30 F. Supp. 2d at 28. The plaintiffs alleged in their Complaint that the cases involved more than 300,000 individual Indians. Complaint ¶1. They further alleged that the IIM accounts at issue had balances of more than $450,000,000, and that more than $250,000,000 passes through them each year. Complaint ¶2. By November 5, 1998, the court noted that the stated balances added up to nearly one billion dollars. Cobell I, 30 F. Supp. 2d at 28.

114. Cobell VII, 226 F. Supp. 2d at 15. Phase I would address “reforming the management and accounting of the IIM trust.” Id. Phase II would address “per-
nied the government’s motion to dismiss and first motion for summary judgment, rejecting the government’s sovereign immunity and other arguments, but granted the motion to dismiss plaintiffs’ claim for mandamus.

Shortly after issuing its November 5, 1998 opinion, the court made known its displeasure with the progress of discovery: a November 24 hearing and December 15 status call included curt exchanges between the court and the government’s counsel about the government’s failure to comply with the court’s discovery orders. On December 18, the court issued an order requiring the government to show cause why it should not be held in civil contempt or sanctioned for that failure.

The court promptly held a two-week contempt trial that revealed why the government had not complied with the court’s discovery orders. Although on its face, the court’s production order was not unduly burdensome, the government’s document management system was in such disarray that a seemingly routine document request could not readily be fulfilled. Indeed, the court concluded that “[t]he defendants’ document production failures are undoubtedly related to the forming a historical accounting of the IIM trust account.” Id.

115. See id. at 15 & n.6 (citing Cobell I, 30 F. Supp. 2d at 30-42). The court also rejected several other government arguments, including ones that asserted that the administration of trust duties is not subject to judicial review because the duties are committed solely to agency discretion, and that there had been no final agency action as required by the Administrative Procedure Act, 5 U.S.C. § 704. In ruling on an additional motion by the government for summary judgment, the court later also rejected still additional arguments. See Cobell VII, 226 F. Supp. 2d at 16-17 (citing Cobell III, 52 F. Supp. 2d at 20, 24, 28-29, 34). Although the court did not chastise the government for its aggressive defensive motion practice, the justification for the government’s defenses may subsequently become an issue in any attempt by the plaintiffs to recover their costs and fees under EAJA.


117. See Cobell II, 37 F. Supp. 2d at 14-15, 19. The court had entered a stipulated document production order in November 1996, that is, nearly two years prior to its November 1998 decision; in May 1998, the court had entered a subsequent scheduling order setting a June 1998 final deadline on pertinent document production. Id.

118. Id. at 8.

119. For example, the court focused on paragraph 19 of its November 27, 1996 stipulated production order, which required the government to produce “[a]ll documents, records, and tangible things which embody, refer to, or relate to IIM accounts of the five named plaintiffs or their predecessors in interest.” Id. at 16 (quoting First Order of Production of Information para. 19).
plaintiffs' allegations of trust mismanagement because the defendants' record-keeping 'system' is so decentralized and disorganized that it will not allow them to produce documents with normal effort that it should take a responsible trustee."120 What clearly troubled the court most, at least at this point in time, was not so much the apparent gross record-keeping flaws, as the lack of candor it discerned on the part of the government officials, including the government attorneys, responsible for the document production.121

Following the contempt trial, the court promptly issued a lengthy opinion holding the named defendants at the time, Secretary of the Interior Bruce Babbitt, Secretary of the Treasury Robert Rubin, and Assistant Secretary of the Interior for Indian Affairs Keith Gover, in civil contempt of the court's November 27, 1996 and May 4, 1998 discovery orders.122 The court found "these remedies to be necessary in light of the defendants' flagrant disregard for the orders of this court and the defendants' corresponding lack of candor in concealing their wrongdoing."123

The court (with the agreement of the parties at the time) also appointed a special master to oversee discovery and ensure compliance with the court's orders.124 The court referred variously in different

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120. Id. at 13. For example, the court noted that, "[b]ecause there is no reliable inventory of IIM documents, items for any one beneficiary could be found in any box in which IIM documents are housed throughout the country." Id. at 26.

121. See, e.g., id. at 31 (quoting the court's exchange with one of the government's lawyers at the contempt trial: "Well, then why didn't the lawyers come back to me and say 'The Secretary can't get it done. The Office of Special Trustee isn't doing it?' But instead, the lawyers came to me – and I'll tell you, I'm very troubled by the conduct of the lawyers too. . . .").

122. See Cobell II, 37 F. Supp. 2d. at 9, 39. Although the plaintiffs had sought that the named defendants "and their employees responsible for this case, including their attorneys," be included as parties to the contempt trial, the court later granted a motion by the government to hold responsible only the named defendants. Id. at 8 n.1. The court noted in its opinion that "[a]lthough it does so with some pause, the court must assume that counsel had the permission of their three clients to ask the court to hold only the defendants, and not their agents or attorneys, responsible for the failure to comply with this court's orders." Id. The court also noted that it:

views it as unfortunate for Secretary Rubin that he has been tarnished with this contempt citation. What personal involvement he has had in this fiasco is unknown to the court, but what is clear is that he has totally delegated his responsibility to others and they have miserably failed to comply with this court's orders, as detailed in this opinion.

Id. at 39.

123. Id. at 9.

124. Id. at 37.
parts of its opinion to the defendants' actions in the course of
the litigation thus far (and on occasion, their attorneys' ac-
tions) as "nothing short of a travesty," 125 "nothing short of con-
tumacious," 126 "egregious," 127 and constituting "reckless disre-
gard." 128 In its conclusion, the court focused in particular on
its disappointment at the government's role as defendant in
the public interest litigation:

In my own experience, government lawyers always strived
to set the example by following the highest ethical stan-
dards that were then a model for the rest of the legal pro-
fession, and the Justice Department always took the posi-
tion that its job was not to win an individual case at all
costs, but to see that justice was done. 129

The court also held that plaintiffs would be awarded all
expenses and reasonable attorney's fees caused by the defen-
dants' failure to obey the court's November 27, 1996 and May
4, 1998 orders. 130 In a subsequent order, the court awarded
plaintiffs expenses and attorney's fees of $624,643.50 for that
failure, noting that defendants had disobeyed an order to
which they had stipulated and then "successfully covered up
their disobedience through semantics and strained, unilat-
eral, self-serving interpretations of their own duties." 131 In
awarding the expenses and fees, the court lamented the in-
herent irony of the taxpayer having to foot the bill for the
government's misconduct. 132

125. Id. at 13.
126. Id. at 32 (referring to "defendants' and their attorneys' actions").
128. Id. at 38.
129. Id.

The court is deeply disappointed that any litigant would fail to obey or-
ders for production of documents, and then conceal and cover-up that
disobedience with outright false statements that the court then relied
upon. But when that litigant is the federal government, the miscon-
duct is even more troubling . . . . The federal government here did not
just stub its toe. It abused the rights of the plaintiffs to obtain these
trust documents, and it engaged in a shocking pattern of deception of
the court. I have never seen more egregious misconduct by the federal
government.

Id.

130. Id. at 37.
131. Cobell IV, 188 F.R.D. at 140 (noting that these "contumacious misdeeds"
had been "carried out by defendants and their counsel").
132. See id. at 140-41.

The court is aware of the unfortunate consequences of today's ruling on
American taxpayers. Ultimately these taxpayers will be forced to pay
The court was no more sympathetic to the government when it later addressed the substance of the case. Based upon a six-week bench trial on plaintiffs' Phase I claims, on December 21, 1999, the district court held that the federal government had breached some of the fiduciary duties owed to the Indians. The court began its opinion with a blistering introduction focusing on the gross mismanagement of the IIM program and its impact on the disadvantaged Indian people. As relief, after specifying particular fiduciary duties that were owed but not met, the court ordered the government to come into compliance and remedy the breach. Further, the court required the government to submit quarterly status reports on its progress in rectifying its "breaches of trust," and retained jurisdiction for five years. In its conclusion, the court noted, perhaps as a hope more than a premonition, that "[i]f the defendants carry out what they now say that they will do and comply with the court's order issued this date, more should not be necessary. In that case, trust

for the misconduct of their government's officials and their government's attorneys. This is a troublesome concept for the court. In this judge's view, the American taxpayers should not continue to be forced to bear the burden of these types of misdeeds. 

Id. at 140; see also Cobell II, 37 F. Supp. 2d at 8 n.1.
133. See Cobell V, 91 F. Supp. 2d at 1.
134. Id. at 6.
It would be difficult to find a more historically mismanaged federal program than the individual Indian Money (IIM) trust. . . . "If courts were permitted to indulge their sympathies, a case better calculated to excite them could scarcely be imagined." (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831) (Marshall, C.J.))

. . . .

The defendants cannot provide an accounting of plaintiffs' money, which the United States has forced into the IIM trust. This problem, which has been handed down from administration to administration of apologetic United States trustee-delegates to generation upon generation of helpless beneficiaries, continues today and is the basis for this lawsuit. It imposes far more than pecuniary costs, although those are clear and cannot be overstated. Plaintiffs' class includes some of the poorest people in this nation. Human welfare and livelihood are at stake. It is entirely possible that tens of thousands of IIM trust beneficiaries should be receiving different amounts of money-their own money-than they do today. Perhaps not. But no one can say, which is the crux of the problem.

Id. 135. Id. at 58.
136. Id. at 58-59.
reform should become a reality rather than a dream." The
court later appointed—with the consent of the plaintiffs and
the Interior defendants—a Court Monitor to oversee the De-
partment’s progress in terms of trust reform.\footnote{Cobell V, 91 F. Supp. 2d at 57.}

On appeal, the D.C. Circuit affirmed the district court’s
order in toto, describing the relief it granted as “relatively
modest.”\footnote{See Cobell VII, 226 F. Supp. 2d at 19.} The court of appeals differed only narrowly with
the district court in terms of its analysis of the actual breach
of trust: the circuit court described it as the government’s
“failure to provide an accounting, not its failure to take the
discrete individual steps that would facilitate an account-
ing.”\footnote{Cobell V, 240 F.3d 1081, 1009 (D.C. Cir. 2001). The court of appeals
rejected all of the government’s various arguments, including those relating to
sovereign immunity, final agency action within the meaning of the Administra-
tive Procedure Act (“APA”), its duties under the Indian Trust Management Re-
form Act, and document destruction. Id.}

As events unfolded, the progress towards trust reform
was unsatisfactory to the court. It issued additional show
cause orders in November and December 2001, and a second
contempt trial ensued, lasting twenty-nine days.\footnote{Id. at 1106.} The second
contempt trial focused on the Interior Department’s fail-
ure to accurately report its progress in efforts to fulfill its
trust responsibilities in accordance with the measures or-
dered by the court as a result of the Phase I trial.\footnote{Id. at 19-20.} In the re-
sulting prolix opinion, the district court again held the gov-
ernment in contempt.\footnote{Id. The opinion is 163 pages in the Federal Supplement 2d (including
the key notes). Id. at 1-163. As discussed herein, only those portions of the
opinion actually holding the government in contempt, awarding fees, and ap-
pointing a Special Master-Monitor were vacated on appeal. Cobell VIII, 334
F.3d at 1150.} The court found the Secretary of
Interior and Assistant Secretary of Interior for Indian Affairs
to have engaged in litigation misconduct in one specification
and “to be in civil contempt of court for committing a fraud on
the Court” in four other enumerated specifications.\footnote{Id. The specifications were:
(1) Failing to comply with the Court’s Order of December 21, 1999, to
initiate a Historical Accounting Project;
(2) Committing a fraud on the Court by concealing the [Interior] De-}
Cobell VII was yet another searing indictment of the government's mismanagement both of its Indian trust responsibilities and the Cobell litigation. The court was strongly disdainful not only of the government's failure to rectify systemic problems in management of the trust, but also of what the court perceived as highly disingenuous conduct on the part of government officials and lawyers in misrepresenting the status of trust reform at various times and in various ways. The court described the Interior Department's administration of the IIM trust as "the gold standard for mismanagement by the federal government for more than a century," and linked the program mismanagement with the legal defense of the case: "In short, the Department of Interior has handled this litigation in the same way that it has managed the IIM trust – disgracefully."

The court painted, in no uncertain terms, a grim picture of the government's conduct of the litigation. In specification one, the court found that the Interior Department had engaged in a "sham" relating to the historical accounting project "that greatly mislead this Court" and "unnecessarily and significantly delayed the Court's and plaintiffs' ability to proceed with the Phase II trial." In specification two, the court found the Department had perpetrated a ruse to create the impression that it was deliberating over what accounting method to use, whereas the method was actually predeter-
mined. In specification three, the court found that the Department had failed to correct a false portrayal during the Phase I trial of the potential of a new asset and accounting management system for Indian trust lands.\(^1\) In specification four, the court found the government had filed false and misleading status reports.\(^2\) In the fifth and final contempt specification, the court found the government had made false and misleading representations regarding the computer security of IIM trust data.\(^3\)

The court called "farcical" arguments made on the Secretary of the Interior's behalf to the effect that a contempt citation would be counterproductive because it would impede her ability to fulfill her fiduciary obligations.\(^4\) Although the court declined plaintiffs' request to appoint a receiver to oversee the IIM trust,\(^5\) as relief, the court did order the govern-

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152. See id. at 118-22.
153. The court held:

Notwithstanding the fact that Interior was aware of these false statements and the need to correct them, the agency intentionally failed to inform the Court about the massive problems it was experiencing with the new land management system. Thus, the record upon which this Court based its Phase I trial decision was infected with numerous false statements and inaccurate documents put forth by the Interior defendants. Id. at 122.

154. Pursuant to the court's Phase I trial order, the government was required to file quarterly status reports on its progress in rectifying the breaches of trust identified by the court and bringing itself into compliance with its statutory trust duties. Cobell V, 91 F. Supp. 2d at 59; see also Cobell VII, 226 F. Supp. 2d at 126-27 n.144. The court found that the government had grossly overstated its progress in its TAAMS and BIA Data Cleanup endeavors, preventing the court and the plaintiffs from knowing their true status. Id. at 124-27. Once again, the court was strikingly indignant towards what it characterized as the government's subversion of the truth, the deceptive role of the government's lawyers, and scheme to defraud the court. See id. at 125-27.

155. Based partly on a report by the Special Master, the court concluded:

There is no question that the defendants, by representing to the Court (and plaintiffs) for more than a year that they were in the process of making their computer system more secure when in reality they were doing virtually nothing, committed a fraud on this Court, and are in civil contempt. Cobell VII, 226 F. Supp. 2d at 128 (citations omitted).

156. Id. at 133. The court parried that Interior officials, including the Secretary, could leave the Department or be reassigned if the court's ruling left them unable or unwilling to perform their duties. Id.

157. Id. at 135-47 (concluding, after extensive discussion, that there was a sufficient legal basis for such an appointment).
ment to file separate plans for conducting a historical accounting of the IIM trust accounts, and for bringing itself into compliance with its fiduciary obligations. Further, the court appointed a special master-monitor to monitor the status of trust reform and oversee part of the additional discovery. The court also scheduled additional proceedings (described as the “Phase 1.5 trial”) to determine what additional relief was warranted, and ordered that the government pay the plaintiffs' expenses and attorney's fees associated with the contempt proceedings. Finally, in its conclusion, the court directed one final sortie aimed directly at Interior and the Secretary, questioning the Agency's competence to administer the IIM trust and calling the Secretary "unfit" to serve as its trustee.

Although the court specifically held only the Secretary of the Interior and the Assistant Secretary for Indian Affairs in contempt of court, it referred to the Special Master for a report and recommendation plaintiffs' show cause motion relating to thirty-seven non-party individuals associated with the case. The court also referred to the Special Master for a report and recommendation plaintiffs' show cause motion relating to the alleged destruction of e-mail by the Interior defendants and their counsel.

158. Id. at 148, 162.
159. Id. at 156-59, 162-63.
160. Id. at 148 ("Specifically, the Phase 1.5 trial will encompass additional remedies with respect to the fixing the system portion of the case, and approving an approach to conducting a historical accounting of the IIM trust accounts.").
162. Id. at 160. The court compared the Secretary to her predecessor in this respect. See id. at 161.
163. Id. at 155, 162. These non-party individuals are past and present government officials and lawyers. Many of them subsequently filed motions to disqualify the judge, Special Master and Special Master-Monitor, all of which were denied. See Cobell v. Norton, 237 F. Supp. 2d 71 (2003).
164. Id. at 155-56, 162. On October 7, 2002 and November 4, 2002, the Special Master issued memoranda governing his investigation of these two show cause motions and requiring the plaintiffs to provide Bills of Particulars with respect to seven of the individuals named in the e-mail destruction motion. See Memoranda from Special Master Alan L. Balaran to All Counsel, Oct. 7, 2002 & Nov. 4, 2002 (signed copies available at http://www.IndianTrust.com.). The seven individuals named in the memoranda include (among others) the Secretary of the Interior, the former BIA Assistant Secretary, and the former Assistant Attorney General of the Environment and Natural Resources Division (the DOJ component that initially defended the case). See id.
On appeal, the D.C. Circuit reversed the contempt finding. The appellate court found that the contempt citation was criminal, rather than civil, in nature, because the district court had exercised its powers essentially in a punitive rather than a coercive fashion. The appellate court then found that none of the Secretary’s conduct constituted either a violation of a court order or a fraud upon the court.

In reversing the five contempt specifications, the appellate court was clearly influenced in part by the fact that the district court had held Secretary Norton responsible not just for actions and inactions that took place during her tenure, but also for the perceived misdeeds of her predecessor. Thus, the appellate court summarily disposed of specifications two and three because they concerned conduct that took place prior to Norton’s term in office. With regard to the first specification, the appellate court found that the marked progress that had been made during Norton’s first six months in office clearly was inconsistent with the district court’s finding that she had failed to comply with its December 21, 1999 order. With regard to the fourth specification, the appellate court found that none of the four quarterly status reports filed during Norton’s tenure rose to the level of fraud on the court, and, in any event, that the district court’s findings of fact did not support a finding that she was personally at fault. Finally, with respect to the fifth specification, the ap-
pellate court found that there was no direct contradiction in
the Interior Department's representations concerning com-
puter security of IIM trust data so as to support a direct in-
ference that Norton had "acted with an intent to deceive or
defraud the court."\textsuperscript{173}

The D.C. Circuit opinion concludes by vacating the dis-
trict court's contempt order "insofar as it sanctions the defen-
dants on specifications one through five and directs the pay-
ment of expenses and fees incurred by the plaintiffs."\textsuperscript{174} The con-
tempt order was also vacated "insofar as it relates to the
appointment and duties of the Special Master-Monitor."\textsuperscript{175}

The sharp criticisms that accompanied the now-vacated
contempt citations were by no means the last of the district
court's expressions of its ongoing pronounced dissatisfaction
with the government's conduct of the litigation. On December
23, 2002, after finding that the Interior Department had im-
properly communicated with members of the class, the court
referred six government counsel, including the Assistant At-
torney General of the Civil Division, to the Committee on
Grievances of the U.S. District Court for the District of Co-
lumbia.\textsuperscript{176} On February 5, 2003, the court held that the gov-
ernment had been dishonest in the course of a deposition
scheduling dispute, and had then obstructed inquiry into the
witness' schedule at her deposition.\textsuperscript{177} For these transgres-
sions, the court personally sanctioned six government coun-

\begin{itemize}
  \item that they were false or misleading. \textit{Id.} at 1149.
  \item \textit{Id.} at 1150 (quoting United States v. Buck, 281 F.3d 1336, 1342 (10th
  Cir. 2002)).
  \item \textit{Id.} at 1150.
  \item \textit{Id.}
  \item \textit{See} Cobell v. Norton, 212 F.R.D. 14 (D.D.C. 2002); \textit{Local Rules of the
  District of Columbia} R. 83.14, 83.16.
  \item \textit{See} Cobell, 213 F.R.D. at 31-32.
\end{itemize}

\textsuperscript{174} Id.

\textsuperscript{175} Id.

\textsuperscript{176} See Cobell v. Norton, 212 F.R.D. 14 (D.D.C. 2002); Local Rules of the
District of Columbia R. 83.14, 83.16.

\textsuperscript{177} See Cobell, 213 F.R.D. at 31-32.

[The discovery abuse committed by defense counsel was only com-
pounded by her superiors at the Justice Department, who not only con-
doned her improper behavior, but proceeded to file a nineteen-page
meritless memorandum that defended her conduct. By filing an un-
meritorious opposition brief, the Justice Department has attempted to
cover up whether its own attorneys have yet again deliberately pro-
vided false information to this Court. The lack of judgment demon-
strated by this action suggests to the Court that something has gone
seriously awry in the Justice Department's handling of this litigation.
An agency that can engage in this kind of attempted coverup has
clearly lost any sense of perspective about the way in which this litiga-
tion should be conducted.

\textit{Id.}
In May 2003, in an opinion denying the government's motion for reconsideration of an earlier order directing payment of the Special Master, the district court rebuffed the government's efforts to influence congressional appropriations bearing on the case. The government had been successful in securing from Congress not only an authorization for the payment of private attorney's fees and costs for employees and former employees of the Department of Interior incurred in connection with Cobell, but also a cap on the annual rate paid to the Special Master and Special Master-Monitor in the case. In essentially overriding the cap (but not the private attorney's fees authorization), the court once again took aim at the government: "The appropriations provisions at issue in this matter appear to represent yet another attempt by defendants to evade the rule of law by any means available to them, no matter how duplicitous or underhanded. They also serve to demonstrate defendants' manifest hypocrisy."

The Phase 1.5 took place from May to July 2003, lasting forty-four court days. On September 25, 2003, the district court entered a pair of substantial memorandum opinions, one entitled "Historical Accounting" and the other entitled "Fixing the System," as well as a "Structural Injunction." The bulk of the more lengthy Historical Accounting opinion closely critiqued the Interior Department's IIM Accounting Plan, which had been submitted pursuant to Cobell VII. The Fixing the System opinion contained a critique of Interior's Comprehensive Trust Management Plan ("Comprehensive Trust Management Plan")

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178. Id. at 32. The individual attorneys included the Assistant Attorney General of the Civil Division as well as four of the five less senior attorneys previously referred to the Grievance Committee. Id. While the court imposed personal sanctions against the government attorney who defended the deposition and the government attorneys who subsequently defended her conduct in a brief filed with the court, the court did not prohibit the Justice Department from indemnifying the attorneys "for their repugnant behavior." Id.


sive Plan"), also submitted pursuant to Cobell VII, but also was largely devoted to a discussion of the Department’s fiduciary obligations to the IIM beneficiaries. In the structural injunction, the court ordered the accounting plan implemented with specified modifications, and adopted, in principle, the Comprehensive Plan.

The structural injunction goes beyond both Interior plans in specifying broader obligations and timetables. Once again, the court appointed a monitor, this time vested with the authority (only) to oversee Interior’s compliance with the structural injunction. The court also extended its retention of jurisdiction over the case for an additional five-year period, through December 2009. If history is to serve as any indication, Cobell may well continue to be actively litigated in the courts through this period, and perhaps beyond.

B. Perspectives on Cobell

Cobell provides important lessons about the government’s perception of its role in defending public interest litigation, and the consequences the government may face when it is deemed to have crossed the line of acceptable litigation conduct. This section offers some perspectives on the case, with particular focus on Cobell II, Cobell VII, and Cobell VIII, the major court opinions that address the manner in which the government has defended the case.

It is important to begin by examining what interests have been served by the government’s vigorous defense of Cobell. The interests of the constituents of the government program concerned in the litigation clearly have not been served: those

185. As described by the court, this plan was very much a work in progress. See Cobell IX- Fixing the System, 2003 WL 22211405, at *163-64, *203 ("[T]he Court views Interior’s 'Comprehensive Plan' merely as a next step in the process of Interior's bringing itself into compliance with its fiduciary obligations, because it is really only a plan to make a plan (namely, the To-Be Plan.").
186. See id. at *175-91.
188. Cobell IX- Fixing the System, 2003 WL22211405, at *204.
190. Cobell IX- Historical Accounting, 2003 WL 22211405, at *140.
191. Id. at *144-45. Significantly, both opinions were largely devoid of the vituperative language and personal attacks which characterized earlier opinions in the case.
192. The next part of this article explores in depth the factors that influence the government’s perception of its role in public interest litigation in general.
constituents are the very citizens who brought suit against the government for allegedly failing to properly serve the public in the first place. Indeed, a 2002 year-end editorial in Indian Country Today listed the resignation of Neal McCaleb, the Assistant Secretary for Indian Affairs (and named defendant) in office at time of the preceding contempt hearing as one of the year's highlights. An accompanying cartoon portrayed McCaleb as a nineteenth century army trooper (with sergeant's stripes) pierced by a half-dozen arrows. The cartoon, which evokes another metaphor—that of the Cobell case itself as the twenty-first century litigation equivalent of the infamous 1876 Custer's Last Stand—suggests that perhaps the Native American community envisions the longstanding courtroom battle as simply an extension of the historical mistreatment of the race.

The broader interests of the general public in having justice prevail have not been served. Judging by the proven merits of the substantive claims thus far in the Phase 1 and Phase 1.5 trials, such a vigorous defense was unwarranted. In addition, the public fisc has had to fund the defense of the litigation and the plaintiffs' legal bills for the first contempt hearing (as well as other motions) and, will likely have to pay plaintiffs' legal fees and costs associated with the trials in which they prevailed. These litigation costs will add sub-

193. See Cobell IX—Historical Accounting, 2003 WL 22211405, at *152 ("When a government agency continually places its own interests ahead of the rights of the American citizens that it is entrusted to protect, something is gravely wrong."); Misplaced Trust: H.R. REP. NO. 102-499, at 56: "The real losers in the mismanagement of the Indian trust fund are the Tribes and the individual Indian accountholders. These accountholders are being misrepresented by the Federal Government. Yet victims of this nonfeasance have had no recourse except to the very agency that is responsible for their predicament.")


195. As noted above, some of the Cobell opinions have diligently recounted the history of the mistreatment of American Indians. Although the courts have not attributed the mismanagement of the litigation to racist motivation, Congress has hinted that the mismanagement of the trust itself smacks of disparate treatment. See Misplaced Trust, H.R. REP. NO. 102-499 at 56 ("This type of trust fund mismanagement would never be tolerated in other, similar trust activities. That it has taken place in the administration of the Federal Government's sacred trust for native Americans can only be described as a national disgrace.").

196. As a result of having prevailed in the Phase 1 and 1.5 trials, plaintiffs
stantially to the burden the public must also bear to revamp the IIM program itself.197

The interests of the government agencies involved in the case in fulfilling their various missions have not been served. The agencies' leaders, programs, and personnel may well have been unnecessarily preoccupied and distracted by the unyielding demands of the lawsuit, to the detriment of other pressing and important matters. Surely, many well-meaning government officials would have preferred to have spent their time working on IIM reform itself or other matters rather than getting swallowed up in the morass of the litigation.

The difficulty in envisioning any interests truly served by the government's approach to Cobell is cause for concern, particularly if the approach is a fair and representative reflection of the government's perception of its role in public interest cases. Although one should be wary of over-generalizing from a single case, it would be facile simply to dismiss Cobell as an anomaly. Even assuming that the government initially failed to take the case seriously enough or properly staff it,9 such shortcomings could only arguably account for the government's conduct early in the case. By no later than the first contempt hearing in January 1999, the case had attained high priority, was fully and selectively staffed, and was closely managed at high levels.200 Yet, the government's litiga-

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197. In his 2004 budget, President Bush proposed nearly $500 million to address IIM problems and meet court mandates. See Budget of the United States Government, Fiscal Year 2004, at 181; see also Opening Statement of J. Steven Griles, Deputy Secretary of the Interior, Before the Subcommittee on Interior and Related Agencies, Committee on Appropriations, U.S. House of Representatives, (Mar. 12, 2003) (referring to a total request for trust programs of $554 million, an increase of $183.8 million).


199. See Cobell II, 37 F. Supp. 2d at 39 (referring to the filing by the government of a memorandum "notifying the court of a complete restructuring of the trial team in this case, with new counsel to replace prior counsel, and additional counsel added to help ensure against repetition of the improper conduct the court today describes.").

200. See id. at 38-39 (praising the new DOJ counsel and noting in particular that the Assistant Attorney General for the Environment and Natural Resources Division at the time had attended the lengthy closing arguments in the contempt trial, and thereafter had personally filed the memorandum advising the court of the restructuring of the trial team); Cobell VII passim.
tation tact continued largely to be unacceptable to the court throughout the duration of the lengthy litigation.\textsuperscript{201}

Moreover, the imposition of sanctions against the government for litigation misconduct in a class action by Native Americans is not unprecedented. Indeed, just over a year before the \textit{Cobell} litigation was filed, another district court took the government strongly to task for litigation misconduct in \textit{Mescal v. United States},\textsuperscript{202} a case in which the Navajo Nation sued private parties as well as the federal government over mineral rights on allotted lands.\textsuperscript{203} Over a decade after the case was initially filed, the government offered a new defense theory, arguing at a status conference that the case constituted a "takings" claim that should be dismissed or transferred to the Federal Claims Court.\textsuperscript{204} The district judge ordered the government to file a motion to that effect by a set date, which the court thereafter repeatedly extended at the government's behest. Eventually, the government abandoned the notion that the case should be transferred, and instead filed a summary judgment motion on other grounds.\textsuperscript{205} In sanctioning the government (and its counsel), the court found its position relating to the "phantom 'takings' issue" "to be incredible and without merit."\textsuperscript{206} It also viewed the government's "behavior as part of a pattern of obstructive and frivolous conduct given the prior decade of controversy in this case," among other factors.\textsuperscript{207}

\textsuperscript{201} Both the district and appellate courts have credited Secretary Norton with changes in Interior's approach to IIM reform and the litigation: in her first sixth months in office, Secretary Norton took significant steps towards completing an accounting, and Interior's eighth quarterly report conceded inadequacies in earlier reports. \textit{See Cobell VII}, 334 F.3d at 1148-49, \textit{citing Cobell VII}, 226 F. Supp. 2d at 44-45 and 84-85.

\textsuperscript{202} 161 F.R.D. 450 (D. N.M. 1995).


\textsuperscript{204} \textit{Mescal}, 161 F.R.D. at 451-52.

\textsuperscript{205} \textit{Id.} at 452-53.

\textsuperscript{206} \textit{Id.} at 454-56. Monetary sanctions were imposed under \textit{FED. R. CIV. P. 16(f)}. \textit{Id.} at 455-56.

\textsuperscript{207} \textit{Id.} at 455. The court also cited to another Indian case in which government counsel had been called to task for asserting a gross misstatement of law. \textit{Id.} at 455 & n.11 \textit{(citing Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States, 21 Cl. Ct. 176, 192 (1990)).
The circumstances suggest that the government's approach to Cobell was driven by institutional forces rather than unique or situational circumstances, and that if the pitfalls the government faced were atypical, the conduct that precipitated them was not. If the government's approach in Cobell does represent the government's standard operating procedure in defending public interest litigation, the implications are sobering. They suggest the need for the government to reassess and redefine its role in defending such cases.

The circumstances also suggest that the course and conduct of public interest litigation is not so much determined by individual government lawyers as by the government as a whole.\footnote{Cobell also supports the argument advanced in Part II, supra, that in the context of litigation where the government is the defendant, the "attorney" in the "attorney-client" relationship should be considered the agency responsible for defending the action.}

The district court in Cobell deduced a longstanding pattern or practice of litigation misconduct on the part of the government, rather than isolated instances attributable solely to the attorneys assigned to the case at any given time. In the long history of the case, there is no indication that any of the casts of government lawyers assigned to the case at various times acted ultra vires. Thus, if the government is to be held accountable for its conduct, the imposition of sanctions that go beyond the attorneys assigned to litigate the case seems appropriate.\footnote{Indeed, apart from not necessarily being as effective as other sanctions, sanctions against individual government attorneys for institutional errors seem unfair.}

Still, there is no doubt that the nature of the sanctions the district court imposed in Cobell II and Cobell VII was highly unusual. As observed in Part II of this article, contempt citations against cabinet officers for discovery misconduct (such as in Cobell II) are exceedingly rare. Indeed, in a later opinion, the district court itself later described the contempt sanction imposed in Cobell II as an "extreme step."\footnote{Cobell IX-Historical Accounting, No. CIV.A.96-1285(RCL), 2003 WL 22211405, at *9 (D.D.C. Sept. 25, 2003) (quoting Cobell II, 37 F. Supp. 2d at 9, where the court explained why it deemed a contempt sanction to be necessary).}

As noted by the D.C. Circuit in Cobell VIII, civil contempt citations based on the perpetration of a fraud upon the court (such as in Cobell VII) appear to be unprecedented.\footnote{Perpetration of a fraud upon the court, the premise upon which four of the contempt specifications in Cobell VII is based, appears to an unprecedented} Clearly,
the district court ventured into largely uncharted territory in both decisions. Whether a reflection of frustration, or designed for effect, the district's court's verbiage in *Cobell VII* also pushed the envelope of judicial etiquette.

Considering the D.C. Circuit's ruling in *Cobell VIII*, alternative sanctions imposed in a more temperate manner would have been more likely to withstand appellate review. Citing the government for civil contempt arguably was only an option if court exercised it in a coercive manner, consistent with the traditional purpose of that particular sanc-

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212. Some caveats are in order. First, as the court noted at the outset of its decision in *Cobell II* (of which the government did not seek interlocutory appeal or mandamus), the government put itself in the unusual litigation posture of essentially stipulating that if a contempt citation were to be issued, it should be directed at the named defendants rather than other agency officials and attorneys. *Cobell II*, 37 F. Supp. 2d at 8 n.1. Second, it remains to be seen whether any of the many individual attorneys involved in the case ultimately will also be sanctioned as a result of the Special Master investigation ordered by the court in *Cobell VII*. Third, as noted above, in subsequent orders, the court has resorted to the more traditional measures of sanctioning individual attorneys for more isolated acts less directly related to the advancement of trust reform.

213. The district court's frustration was evident in its January 17, 2003 memorandum and order denying the disqualification motions by the past and present employees under investigation by the Special Master: the judge noted that recusal was a "tempting prospect" considering the time and "headaches" of the seven-year litigation. *Cobell v. Norton*, 237 F. Supp. 2d at 102 (D.D.C. 2001).

214. The appellate court construed the "exceedingly strong words" as a reprimand, which, in turn, the court construed as a sanction evidencing the criminal nature of the proceeding. See *Cobell VIII*, 334 F.3d at 14.

215. Courts, including the Supreme Court, do on occasion resort to strong sanctions and harsh language when they perceive the judicial process as having been abused. See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991), quoting Universal Oil Prod. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946) ("[T]he very temple of justice has been defiled . . . .").

216. Likewise, the appellate court might have been more receptive to a special master-monitor with less oversight power. Although federal courts traditionally have appointed special masters and monitors with broad roles and have retained long-term jurisdiction in other types of public interest litigation, courts typically have done so in cases against state and local governments, not the federal government. See e.g., Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982) (prisoner rights litigation); Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 743 (6th Cir. 1979) (school segregation). Still, as the D.C. Circuit noted in *Cobell VI*, "[t]hat this case involves decades-old Indian trust funds, rather than segregated schools does not change the nature of the court's remedial powers." *Cobell VI*, 240 F.3d at 1108. See also *Cobell IX- Historical Accounting*, 2003 WL 2211405 at *14-33 (containing an extensive discussion of institutional reform litigation, including cases against the federal government).
As it stands, the contempt citation was more punitive than coercive, as well as largely symbolic. Had the court fashioned a curable contempt citation or imposed other forms of sanctions, they might have had a greater practical effect and might also have been more likely to withstand appeal.

Although unquestionably an important victory for the government, *Cobell VIII* should not be overstated as a vindication of the government's conduct as a whole. The appellate court clearly found with relative ease that the contempt sanction imposed by the district court was not warranted, but stopped far short of condoning any of the conduct found so objectionable by the district court.

In sum, the government's vigorous defense of *Cobell*, as chronicled by the court, appears to have served no cognizable purpose, and the conduct described in *Cobell II* and *VII* left the government vulnerable to sanctions. While on the surface, the government's conduct and the court's response reflect a struggle about acceptable norms in litigation, the underlying fundamental cause of the disagreement might well be differing perceptions about the government's proper role in high-stakes public interest litigation. The next part of this article will explore the factors that contribute to the government's formulation of that role, as well as measures that could be taken to ensure that the public interest is better served in such cases.

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218. The citations—and particularly the severely critical language the court used in imposing them—arguably could be considered coercive in the sense that may have been designed to shame the government into reform.

219. As the district court later observed, the court of appeals did not set aside the findings of fact made in *Cobell VII*. See *Cobell IX- Historical Accounting*, 2003 WL 22211405, at *13. Also, although the D.C. Circuit disqualified the Special Master-Monitor, its decision does not affect the original Special Master's inquiry into the plaintiffs' two pending show cause motions or, for that matter, the district court's disposition of additional government misconduct and other issues that arose in late 2002 and early 2003.

220. The conflict between the government and court in *Cobell* can be viewed as a high-level and high-profile power struggle of sorts between the judiciary and executive branches over conflicting visions of the appropriate role of the federal government in defending such a case. The appropriations authorizations and limitations suggest that the tug of war has even spilled over to a limited degree into the legislative branch.
IV. REFORMING THE GOVERNMENT'S ROLE IN DEFENDING PUBLIC INTEREST LITIGATION

It is axiomatic that as a general proposition, the federal government should serve the public interest. Whether, to what extent, and how the government should accomplish that end when it is a party to various types of litigation are questions that periodically attract the attention of legal scholars, with the predictable panoply of insights.\textsuperscript{221} The focus here is exclusively on the role of the federal government in defending public interest litigation.

As noted in this article (and elsewhere), “public interest” litigation is difficult to define.\textsuperscript{222} The admittedly imperfect definition provided in the introduction\textsuperscript{223} is intentionally broad because a fixed formula for identifying bona fide public interest cases necessarily would be both under- and over-inclusive. Still, it is possible to characterize certain types of lawsuits as more typical of public interest cases than others based upon the nature of the cause of action, the number of plaintiffs, and/or the relief sought. For example, constitutional claims, class actions, and cases that seek only injunctive rather than only equitable relief are potential indicators.

At present, for a number of institutional reasons, the government routinely interprets its role in public interest cases to be defense of the status quo, and conducts the litigation accordingly.\textsuperscript{224} This part explores these reasons, and then presents specific proposals designed to promote the public interest through the resolution of meritorious cases.

\begin{itemize}
\item \textsuperscript{221} The literature covers the spectrum from the government as prosecutor in criminal actions to the government as plaintiff and/or defendant in civil actions. For a thorough discussion of the scholarship on the subject, see Stephen Berenson, \textit{Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?}, 41 B.C. L. REV. 789 (2000).
\item \textsuperscript{222} As Judge Patricia Wald has written, there can sometimes be a fine line between the “public interest” and “special interest” labels. See Patricia M. Wald, \textit{Whose Public Interest Is It Anyway?}, \textit{47 ME. L. REV.} 3, 6-7 (1995).
\item \textsuperscript{223} The definition provided in the introduction reads as follows: “When a civil action brought against the federal government challenges a program, policy or action as unlawful, and seeks remedies intended to inure to the benefit of a broad class of persons rather than simply an individual plaintiff, the case can be considered public interest litigation.” \textit{Supra} Part I.
\item \textsuperscript{224} Of course, the status quo may change over the course of a case, as it did in \textit{Cobell}, as the government labored to reform the IIM program while vigorously defending its efforts.
\end{itemize}
A. The Government’s Perception of Its Role

At least five institutional factors may individually or collectively affect how the government perceives its role in defending public interest lawsuits brought against it. They are: 1) the priority placed on winning; 2) insulation from risks normally associated with litigation; 3) agency cultures that favor the vindication of challenged government programs, policies, and actions; 4) ambiguous loyalties; and 5) procedural and practical constraints. These factors militate toward a defensive, not reflective, mode on the part of the government when it is sued, and may well preclude resolution of a case, even when in the public interest.

First, like other litigants, the government “plays to win.” Although government law offices do not have the same financial pressures as private law firms, they do have institutional pressures that include the need to justify their existence—and their budget. In the litigation realm, success is routinely defined as winning. No less than private firms, government law offices may judge themselves and be judged by whether they prevail in the cases with which they are entrusted.

The institutional pressure to win is imparted from the government law office to the individual government lawyer. Like his counterpart in the private sector, a government lawyer is expected to win if he is to advance professionally; get promoted; obtain favorable assignments; and win bonuses, accolades, and respect.225 Thus, winning might be just as much a priority for personal and professional reasons for the individual government lawyer.

Second, while sharing the private sector’s emphasis on winning, government agencies are shielded from some of the risks that a private-party defendant ordinarily faces in a case in which it has a very substantial interest (monetary or otherwise). A private litigant faces not only legal fees and a judgment (if it loses), but also various market effects of litigation. For example, if a party is a publicly-traded company, litigation may trigger SEC disclosure requirements, which may in turn affect its stock value.226 Whether the company is

225. Although the government lawyer has civil service protections not available to an attorney in a private firm, these may well provide only small comfort as a practical matter if and when he is faced with the choice of following his personal vision or the institutional interest of his employer-agency.

public or private, litigation also might bring negative publicity that could adversely affect business.

By contrast, government agencies generally have free representation (by the Justice Department), judgments entered against them are generally absorbed not by their budgets but by the general Judgment Fund, and adverse publicity is unlikely to negatively impact a bottom line. Because a government agency therefore has less of a monetary incentive to resolve a case than a private-party litigant, the government may well be more inclined to defend a public interest suit even when resolving it would benefit the public at large. Indeed, the relative luxury of the absence of monetary risk may actually embolden or encourage the government to launch a more vigorous defense than a particular case actually deserves. In the process, the government may too readily turn a blind eye to shortcomings it is defending and lose sight of the ideal of serving the public interest.

Third, agency cultures tend to favor efforts at vindicating programs, policies, and actions that are subject to challenge. Inherent in these cultures is the message that the responsibilities and interests of the offices and individuals directly implicated by a given lawsuit lie in protecting the agency and themselves from attack. There is generally little incentive for deviation from this expected norm. Thus, the key government players in a case may well not interpret their role to include a candid assessment of the merits of the case. Rather, these actors more than likely perceive that they have a substantial personal stake in defending the challenged programs, policies, or actions and little personal stake in the costs that effort may bring.


Having had oversight responsibility for more than two decades, the Office of Inspector General benefits from having a unique historical perspective of the Department as an institution. During our years of oversight, we have often observed that the components of the Department have no history of, and no particular incentive to, work together. The Office of Inspector General has seen this 'bunker mentality' display itself time and again. The pattern here is the same—begin by protect-
Fourth, as discussed in Part I of this article, there may well be ambiguity in terms of defining where a government agency's ultimate loyalties should lie in a given case. For example, a government legal team might adopt the program or individuals directly implicated in a given suit that it defends as essentially its "client(s)." The legal team might then operate under the assumption that its primary role is to serve the perceived interests of these client(s) above other interests. When that is the case, the legal team might well in effect vicariously adopt the program's inherent cultural bias (discussed above) in favor of defending the status quo.

Correctly establishing allegiances can be particularly complex when the Justice Department conducts litigation on behalf of more than one "client-agency" in the same general types of cases or even in the same case, and finds itself serving different masters with different agenda. DOJ's position in such cases might well be influenced by its diverse responsibilities in a way that might be deemed unacceptable in the context of private sector representation. The Department may advance or refrain from advancing a particular ar-

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Id.; see also Cobell VII, 226 F. Supp. 2d 163, 172 n.5 (D.D.C. 2002) (denying defendants' motion to revoke appointment of Special Master-Monitor and to clarify his role and authority); Cobell IX - Fixing the System, 2003 WL 22211405, at *202 (again referencing the "bunker mentality").

229. Thus, within an agency, legal staff commonly refer to the program with which they work as the "client," just as the Justice Department often refers to the agency with which it works as the "client-agency."

230. For example, the Justice Department brings environmental enforcement actions on behalf of some government agencies (commonly EPA), but defends environmental enforcement against brought against others (commonly the Defense Department).

231. Such a scenario is not uncommon in the context of cost recovery actions brought under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund"), 42 U.S.C. §§ 9604, 9606 (2003), where one or more private parties and one or more government agencies are potentially responsible parties at a Superfund site. The United States can be both plaintiff and counter-defendant in such actions.

232. One scholar (and former Justice Department lawyer) has suggested that the Justice Department's diverse responsibilities do present a conflict of interest in the context she examined. See, e.g., Ann C. Juliano, Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes, 37 GA. L. REV. 1307 (2003).
argument on behalf of one "client-agency" either as a matter of general practice or in a specific case, in deference to the interests of another "client-agency." Such ambiguities in loyalties potentially could affect the ultimate result in a case.

Fifth, as a practical matter, the process triggered by the initiation of a lawsuit against the government immediately puts it on the defensive. An action filed against the United States and/or its agencies and officers, as a matter of federal civil procedure, must be served upon the Department of Justice. A Department office generally is charged with its defense, usually with the assistance of an agency counsel's office. The first major formal task associated with the case usually is answering the complaint within the limited time permitted by the rules. The case therefore is assigned to a government trial attorney (or attorneys) with that pressing purpose, not necessarily to evaluate its merits. Nor does

233. Or, competing interests may deter the Justice Department from approving one agency's formal administrative action against another agency. Again, Superfund provides a useful illustration. An administrative order requiring a government agency to take specified action with respect to a hazardous waste site may be issued only with the concurrence of the Attorney General (and may be subject to other conditions as well). See 42 U.S.C. § 9606(a) (2003); Exec. Order No. 12580, §§ 4(c)(3), 4(d)(3), and 4(e), 52 Fed. Reg. 2923 (Jan. 23, 1987), as amended in 61 Fed. Reg. 45871 (Aug. 8, 1996). In practice, the agencies involved may seek to avoid the inter-agency conflict that the issuance of such orders might generate, with the result that an imminent and substantial endangerment at such a site might go unabated.

234. See Fed. R. Civ. P. 4(i). The action must be served both upon the local U.S. Attorney, as well as the Attorney General. See Fed. R. Civ. P. 4(i)(1). An action attacking the validity of an order of an officer or agency of the United States not a party, as well as an action against such a party, must also be served on the respective officer or agency. See Fed. R. Civ. P. 4(i)(2).

235. As noted above, the Department of Justice has litigating authority over such actions, except as otherwise provided by law. See 28 U.S.C. § 516 (2003). Once the action is served, it is handled locally by the Office of the U.S. Attorney in which the action is brought, and/or by a litigating division of the Justice Department.

236. The United States is afforded sixty days in which to answer or otherwise plead. See Fed. R. Civ. P. 12(a)(3).

237. The sixty-day time frame provides only a limited period for review of any litigation report provided by the agency concerned. See, e.g., U.S. ATTORNEYS' MANUAL § 5-6.520 (1997) (governing the defense of environmental actions), let alone an investigation of the allegations and an assessment of the public interest implications of the suit in certain defensive litigation. Although not necessarily during that time period, the trial attorney is required to make reasonable efforts to settle the case. See Exec. Order No. 12,988, 61 Fed. Reg. 4729 § 1(b) (Feb. 5, 1996) [hereinafter 1996 Executive Order]: "As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout
the answer or defense of the action necessarily require high-
level authorization. This process, then, is not particularly
conducive to identification of the potentially meritorious case.

As a result of all of these factors, a meritorious public in-
terest lawsuit that in and of itself stimulates reform of a gov-
ernment program, policy, or action is likely to be the excep-
tion, not the rule. Rather, the filing of such a lawsuit is more
likely to trigger only a defense, and often a spirited one at
that, even if ill-deserved.

B. Proposals for Reform

The government needs to reassess and redefine its role in
public interest lawsuits brought against it. The ultimate goal
should be a concerted effort on the part of the government to
identify and resolve, rather than to litigate, meritorious pub-
lic interest cases. Additional congressional legislation and
oversight, further implementation of an existing Executive
Order, and formal agency guidance all could facilitate that
end.

Congress should amend EAJA in order to make govern-
ment agencies more accountable by increasing the monetary
risk they face when they litigate unjustly. For example, legis-
lation recently introduced in Congress would remove both the
substantial justification defense and the fee cap, and provide
that any EAJA award (not just those imposed when the gov-
ernment has litigated in bad faith) would have to be paid
through an agency’s own appropriations rather than from the
Treasury’s general Judgment

238. In fact, it is common for the agency’s litigation report to be routed di-
rectly to the attorney assigned to the case, see, e.g., U.S. ATTORNEYS’ MANUAL
§ 4-6.100 (1997) (governing the defense of personnel litigation).

239. It must be conceded that it may well be difficult to flag bona fide public
interest cases with a sound legal basis, that such cases may well be the excep-
tion, and that other cases deserve the government’s best defense. The propos-
als presented here are designed to help facilitate the separation of the wheat
from the chaff.

(2003). The proposed bill also called for increased reporting requirements. See
id.
public interest litigation. Even if the proposed EAJA reforms were to be adopted, the Judgment Fund ordinarily would continue to absorb the cost of the actual judgment (albeit not the EAJA award), and an agency could still be represented at taxpayer expense by the Justice Department. If an agency's budget were to be tapped to fund these expenditures when a court finds that the government litigated unjustifiably, the agency presumably would have an additional financial stake in the cost of the litigation and its outcome that might influence its conduct of the litigation.

In addition to amending EAJA with the goal that it more effectively curb unjustified civil litigation, Congress could also exercise additional oversight authority over the cost of such litigation. Conceivably, Congress, through the General Accounting Office or oversight committees, could periodically review either a sampling of public interest cases, and/or the most high-profile ones. Congress could also review significant government policies that are at issue in litigation with an eye toward legislating—and funding—any needed reform. Ultimately, however, Congress likely will not have the time and resources (or for that matter, constitutional authority) to devote to micro-managing federal civil litigation. Consequently, the task of doing a better job of ensuring that legitimate public interest cases are resolved and/or litigated fairly will fall back on the executive branch.

The executive branch, in turn, should institute government-wide measures to ensure that efforts by the last two administrations to rein in civil litigation involving the government have greater impact. Both President George H. W. Bush and President Clinton issued "Civil Justice Reform" Executive Orders enacting guidelines designed to promote settlement (including the use of alternative dispute resolution) and minimize discovery by the government in the course of

241. There are already limited circumstances under which an agency's budget must bear the cost of judgments entered against it. For example, under the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, P.L. 107-174, 116 Stat. 556 (2002), agencies must reimburse the Judgment Fund, see 28 U.S.C. § 2301 (2003), for payments made as a result of liability for acts of discrimination or whistleblower retaliation.

242. On the other hand, it can be argued that making agencies responsible for paying judgments entered against them will serve as a disincentive for them to settle.
civil litigation. Both orders speak in terms of “[improving] the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations,” and plainly state that the federal government should aspire to set an example for the private bar.

It is unclear in practice, however, to what extent the orders have generated any meaningful across-the-board reform. There have yet to be any final published Justice Department guidance (as contemplated by the orders themselves) on how these goals are to be implemented. Whether initiated by

243. See Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (Oct. 25, 1991) [hereinafter 1991 Executive Order], replaced by the 1996 Executive Order. The second order is a somewhat pared-down version of the first. To the extent that the amendment in 1993 of the Federal Rules of Civil Procedure governing discovery incorporated some of the same guidelines included in the first order, they became superfluous in the second order.

244. Not demonstratively different in most major respects, both sets of guidelines appear on their face and by their terms to apply broadly to all civil litigation in which the federal government is a party, whether plaintiff or defendant. See 1991 Executive Order § 7; 1996 Executive Order § 8. Both orders expressly exclude criminal litigation. Both orders seem designed with somewhat more of a focus on affirmative civil litigation rather than defense, but the Clinton Order does include preamble language which includes the goal of improving “access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes.” See 1991 Executive Order § 7; 1996 Executive Order § 8.


246. See 1991 Executive Order (affirming in its preamble language that “the United States sets an example for private litigation by adhering to higher standards than those required by the rules of procedure in the conduct of Government litigation in Federal court, and can continue to do so without impairing the effectiveness of its litigation efforts”); see also Freeport-McMoran Oil & Gas Co. v. FERC, 962 F.2d 45, 47 (D.C. Cir. 1992); 1996 Executive Order (superseding the 1991 Executive Order, but substituting somewhat equivalent preamble language: “to provide a model for similar reforms of litigation practices in the private sector and in various states”).

the Justice Department (in the form of final guidance on implementation of the extant 1996 Executive Order, or other agencies (in the form of agency regulations, orders, or policies), additional formal high-level measures are desirable.

Such measures should be designed to ensure that both the agency whose program or action is being challenged, as well as the Department of Justice, should conduct a more rigorous review of public interest litigation. At a minimum, the government should apply the same standards it employs as plaintiff in a public interest case to cases where it stands instead in the shoes of defendant. At present, the government engages in a much more deliberative process before embarking on public interest cases as plaintiff than as defendant. For example, before the Justice Department brings a civil environmental enforcement action on behalf of EPA, the agency normally makes a formal referral accompanied by an extensive litigation report. Once the matter is assigned to a DOJ trial attorney, it is his responsibility to thoroughly evaluate the case and make a formal recommendation about filing suit. That process generally entails preparation of a substantial memorandum analyzing the law and the facts of the case, which is ultimately directed to the Justice Department official with the legal authority to approve the action. Moreover, assuming the appropriate authority approves the case, it may not actually be filed until a reasonable effort has been made

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248. It should be noted that the federal government is often the plaintiff in public interest litigation. This point was emphasized by the district court in Cobell, when it noted that "[i]t is no small irony that while attorneys from the Civil Rights Division are urging federal courts across the nation to enforce compliance with the structural injunctions they have issued against state and local government agencies, their colleagues in the Civil Division are arguing that this Court possesses no authority even to issue such an injunction against a federal agency." Cobell IX- Historical Accounting, 2003 WL 22211405, at *214 n.13.

249. This deliberate process is also true of the procedures the government follows when it brings criminal charges.

250. A high-level EPA official makes the formal referral to a high-level Justice Department official in its Environment and Natural Resource Division. Before a case is sent to the DOJ, the referral generally works its way up a bureaucratic chain of command both in the EPA regional program and counsel's offices, and sometimes involves EPA Headquarters offices as well.

251. The level of that official varies with the action, but the process usually entails no fewer than two levels of review above the trial attorney, and culminates in review and approval of the filing of the complaint by the Assistant Attorney General, or another designated senior manager. See U.S. ATTORNEYS' MANUAL §§ 5-12.111, 5-12.320(A) (2001).
to notify the prospective defendants and to afford them an opportunity to settle (unless the agency has already made such an effort). 252

The government should employ no less rigorous a process when it defends a public interest case, notwithstanding the time pressures involved in defending, rather than prosecuting, a case (not the least of which is lack of control over the date of the filing of the action and the concomitant deadlines it triggers). Both the agency legal offices involved and DOJ should conduct thorough evaluations of the case, beginning at an early stage, to include assessments of the legal merits of the suit and any associated public policy implications. 253

The evaluation of the case should begin promptly upon service of the suit because early identification of meritorious lawsuits could facilitate their expeditious resolution prior to the entrenchment of positions that oftentimes characterizes prolonged litigation. Periodic reevaluations should continue in earnest at least through the close of discovery because litigation, by its very nature, can reveal a wealth of information (thus, it is said, the discovery process often brings skeletons out of the closet).

In the course of the evaluation process, the government should be on alert for meritorious cases. In the event that an evaluation results in a decision that the case is legally meritorious, the government should devote its resources primarily to settling, not litigating the matter. 254

When a public interest case cannot or should not be settled for good reason, the government should undertake its defense in the most forthright manner. In other words, the government should place a premium on litigating openly and fairly, not on winning. To that end, only bona fide defenses should be asserted, the issues of liability and relief should be

252. See 1996 Executive Order.
253. That is not to suggest that the government necessarily must divorce itself from the legal merits of a case to conduct a separate and distinct analysis of any and all public policy implications in every case. Nonetheless, public policy issues are sometimes inextricable from legal issues. See Internet home page of the United States Department of Justice, Civil Division, http://www.usdoj.gov/civil/home/html (last visited Sept. 9, 2003) (where the Civil Division, the largest of the Justice Department’s litigating divisions, asserts that it “confronts significant policy issues, which often rise to constitutional dimensions, in defending and enforcing various Federal programs and actions.”).
254. Alternative dispute resolution may be beneficial, and is encouraged by the 1996 Executive Order. See 1996 Order § 1(b).
narrowed as much as possible, and candor, not obfuscation, should be the rule.\textsuperscript{255}

In any case in which it is involved, the Justice Department should act as a check on the agency and vice versa. Under some circumstances, it might be appropriate for DOJ to decline to defend the agency program or action being challenged, or to withdraw from representation.\textsuperscript{256} If the Justice Department discovers credible allegations of wrongdoing on the part of the agency or its officials, the Department should take appropriate action.\textsuperscript{257} By the same token, the agency should also act as a check on the Department insofar as its litigation conduct is concerned.

Public interest cases of major significance should receive even greater scrutiny. To that end, the agencies and the Justice Department should institute procedures whereby such cases are reviewed by independent case panels to ensure that the cases are being handled properly. While individuals who are associated with the action (whether as a party, attorney, or program official) should have input in the process, the members of the case panels should not have any personal stake in the issues, and should report directly to high-level officials who also are not involved in the management of the case. Such an independent review can serve to minimize the possibility of the government's position in the litigation being unduly influenced by the parochial interests of the defendant-

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\textsuperscript{255} At a minimum, "kitchen-sink" vintage defenses should be avoided, discovery should be open and cooperative, and admissions and stipulations should be made early in the course of the litigation. Moreover, there should no place in the government's defense of public interest litigation for so-called "scorched earth" litigation practices or, for that matter, an across-the-board "no settlement" policy akin to one sometimes attributed to big tobacco.

\textsuperscript{256} Although the decision may well be a difficult one, the Justice Department ostensibly may decline to represent the agency, or may or even should withdraw from the representation, under certain circumstances, just as would be expected of a private law firm. The prospect of requiring a so-called "noisy withdrawal" from representation under certain circumstances in the private representation context drew so much attention when the SEC proposed new rules as a result of the Sarbanes-Oxley legislation that the Commission extended the notice-and-comment period on the rule. \textit{See} Implementation of Standards of Prof'l Conduct for Attorneys, Part III, Release Nos. 33-8186, 34-47282, IC-25920, 68 Fed. Reg. 6324 (Feb. 6, 2003).

\textsuperscript{257} Such action could include a referral to the agency's inspector general, or, in more extreme cases, especially those with potential criminal implications, an investigation of the agency by the Justice Department. Depending on the nature of the wrongdoing, disclosures to the plaintiff(s) and/or the court in the case might well also be appropriate.
agency and/or its officials. The case panel reviews should be conducted periodically during the course of the litigation, and, as appropriate, should include consultation with agency program and legal personnel with particular expertise, as well as outside experts.

The proposed evaluation and review process is not without its challenges. Government agencies may well view such requirements as an overly burdensome demand on resource-strapped, overworked government offices. Still, an initial investment of this nature might generate high long-term dividends when one considers not only the substantial financial demands of litigation, but also the negative implications of defending a meritorious lawsuit.

The proposed reforms are intended to shift the government's priorities so that they favor resolution, rather than litigation, of meritorious public interest lawsuits. The success of the reforms will depend, to a degree, on the extent to which agency leaders embrace the need for change and provide the requisite encouragement and support to front-line career civil servants. In the final analysis, the beneficiaries of change will include not simply the plaintiffs in public interest cases, but also the government and the public at large.

V. CONCLUSION

Although public interest lawsuits against the federal government can serve as an effective means of generating desirable changes in government policies and programs, there is a tendency for the government to defend the status quo, and sometime even to overreach, without sufficient regard to the merits of the case. At present, relatively weak external controls combine with relatively strong internal factors to produce this net result. Ideally, the suggested reforms will have a positive influence on the role the government plays in defending public interest cases.