Rule 11 and Federal Sovereign Immunity: Respecting the Explicit Waiver Requirement

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Federal Rule of Civil Procedure 11 requires courts to impose sanctions on attorneys or represented parties who file signed papers that are not well-grounded in law and fact or are interposed for improper purposes.¹ Rule 11 does not specify the precise penalty to be imposed, but rather delegates to the courts the authority to fashion an “appropriate sanction.”² Monetary sanctions, especially awards of attorneys’ fees, have become the Rule 11 sanction of choice.³

During the years after the adoption of the new Rule 11 in 1983, sanctions were rarely assessed against the United States or its attorneys.⁴ Today, however, increasing numbers of courts are

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¹ FRCP 11 states:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney’s individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party’s pleading, motion, or other paper and state the party’s address. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer’s knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.

² *Id.*

³ See Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some “Chilling” Problems in the Struggle Between Compensation and Punishment*, 74 *Georgetown L J* 1313, 1333 (1986) (costs and attorneys’ fees were the only penalties awarded in 96 percent of the Rule 11 cases studied).

⁴ This Comment considers only Rule 11 sanctions imposed against the federal government. The complicated issues of state government immunity from attorneys’ fee awards

moving toward parity in their treatment of the federal government and private litigants under Rule 11.⁵ Unfortunately, the opinions of these courts do not acknowledge the tension between Rule 11 and governmental immunities.⁶

Although Rule 11 establishes that either the government, its attorneys, or both may be sanctioned,⁷ the courts have not recognized that sanctioning the government and sanctioning its attorneys raise two different, albeit related, sets of issues. This Comment argues that distinguishing these situations will enable the district courts to control the government's trial behavior without contravening the Supreme Court's sovereign immunity jurisprudence.

The first situation, sanctioning the government, raises important sovereign immunity questions that the courts are beginning to acknowledge, but have failed to analyze adequately. The government's claim is simple: sovereign immunity prevents courts from assessing attorneys' fees against the federal government unless it waives its immunity.⁸ Yet the lower courts, perhaps fearing that the government's trial behavior would otherwise be unregulable, have rejected this claim.⁹

Section I of this Comment argues that, despite lower court decisions to the contrary, the government has never waived its sovereign immunity in the context of Rule 11. An increasingly, and perhaps unreasonably, severe body of Supreme Court precedent repeatedly insists that waivers of sovereign immunity be explicit.¹⁰ The lower courts have either circumvented this requirement with manufactured waivers¹¹ or have imposed Rule 11 sanctions against

under Rule 11 lie beyond the scope of this Comment. See generally Note, *Congressional Abrogation of State Sovereign Immunity*, 86 Colum L Rev 1436 (1986).

⁵ See John Mulligan, *Rule 11: Should Sanctions Be Imposed Against the Government and Its Attorneys in Federal Tax Cases? A Review and Critique of Mattingly v. United States*, 5 Georgetown J Legal Ethics 613 (1992).

⁶ "Governmental immunities" include sovereign immunity and official immunities, both limited and absolute.

⁷ Rule 11 allows the court to "impose [sanctions] upon the person who signed [the paper], a represented party, or both." In a suit involving the government, the government agency or department is itself the "represented party." This Comment employs the term "the government" as shorthand for the variety of federal government litigants that have raised sovereign immunity questions in the Rule 11 context.

⁸ See *Ruckelshaus v Sierra Club*, 463 US 680, 685 (1983), citing *Alyeska Pipeline Co. v Wilderness Society*, 421 US 240, 267-68 (1975).

⁹ See text accompanying notes 57-88.

¹⁰ See text accompanying notes 16-56.

¹¹ See, for example, *Joseph v United States*, 121 FRD 406, 413-14 (D Hawaii 1988) (recognizing that a sovereign immunity waiver must be "explicit," but somehow finding one

the government without even attempting to find an explicit waiver.¹² At best, these decisions may be viewed as the handiwork of federal judges desirous of particular results; at worst, they may evidence disregard for the regime the Supreme Court has established in the area of sovereign immunity.

The second situation, sanctioning the government's attorneys personally, raises a different set of problems. Occasionally, there are cases where sovereign immunity prevents a suit from proceeding against a government officer,¹³ and there may be cases in which a government attorney might benefit from either absolute or limited government officer immunity.¹⁴ The purposes of Rule 11, however, and the rule's emphasis on the personal responsibilities of attorneys, all point toward a different result. Section II of this Comment analyzes these problems and concludes that neither sovereign immunity nor official immunity should shield the government attorney from Rule 11 sanctions.

Section III brings the distinction between monetary sanctions on the government itself, and sanctions on the government's attorneys, to bear on how courts might attempt to control the government's trial behavior. This Comment argues that monetary sanctions on individual attorneys and non-monetary sanctions on the government itself provide adequate control over the government's trial conduct.

I. APPLYING RULE 11 TO GOVERNMENT ENTITIES

Rule 11 states that sanctions may be applied against either an attorney or a "represented party." When a government agency or department is involved in litigation, it falls within the scope of Rule 11 sanctions under the "represented party" provision.¹⁵ Gov-

anyway in the government's consent to a suit in a court in which Rule 11 applies); *Adamson v Bowen*, 855 F2d 668, 671 (10th Cir 1988) (finding an explicit waiver in the Equal Access to Justice Act); *In re Good Hope Industries, Inc.*, 886 F2d 480, 482 (1st Cir 1989) (citing *Adamson* with approval).

¹² See, for example, *Mattingly v United States*, 939 F2d 816, 818 (9th Cir 1991) (concluding that "[t]he government is not immune from Rule 11 sanctions" without addressing an explicit waiver requirement). See also *United States v Gavilan Joint Community College District*, 849 F2d 1246, 1251 (9th Cir 1988) (not mentioning an explicit waiver requirement, but stating monetary sanctions against the government may be awarded under Rule 11).

¹³ See text accompanying notes 96-105.

¹⁴ The courts have not addressed this problem, and have thus far simply imposed sanctions on the government itself.

¹⁵ See *Trout v Garrett*, 780 F Supp 1396, 1428 (D DC 1991) ("Rule 11 sanctions may lawfully be imposed not only upon the signing attorney but also upon the 'represented party.' The parties represented by Justice counsel in this case are technically the Secretary

ernment litigants assert, however, that while they may fall within the ambit of Rule 11, sovereign immunity nonetheless protects them from monetary sanctions. To decide whether this claim is correct, the first step is to examine the Supreme Court's sovereign immunity waiver jurisprudence.

A. Waiver of Federal Sovereign Immunity in the Supreme Court

The early history of federal sovereign immunity in the United States remains the subject of considerable academic debate. For example, scholars still disagree concerning the doctrine's precise source.¹⁶ But for purposes of this Comment these questions are largely irrelevant; whatever its source, the basic principle that the United States must consent to suit has gone unchallenged for nearly one hundred and fifty years.

The United States's sovereign immunity has, however, been cut back considerably by waivers and judicial decisions. Most importantly, the Administrative Procedure Act (APA) now provides a clear waiver of federal sovereign immunity for non-pecuniary claims.¹⁷ Unfortunately, in the many situations that do involve monetary judgments against the United States, it remains difficult to determine whether Congress has waived the government's sovereign immunity. Often it is unclear how far an apparent waiver was

of the Navy and the Commander of NARDAC, but in reality the party is the Department of the Navy.").

¹⁶ Some have suggested that the Constitution contains the principle of federal sovereign immunity. See, for example, *Kennecott Copper Corp. v State Tax Comm.*, 327 US 573, 580 (1946) (Frankfurter dissenting) (sovereign immunity is "embodied in the Constitution"); Note, *How Well Can States Enforce Their Environmental Laws When the Polluter is the United States Government?*, 18 Rutgers L J 123, 129 (1986) (suggesting that federal sovereign immunity springs from the Supremacy Clause). Compare Federalist 81 (Hamilton), in Clinton Rossiter, ed, *The Federalist Papers* 481, 487 (Mentor, 1961) (sovereign immunity is part of the "general practice of mankind").

Other commentators believe that sovereign immunity is a common law principle borrowed from the English tradition. See, for example, Erwin Chemerinsky, *Federal Jurisdiction* § 9.2.1 at 470 (Little, Brown, 1989). Under this view, the "source" of U.S. government sovereign immunity is probably Chief Justice Marshall's opinion in *Cohens v Virginia*, 19 US (6 Wheat) 264, 411-12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States . . .").

¹⁷ The APA states:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity . . . shall not be dismissed . . . on the ground that it is against the United States.

5 USC § 702 (1988). The *Ex Parte Young* fiction also allows non-monetary relief against the government. See text accompanying note 101.

intended to extend, or even whether one was intended at all. The Rule 11 setting presents one such predicament.

The Supreme Court has offered general guidelines for determining whether, in a particular context, Congress has waived the United States's immunity to money damages. As early as 1927, the Court had already established that waivers of sovereign immunity must be clearly expressed and narrowly construed. In *Eastern Transportation Co. v United States*,¹⁸ the Court wrote: "The sovereignty of the United States raises a presumption against its suitability, unless it is clearly shown; nor should a court enlarge its liability to suit beyond what the language requires."¹⁹

Early cases following *Eastern Transportation* applied these apparently strict requirements with some leniency.²⁰ More recent Court decisions, however, view the "unequivocal expression" standard enunciated in *Eastern Transportation*, far more narrowly.²¹ In 1983, for example, the Court decided *Ruckelshaus v Sierra Club*,²² involving whether attorneys' fees could be awarded in an action against the federal government under § 307(f) of the Clean Air Act absent some degree of success on the merits by the claimant. The language at issue in the case provided that the court could award reasonable attorneys' fees in suits challenging emission standards promulgated under the Act "whenever it determines that such an award [would be] appropriate."²³

The D.C. Circuit had found that although all of claimants' substantive claims were rejected, an award of fees was still "require[d]" for their contributions to the goals of the Clean Air Act.²⁴ The Supreme Court reversed, holding that sovereign immunity prohibited the appellate court's award because § 307(f) did not provide the explicit waiver of immunity necessary to impose

¹⁸ 272 US 675 (1927).

¹⁹ *Id.* at 686.

²⁰ See, for example, *Canadian Aviator, Ltd. v United States*, 324 US 215, 222-23 (1945) (stating "[c]ongressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation"); *Indian Towing Co., Inc. v United States*, 350 US 61, 68-69 (1955) (acknowledging that the Federal Tort Claims Act could be read to disallow recovery against the United States, but holding that the Court should not "import immunity back into a statute designed to limit it").

²¹ See *Irwin v Veterans Administration*, 498 US 89, 95 (1990), citing *United States v Mitchell*, 445 US 535, 538 (1980), in turn quoting *United States v King*, 395 US 1, 4 (1969) (distilling the holding of *Eastern Transportation* and other early cases to an "unequivocal expression" standard).

²² 463 US 680 (1983).

²³ Clean Air Act Amendments of 1977, Pub L No 95-95, 91 Stat 685, 777 (Aug 7, 1977), codified at 42 USC § 7607(f) (1988).

²⁴ *Sierra Club v Gorsuch*, 672 F2d 33, 41 (DC Cir 1982).

fees on the government.²⁵ The Court emphasized the strictness of the waiver standard: "Waivers of sovereign immunity must be 'construed strictly in favor of the sovereign.'" ²⁶ It then concluded that "care must be taken not to 'enlarge' § 307(f)'s waiver of immunity beyond what a fair reading of the language of the section requires."²⁷

The very next paragraph in the opinion, however, arguably concedes that a "fair reading" of the language of § 307(f) might indeed "require" the court to find a waiver of immunity. The Court found it necessary to reach well beyond the language of the statute for some rather abstract arguments to justify its holding:

[W]e fail to find in § 307(f) the requisite indication that Congress meant to abandon historic fee-shifting principles and intuitive notions of fairness when it enacted the section. Instead, we believe that the term "appropriate" modifies but does not completely reject the traditional rule that a fee claimant must "prevail" before it may recover attorneys' fees. This result is the most reasonable interpretation of congressional intent.²⁸

The Court's reliance on congressional intent and "intuitive notions of fairness" to avoid recognizing a waiver of sovereign immunity suggests that even if an "unequivocal expression" of a waiver could reasonably be found in a statute, the Court today may be unwilling to find it.

Several more recent waiver cases also support the view that the Court has toughened the "unequivocal expression" standard. The first, *Ardestani v INS*,²⁹ involved a claim by an Iranian who had prevailed in administrative deportation proceedings and then brought suit to recover attorneys' fees under the Equal Access to Justice Act (EAJA).³⁰ The Eleventh Circuit, narrowly construing the EAJA's waiver of sovereign immunity, held that the EAJA does not apply to administrative deportation proceedings,³¹ and the Supreme Court affirmed.³²

²⁵ *Ruckelshaus*, 463 US at 685-86.

²⁶ *Id.* at 685, citing *McMahon v United States*, 342 US 25, 27 (1951).

²⁷ 463 US at 686.

²⁸ *Id.*

²⁹ 112 S Ct 515 (1991).

³⁰ See 5 USC § 504 (1988) and 28 USC § 2412 (1988).

³¹ *Ardestani v INS*, 904 F2d 1505 (11th Cir 1990).

³² *Ardestani*, 112 S Ct at 518.

The Court was called upon to construe several related statutory provisions. The EAJA provides that “[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding.”³³ It then defines an “adversary adjudication” as “an adjudication under section 554 of [the Administrative Procedure Act] in which the position of the United States is represented by counsel or otherwise.”³⁴ Section 554, in turn, defines the scope of an “adjudication.”³⁵

Ardestani contended that, given the relationship between these provisions, the text of § 504 could reasonably be interpreted as encompassing all proceedings conforming to the definition of “adjudication” offered in § 554, even if the proceeding were not otherwise governed by § 554. She cited the legislative history of the EAJA to bolster her interpretation.³⁶ The Court countered that the legislative history could not be allowed to “undercut the ordinary understanding of the statutory language.”³⁷ In addition, the Court argued, the “limited nature of waivers of sovereign immunity” militated against permitting an attorneys’ fee award.³⁸ Citing *Ruckelshaus*, the Court repeated its view that a “waiver must be strictly construed in favor of the United States,”³⁹ and held that this rule may not be bent even to accommodate congressional intent:

We have no doubt that the broad purposes of the EAJA would be served by making the statute applicable to deportation proceedings. . . . But we cannot extend the EAJA to administrative deportation proceedings when the plain language of the statute, coupled with the strict construction of waivers of sovereign immunity, constrain us to do otherwise.⁴⁰

In short, the *Ruckelshaus* Court invoked congressional intent to demonstrate that a waiver of sovereign immunity was not intended, and then the *Ardestani* Court held that intent is unavailable to demonstrate that a waiver was intended.

³³ 5 USC § 504(a)(1).

³⁴ 5 USC § 504(b)(1)(C)(i).

³⁵ Section 554 is lengthy, and the precise contours of the definition it offers are not relevant here. Indeed, for the purposes of this Comment, it matters little whether Ardestani’s case was an “adjudication” under § 554 or not.

³⁶ *Ardestani*, 112 S Ct at 520.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 521.

Later in the same term, in *United States v Nordic Village, Inc.*,⁴¹ the Court extended the reasoning of *Ardestani* a step further, making it still more difficult to find a waiver of sovereign immunity. In *Nordic Village*, the issue was whether a bankruptcy trustee could enforce a monetary judgment against the IRS for funds that had been illicitly transferred to the IRS.⁴² The Court held that sovereign immunity rendered the judgment unenforceable.⁴³

Nordic Village turned on the construction of § 106(c) of the Bankruptcy Code, which states:

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—

(1) a provision of this title that contains “creditor”, “entity”, or “governmental unit” applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.⁴⁴

The Court held that although § 106(c) “waives sovereign immunity, it fails to establish unambiguously that the waiver extends to monetary claims. It is susceptible of at least two interpretations that do *not* authorize monetary relief.”⁴⁵

The Court first suggested that the two parts of § 106(c) could be read complementarily, rather than independently. Under this reading, the first paragraph only “identifies” the subject matter that courts may entertain under the statute, while the second paragraph “specifies the *manner* in which there shall be applied to governmental units the provisions identified by the first paragraph, *i.e.*, a manner that permits declaratory or injunctive relief but not an affirmative monetary recovery.”⁴⁶ Second, the Court proposed that “[e]xcept as provided in subsections (a) and (b) of this section” could be read to mean that those subsections provide the exclusive remedy for a certain subclass of cases that they address.⁴⁷ The Court did not explain this reading, nor did Justice Scalia, the author of the opinion, describe either of these “plausible” interpre-

⁴¹ 112 S Ct 1011 (1992).

⁴² *Id.* at 1013.

⁴³ *Id.* at 1017.

⁴⁴ 11 USC § 106(c) (1988).

⁴⁵ 112 S Ct at 1015.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1016.

tations as a "plain language" reading of the statute. As Justice Stevens pointed out in his dissent, they are, at best, imaginative.⁴⁸

Justice Scalia also went on to make explicit *Ardestani's* implicit requirement that an "unequivocal expression" of a sovereign immunity waiver appear in the actual text of the statute in question. He wrote: "[T]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report."⁴⁹ Thus, *Nordic Village* suggests that the "unambiguous expression" inquiry asks whether the actual statutory language in question admits of *any* "plausible interpretation" that would avoid waiving sovereign immunity.

The Court's most recent major sovereign immunity decision, *United States Department of Energy v Ohio*,⁵⁰ confirmed that the *Nordic Village* approach is now the standard. In *Ohio*, the Court was obliged to decide whether certain sections of the Clean Water Act (CWA)⁵¹ or the Resource Conservation and Recovery Act⁵² waived sovereign immunity from liability for civil fines imposed by a state against the federal government for past violations of these acts. Ohio claimed that several sections of these statutes clearly waived sovereign immunity. The most illustrative of these is § 1323(a) of the CWA, which states:

[T]he Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions . . . in the same manner . . . as any nongovernmental entity
[T]he United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.⁵³

The Court found that "sanctions" in the first sentence of the section encompassed only coercive fines, and did not extend to civil liability for past infractions.⁵⁴ It admitted that this rendered the "civil penalties" clause of the second sentence meaningless, but speculated:

⁴⁸ Id at 1018-19 (Stevens dissenting).

⁴⁹ Id at 1016.

⁵⁰ 112 S Ct 1627 (1992).

⁵¹ 33 USC § 1251 et seq (1988).

⁵² 42 USC § 6901 et seq (1988).

⁵³ 33 USC § 1323(a).

⁵⁴ 112 S Ct at 1636-37.

Perhaps [Congress] used ["civil penalties"] just in case some later amendment might waive the government's immunity from punitive sanctions. Perhaps a drafter mistakenly thought that liability for such sanctions had somehow been waived already. Perhaps someone was careless. The question has no satisfactory answer.⁵⁵

The Court's reading is less than compelling. In dissent, Justice White observed that "rather than reading the CWA as Congress wrote it and recognizing that it effects a waiver of immunity, the majority engages in speculation about why Congress could not have meant what it unambiguously said."⁵⁶ Although Justice White's comment was aimed at the *Ohio* majority, it is probably also an accurate description of the explicit waiver standard under *Nordic Village*. In effect, the test is that if a plausible story may be told that would avoid recognizing a waiver, the Court will adopt that "speculation" as the statute's meaning.

B. Applying the Explicit Waiver Requirement in the Rule 11 Context

The language of Rule 11 does not contain an "explicit waiver" of sovereign immunity. Indeed, the text does not include any reference to the government, or to sovereign immunity.⁵⁷ Therefore, under the Supreme Court's exacting "unequivocal expression" standard, monetary sanctions under Rule 11 should not apply to a government agency or department involved in litigation. It is thus somewhat unsettling to note that no court has ever reached this seemingly obvious conclusion. In fact, until 1988, the courts simply ignored the issue entirely.⁵⁸ Since then, they have failed to put forth a convincing argument as to why sovereign immunity should not bar monetary sanctions under Rule 11 against the government.

⁵⁵ Id at 1639.

⁵⁶ Id at 1643.

⁵⁷ See note 1.

⁵⁸ See, for example, *Larkin v Heckler*, 584 F Supp 512, 513-14 (N D Cal 1984) (imposing Rule 11 sanctions on the government without considering sovereign immunity issues); *Adamson v Bowen*, 855 F2d 668, 670 (10th Cir 1988) (observing that "[t]he courts have not discussed the specific issue whether the United States has waived immunity from monetary sanctions under Rule 11").

1. Rules Enabling Act.

In *Barry v Bowen*,⁵⁹ the Ninth Circuit tentatively suggested one theory under which to find a waiver of sovereign immunity in the Rule 11 context. The issue actually confronting the *Barry* court was whether sovereign immunity precluded a district court from using its contempt powers to impose a monetary sanction on the government for late payment of an attorneys' fees award under the EAJA. The court concluded that it did. Along the way, however, in an attempt to distinguish *Barry* from an earlier Ninth Circuit case permitting sanctions to issue against the government under Rule 11,⁶⁰ the court wrote that the "rule making procedure which involves Congress perhaps can be viewed as an explicit waiver of sovereign immunity."⁶¹

The EAJA text cited by the *Barry* court—28 USC § 2072(a)—simply does not support its argument. The most relevant language states only that the "Supreme Court shall have the power to prescribe by general rules . . . practice and procedure."⁶² In no way does this appear to address sovereign immunity or governmental liability. One can only speculate that the Ninth Circuit may have wished to imply that the Rules Enabling Act (REA) is evidence of Congress's *intent* to waive sovereign immunity as to the Federal Rules of Civil Procedure. At the risk of belaboring the obvious, however, this does not meet the "unequivocal expression" requirement enunciated in *Nordic Village*.

Moreover, the second subsection of § 2072 cuts directly against the *Barry* court's suggestion. Section 2072(b) states that the "rules shall not abridge, enlarge or modify any substantive right." Perhaps the most influential discussion of the term "substantive right" is John Hart Ely's in his article *The Irrepressible Myth of Erie*.⁶³ Professor Ely wrote that a substantive right is "a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process."⁶⁴ While the rationale for sovereign immunity, be it history or policy, remains elusive, it is clear that the

⁵⁹ 884 F2d 442 (9th Cir 1989).

⁶⁰ *United States v Gavilan Community College Dist.*, 849 F2d 1246 (9th Cir 1988).

⁶¹ *Barry*, 884 F2d at 444, citing 28 USC § 2072 (1988).

⁶² 28 USC § 2072.

⁶³ 87 Harv L Rev 693 (1974).

⁶⁴ *Id* at 725. See also *Black's Law Dictionary* 1429 (West, 6th ed 1990) (defining a "substantive right" as a "right to the equal enjoyment of fundamental rights, privileges and immunities; distinguished from a procedural right").

purpose of the immunity is not to ensure the "fairness or efficiency of the litigation process." Sovereign immunity therefore falls squarely within the category of "substantive rights," which may not, by the very terms of § 2072, be abridged by the Federal Rules of Civil Procedure.⁶⁵ Far from providing a waiver of sovereign immunity, the REA, if anything, buttresses the government's claim.⁶⁶

2. Federal Rules of Civil Procedure.

A second Ninth Circuit opinion, *Mattingly v United States*,⁶⁷ proposed another tack that may justify applying Rule 11 sanctions to the government. *Mattingly* suggested that rather than looking to the REA, the courts could find a waiver of sovereign immunity in the rules themselves.⁶⁸

According to the *Mattingly* court, Rules 1 and 81 establish that the Federal Rules of Civil Procedure "apply by their own force to all litigants before the court."⁶⁹ To support this contention, the court cited Rule 1, which provides that the "rules govern the procedure in the United States district courts in all suits of a civil nature."⁷⁰ This language, the court implied, must be read as including suits against the United States. The court also argued that Rule 81 lists circumstances under which the rules do not apply, without exempting suits involving the United States, and thus supports applying monetary sanctions to the government under Rule 11.⁷¹

Like the *Barry* court's REA theory, the FRCP justification does not come close to satisfying the explicit waiver test enunciated by the Supreme Court. Nowhere in the text of the rules does it say that the government waives any part of its sovereign immunity.

In addition, the government's sovereign immunity defense does not, as *Mattingly* would suggest, render any portion of the

⁶⁵ But see *Joseph v United States*, 121 FRD 406, 414 (D Hawaii 1988) (stating that "an award of fees in this context is more a matter of procedure than substance," but offering no authority or explanation for how this could be so).

⁶⁶ See also *Sibbach v Wilson & Co.*, 312 US 1, 14 (1940) (holding that a rule is not substantive for REA purposes if "the rule really regulates . . . the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them").

⁶⁷ 939 F2d 816 (9th Cir 1991).

⁶⁸ *Id.* at 818.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

Rules inoperative. It is consistent with the texts of both Rule 1 and Rule 11 to say that the rules "govern procedure" in all civil suits, including those involving the United States as a litigant, and yet admit that sovereign immunity prevents applying monetary sanctions under Rule 11 to the federal government. For Rule 11 does not mandate monetary sanctions, but delegates to the district court the discretion to fashion an "appropriate sanction." Although sovereign immunity renders monetary sanctions "inappropriate" under Rule 11, a spectrum of non-monetary sanctions remain available to the district court, and Rule 11 retains its "governing" force.⁷²

This reading of Rule 11 not only respects the Supreme Court's sovereign immunity jurisprudence, but also Congress's REA mandate that the rules "shall not abridge, enlarge or modify any substantive right."⁷³ It simply would not make sense to read the rules as the *Mattingly* court suggests, in clear contravention of the enabling statute.⁷⁴ In short, there is no plausible argument that the rules themselves effect a waiver of sovereign immunity under the Supreme Court's explicit waiver standard.

3. Equal Access to Justice Act.

The third justification courts have offered for applying monetary sanctions to the government under Rule 11 was elaborated by the Tenth Circuit in *Adamson v Bowen*.⁷⁵ *Adamson* concerned a disability claimant who had been denied benefits by the Secretary of Health and Human Services.⁷⁶ The district court reversed, found Adamson totally disabled, and imposed Rule 11 sanctions on the Secretary in the form of Adamson's attorneys' fees.⁷⁷ On ap-

⁷² See text accompanying notes 153-54; Charles A. Wright and Arthur Miller, *Federal Practice and Procedure* § 1336 at 117-18 (West, 2d ed 1990) (noting district courts have great discretion in fashioning a sanction, including reprimands, referral to a judicial disciplinary board, and dismissal, in addition to monetary sanctions).

⁷³ 28 USC § 2072.

⁷⁴ It is axiomatic that the courts should interpret statutory language to give effect to the expressed intent of Congress. See, for example, *Chevron v Natural Resources Council, Inc.*, 467 US 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter.").

⁷⁵ 855 F2d 668 (10th Cir 1988).

⁷⁶ *Id.* at 670.

⁷⁷ As in most Social Security cases, the Tenth Circuit's opinion speaks of applying sanctions to "the Secretary," but its EAJA argument clearly concerns the liability of the United States. See *id.* The courts use "the Secretary" as shorthand for the Department of Health and Human Services, and do not mean the Secretary in his individual capacity as a government officer.

peal, the Tenth Circuit rejected the Secretary's argument that sovereign immunity was a complete defense to monetary sanctions against the United States under Rule 11.⁷⁸

The *Adamson* court held that the EAJA effected a waiver of sovereign immunity. The court wrote: "[u]nder § 2412(b) of the EAJA, the United States is liable for attorneys' fees 'to the same extent that any other party would be liable under the common law or under the terms of *any statute* which specifically provides for such an award.'"⁷⁹ The court claimed that "[t]his section . . . would appear on its face to be sufficiently broad to waive the government's immunity from fee awards pursuant to the [federal rules]."⁸⁰ It explained that while the rules do not appear in the language of the EAJA, they are impliedly included because they have "the force of a federal statute."⁸¹

The *Adamson* court also relied heavily on the legislative history of the EAJA to support its claim that sovereign immunity did not bar an award of attorneys' fees under Rule 11. It pointed out that Congress had amended FRCP 37(f), governing discovery sanctions, to remove an exemption for the United States.⁸² Through this action, the court argued, Congress "manifested its broader intent that the United States be subject to fee sanctions under all of the federal rules to the same extent as private parties."⁸³

There are several problems with the *Adamson* court's analysis. Again, like the other theories for applying Rule 11 to the government, it fails to conform to the explicit waiver standard established by the Supreme Court. The Court's *Nordic Village* and *Ohio* decisions demonstrate that the relevant question in determining whether a statute waives sovereign immunity is not whether the statute could, or even should, reasonably be interpreted as doing so. Rather, the Court's "plausible interpretation" test inquires whether the statute could be construed as *not* waiving sovereign immunity. In the EAJA context, such an interpretation is surely plausible; the "plain language" of the EAJA does not mention the FRCP, but only states that the United States shall be liable for fees under the "common law or any . . . statute."⁸⁴

⁷⁸ Id at 671.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id, citing *Sibbach v Wilson & Co.*, 312 US 1, 13 (1941).

⁸² 855 F2d at 671, citing HR Rep No 1418, 96th Cong, 2d Sess 19 (1980).

⁸³ 855 F2d at 671.

⁸⁴ 28 USC § 2412(b).

A second, and still more damaging, objection to *Adamson* would remain even if a consensus were to emerge that the EAJA does waive sovereign immunity. The *Adamson* court simply ignored the first half of § 2412(b): "a court may award reasonable fees and expenses of attorneys . . . to the prevailing party."⁸⁵ As the *Mattingly* court pointed out, the EAJA could not possibly support Rule 11 sanctions against the United States when the government wins on the merits.⁸⁶

Therefore, while one might at least argue that the EAJA provides a waiver of sovereign immunity from Rule 11 sanctions when the government loses on the merits, it would be patently ridiculous to suppose that the EAJA waives sovereign immunity from Rule 11 as a general matter. And, since the EAJA itself authorizes attorneys' fees awards when the government loses, *Adamson's* argument that it might also be read to waive immunity to Rule 11 would be irrelevant, even if true.

Finally, the bulk of the *Adamson* court's argument supporting its interpretation of § 2412(b) was drawn from the legislative history of the EAJA. Yet under *Nordic Village*, legislative history has no bearing on the waiver issue.⁸⁷ "[T]he unequivocal expression of elimination of sovereign immunity that we insist upon is an expression in statutory text."⁸⁸

4. Policy arguments for finding a waiver.

It is impossible to avoid the conclusion that Rule 11 provides no waiver of sovereign immunity under the Supreme Court's recent jurisprudence. Nonetheless, one could imagine policy arguments which conclude this is simply the wrong result. Indeed, although the courts have not generally offered policy justifications for their decisions in this area, the implication is clear that policy concerns underlie their positions.

The policy argument would presumably be made on two levels. First, as a practical matter, Rule 11 immunity would permit the government's trial behavior to go unregulated. Second, one might worry that confining Rule 11 with the law of sovereign immunity, and thus prohibiting monetary awards, prevents innocent victims

⁸⁵ 855 F2d at 671 (emphasis added).

⁸⁶ See 939 F2d at 819.

⁸⁷ See text accompanying notes 48-49.

⁸⁸ 112 S Ct at 1016.

of impermissible government pleading practices from being made whole.⁸⁹

Fortunately, these fears are insubstantial. Monetary sanctions under Rule 11 are not the only means available to discipline the government's trial behavior. The courts can always apply non-monetary sanctions to the government under Rule 11.⁹⁰ In addition, the courts can look beyond Rule 11 and employ a variety of other methods to control the government's trial behavior.⁹¹ Finally, as Section II of this Comment demonstrates, the district courts are free to impose monetary sanctions on the government's attorneys.⁹² All of these techniques could be employed without unnecessarily contravening the settled law of sovereign immunity.

The second policy argument is no more persuasive. First, compensation generally is available to victims of governmental abuses at trial.⁹³ Second, to the limited extent that the objection is true, it fails to comprehend the very nature of sovereign immunity. A basic feature of sovereign immunity is precisely that injured parties do remain uncompensated.⁹⁴ Certainly this fact is unfortunate, often even unpalatable, and strongly supports reevaluating the policies behind sovereign immunity.⁹⁵ This, however, is a matter for Congress, not the courts. For courts to begin holding that there has been a waiver of sovereign immunity when there has not been an explicit waiver would only cause needless confusion.

⁸⁹ Ninety-six percent of all sanctions assessed under Rule 11 are attorneys' fee awards. See Nelken, 74 Georgetown L J at 1333 (cited in note 3). Nelken also summarizes the debate over the "real" purpose of Rule 11, including consideration of its possible compensatory function. *Id.* at 1323-25. See also Wright and Miller, *Federal Practice and Procedure* § 1332 at 26-29 (cited in note 72).

⁹⁰ See text accompanying note 17.

⁹¹ See text accompanying notes 143-55.

⁹² See text accompanying notes 96-142.

⁹³ The EAJA, of course, is the most obvious means by which a litigant may receive a monetary award against the government.

⁹⁴ Consider, for example, *Ardestani*, 112 S Ct 515, in which no one doubted that the plaintiff deserved to be reimbursed for her attorneys' fees.

⁹⁵ A number of commentators have urged that the doctrine be eliminated entirely, and perhaps they are correct. See David P. Currie, *Sovereign Immunity and Suits against Government Officers*, 1984 S Ct Rev 149, 168 ("Sovereign immunity is an unattractive doctrine that does not belong in an enlightened constitution. Unfortunately, however, it is a part of ours."); Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 Admin L Rev 383, 383 (1970) (arguing that sovereign immunity is both unjust and inefficient); Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich L Rev 389, 418 (1970) (condemning sovereign immunity as "illogical, confusing, and erratic").

II. APPLYING RULE 11 TO GOVERNMENT ATTORNEYS

Imposing Rule 11 sanctions against a government attorney, rather than the government itself, raises related, but analytically distinct, problems. Yet the courts seem oblivious to the distinction. Research discloses no case discussing the problems raised by the imposition of sanctions against government attorneys. Courts simply impose sanctions on the government and never reach the analysis outlined below. If, however, the courts take the Supreme Court's sovereign immunity jurisprudence seriously in the context of Rule 11, the differences in these analyses will become highly relevant. As the discussion below suggests, making appropriate distinctions between the government agency and attorney contexts would enable the courts to control the government's trial behavior by sanctioning the government's attorneys without contravening the doctrine of sovereign immunity.

A. Sovereign Immunity Implications of Applying Rule 11 to Government Attorneys in Their Individual Capacities

Analyzing whether monetary sanctions under Rule 11 may appropriately be levied against government attorneys must also begin with a look at the relevance of sovereign immunity. At first blush, it is not clear why this should be so; the name "sovereign immunity" might logically be taken to mean that the doctrine would only be relevant in suits against the sovereign itself. But, this area of the law is not so simple. Instead, the Supreme Court has determined that the doctrine of sovereign immunity means that an individual government official "sometimes . . . may be sued and sometimes . . . may not."⁹⁶

There is probably a simple explanation for this confusion. Since the government may not be sued unless it has waived its immunity, plaintiffs are motivated to search for defendants who are subject to suit whenever the state is the real object of their ire. This leads to difficult questions about whether the official really committed an actionable wrong, or whether the suit is just a clever way to get at the government.⁹⁷

⁹⁶ Currie, 1984 S Ct Rev at 149.

⁹⁷ See The National Association of Attorneys General, Committee on the Office of the Attorney General, *Sovereign Immunity: The Liability of Government and its Officials* 12 (1976) ("[T]he threshold question to be determined is whether the suit is in fact against the official in his individual capacity or against the government.").

The Supreme Court has made a number of attempts to establish criteria for sorting these two basic categories of cases. The earliest cases, for reasons that were perhaps as much political as judicial, suggested that the division could be made along simplistic, formal lines. In *Osborne v Bank of the United States*, for example, Chief Justice Marshall wrote that sovereign immunity under the Eleventh Amendment was "limited to those suits in which a State is a party on the record."⁹⁸

Not surprisingly, the Court has been obliged to expand considerably the coverage of sovereign immunity from the narrow scope suggested by Marshall in *Osborne*. In *re Ayers*,⁹⁹ the Court sharply limited a plaintiff's ability to avoid sovereign immunity by naming an official, rather than the state, as defendant. *Ayers* was an action to enjoin an officer from suing to collect taxes that had already been paid in interest coupons. The Court wrote that the action should only be permitted when the official's act entitled the plaintiff "to a remedy . . . against the wrongdoer in his individual character."¹⁰⁰

This distinction appears to draw a workable line between cases that are prohibited by sovereign immunity and those that are not. Since *Ayers*, however, the Court has pared back the coverage of sovereign immunity considerably, adding a number of circumstances in which plaintiffs may bring suit against government officials for wrongs that would appear to be those of the state itself. Perhaps most familiar is the *Ex Parte Young* fiction, permitting suits for injunctive relief to proceed against government officers even when the behavior complained of is emphatically not the personal act of the individual defendant, but really that of the state.¹⁰¹ A more recent example appeared in *Hutto v Finney*, in which the Court permitted an order for injunctive relief against state officers to include a fee award payable by the state itself.¹⁰² As Professor Currie writes, the Court has required "officers who are suable only on the theory that they are not the state to pay money that only the state has a duty to pay."¹⁰³

⁹⁸ 22 US (9 Wheat) 738, 857 (1824). Professor Currie has suggested that Marshall's opinion in *Osborne* was an attempt "to sabotage the Eleventh Amendment" and one of his "least attractive moments." Currie, 1984 S Ct Rev at 168.

⁹⁹ 123 US 443 (1887).

¹⁰⁰ Id at 502.

¹⁰¹ 209 US 123, 159-60 (1908).

¹⁰² 437 US 678, 689-93 (1978).

¹⁰³ Currie, 1984 S Ct Rev at 168.

The general outline of sovereign immunity has thus changed considerably since its initial narrow definition in *Osborne*; first it was expanded to prohibit suits against officers that are “really” suits against the state,¹⁰⁴ and then narrowed slightly to permit some suits that do appear to be against the state.¹⁰⁵ The landscape at the frontier between suits that are permitted and suits that are not thus remains hazy.

Fortunately, however, the Rule 11 scenario with which we are faced does not lie in that uncertain area. It is an easy case. For even when the reach of sovereign immunity was greatest, in *Ayers*, it clearly would not have extended to a government attorney sanctioned under Rule 11. Following the *Ayers* reasoning, the question in the Rule 11 context is whether “the act complained of, considered . . . as the personal act of the individual defendant, constituted a violation.”¹⁰⁶

The answer is a resounding yes. Imposing Rule 11 sanctions on a government attorney for a frivolous filing both serves the purposes of Rule 11 and respects the government’s sovereign immunity. It would legitimately hold government attorneys to the same standard that private attorneys face under Rule 11.¹⁰⁷ Rule 11 imposes on all individuals who sign papers filed with the court, regardless of who employs the signer, the duty to make a “reasonable inquiry [to verify that the paper] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose.”¹⁰⁸

This duty has been underscored by a recent pronouncement of the Supreme Court. The central purpose of Rule 11, the Court wrote, “is to bring home to the individual signer his personal, non-delegable responsibility [T]he court expects the signer personally . . . to validate the truth and legal reasonableness of the

¹⁰⁴ This is the logical path suggested by *Ayers*.

¹⁰⁵ This is the trend started by *Young*, and appearing more recently in cases like *Hutto* and *Quern v Jordan*, 440 US 332 (1979) (holding that a state official could be ordered to notify, on behalf of the state, members of a class denied relief by the courts that they could still seek administrative relief).

¹⁰⁶ *Ayers*, 123 US at 502.

¹⁰⁷ See also *Zimmerman v Schweiker*, 575 F Supp 1436, 1440 (E D NY 1983) (“Any ethical and procedural obligation of a private attorney to be fair to opponents and candid with the court is enforceable when the litigant is represented by an attorney for the government.”).

¹⁰⁸ FRCP 11.

papers filed" and "will visit upon him personally . . . its retribution for failing in that responsibility."¹⁰⁹

The lower courts have not been slow to incorporate this view of Rule 11 into their sanction rulings. A number have since explicitly prohibited any reimbursement by the client of a Rule 11 sanction imposed upon an attorney individually.¹¹⁰ For example, the Second Circuit in *Derechin v State University of New York* held that the district court's order forbidding the state from reimbursing its attorney for a Rule 11 sanction, despite a statute entitling the attorney to reimbursement, was not an abuse of discretion.¹¹¹ The Second Circuit explained that "allowing the sanctioned attorney to shift the burden of the sanction" would undermine the deterrence goal of the Rule and nullify the "personal responsibility" of the attorney.¹¹²

Thus, while Rule 11 includes the represented party among those who may be sanctioned, violations of Rule 11 remain emphatically the personal transgressions of signatories, including government attorneys. And, as discussed above, no view of sovereign immunity would afford government attorneys protection from sanctions for their personal wrongs.

B. Government Official Immunity

Before concluding that Rule 11 sanctions may be imposed on government attorneys, however, one must also consider whether the attorneys might be shielded by some form of immunity other than sovereign immunity. Although no court has yet addressed the argument, the claim might be made that government attorneys are immune from sanctions levied against them personally on the basis of an absolute or qualified government official immunity.

Official immunities have developed primarily in the context of

¹⁰⁹ *Pavelic & LeFlore v Marvel Entertainment Group*, 493 US 120, 126-27 (1989). See also the Advisory Committee Notes to the 1983 Rule 11 amendment, which state that the "new language is intended to reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney." The Committee also explains that "it is the attorney whose signature violates the rule." *Id.*

¹¹⁰ See *Borowski v DePuy, Inc.*, 850 F2d 297, 305 (7th Cir 1988); *Huettig & Schromm, Inc. v Landscape Contractors Council*, 582 F Supp 1519, 1522 (N D Cal 1984).

¹¹¹ 963 F2d 513, 519 (2d Cir 1992).

¹¹² *Id.*

§ 1983¹¹³ and *Bivens* suits,¹¹⁴ which afford a right of action to individuals whose “clearly established statutory or constitutional rights”¹¹⁵ have been infringed by state or local officials or by federal officials, respectively. Because § 1983 and the *Bivens* suits presented the prospect of dramatically increased liability for public officials, the Court was obliged to decide whether the traditional common-law immunities that protected public officials applied to this new class of claims. Although the language of § 1983 makes no mention of immunities,¹¹⁶ the Court, drawing on what some commentators see as questionable precedent and public policy concerns,¹¹⁷ decided that modern versions of these common law immunities should apply to both § 1983 and *Bivens* liability.¹¹⁸

The question, then, is whether a similar route should be taken in the Rule 11 context. The answer is clearly no. As the following sections demonstrate, bringing the same analytic framework that the Supreme Court employed in its § 1983 and *Bivens* inquiries to bear on the Rule 11 situation allows one to confidently conclude that no governmental immunity would be recognized in the Rule 11 context.

1. Absolute immunity.

The most complete form of government official immunity, absolute immunity, is essentially a privilege that attaches to certain government positions. “This privilege is absolute and unqualified,

¹¹³ Section 1983 provides: “Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .” 42 USC § 1983 (1988).

¹¹⁴ See *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388 (1971) (establishing the federal action analog to § 1983 actions against state and local officials).

¹¹⁵ *Harlow v Fitzgerald*, 457 US 800, 818 (1982).

¹¹⁶ See note 113.

¹¹⁷ Considerable debate surrounds the issue of whether the Court was correct to recognize immunities at all in the § 1983 arena. See generally Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L Rev 482 (1982); Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L J 447 (1978). This debate, however, is beyond the scope of the present Comment.

¹¹⁸ See, for example, *Butz v Economou*, 438 US 478, 504 (1978). See also *Burns v Reed*, 111 S Ct 1934, 1945-46 (1991) (Scalia concurring). Though Justice Scalia notes a possible distinction between the two types of suits, the Court has generally assumed that “the immunities of state officials in § 1983 actions and of federal officials in *Bivens* actions should be co-extensive.” See Paul M. Bator, et al, *Hart and Wechsler's The Federal Courts and the Federal System* 1293 (Foundation, 3d ed 1988).

even for acts done with malice or in bad faith"¹¹⁹ In this narrow range of circumstances,¹²⁰ the Court has held that the danger of withholding a remedy from a defendant genuinely wronged by a government official is outweighed by the public interest promoting the vigorous and fearless performance of her function.¹²¹ Officials to whom the Court has clearly extended this protection include judges,¹²² prosecutors,¹²³ legislators,¹²⁴ and the President.¹²⁵

Deciding whether an official benefits from absolute immunity in a § 1983 or *Bivens* action entails a two-part inquiry. First, the claimed immunity must have been well-established under the common law in analogous situations.¹²⁶ Second, its existence must be compatible with the purposes of recognizing the cause of action that gave rise to the suit in which the immunity is claimed.¹²⁷ Absolute immunity for government attorneys under Rule 11 probably fails on the first count, and certainly on the second.

There is no evidence that an equivalent immunity existed in the pre-Rule 11 world. Rule 11 consolidated elements from a number of common law pleading practices found in state codes at the time the Federal Rules of Civil Procedure were adopted, the Federal Equity Rules, and English rules under the Judicature Act.¹²⁸ Research discloses no instance in which these antecedents to Rule 11 exempted government attorneys in civil actions from punish-

¹¹⁹ See The National Association of Attorneys General, *Sovereign Immunity* at 9 (cited in note 97).

¹²⁰ See *Forrester v White*, 484 US 219, 224 (1988) (the Court has recognized qualified immunities to avoid expanding the reach of absolute immunity, and has "generally been quite sparing in its recognition of claims to absolute . . . immunity"). For more on qualified immunities, see text accompanying notes 134-42.

¹²¹ This general point has been restated endlessly by courts and commentators; for particularly influential versions, see *Imbler v Pachtman*, 424 US 409, 423 (1976) (protecting a prosecutor's "independence of judgment [as] required by his public trust"); *Gregoire v Biddle*, 177 F2d 579, 581 (2d Cir 1949) (Judge Learned Hand, unwilling to "subject those who try to do their duty to the constant dread of retaliation," set forth the classic argument for immunity.).

¹²² *Stump v Sparkman*, 435 US 349, 356-57 (1978).

¹²³ *Imbler*, 424 US at 422-23.

¹²⁴ *Tenney v Brandhove*, 341 US 367, 376-77 (1951).

¹²⁵ *Nixon v Fitzgerald*, 457 US 731, 749 (1982).

¹²⁶ See *Burns*, 111 S Ct at 1945 (Scalia concurring) (a common law tradition of immunity is a necessary, but not sufficient, condition for absolute immunity in § 1983 actions).

¹²⁷ See, for example, *Gomez v Toledo*, 446 US 635, 639 (1980) (the immunity must be consistent with the purposes of § 1983); *Tower v Glover*, 467 US 914, 920 (1984) (The Court will not recognize an immunity available at common law if § 1983's history or purpose counsel against it.). See also David Achtenberg, *Immunity Under 42 USC § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw U L Rev 497, 535-36 (1992) (key to recognizing immunity is whether it would "implement the legislative will").

¹²⁸ Wright and Miller, *Federal Practice* at 9-10 (cited in note 72).

ment for infractions, nor any in which the government even raised an immunity issue.

Moreover, absolute immunity for government attorneys under Rule 11 would simply be incompatible with the major purpose of the Rule. In substantially its current form, Rule 11 dates only from 1983; at that time Rules 11, 7, 16, and 26 were thoroughly overhauled in response to widespread concern about increasing frivolous litigation and pretrial abuses.¹²⁹ Rule 11 addressed these problems by emphasizing the need to improve attorney behavior.¹³⁰ In the words of Judge Kaufman of the Second Circuit: "Rule 11 requires that members of the bar avoid haphazard, superficial research. That requirement places the responsibility for properly invoking the power of the court on counsel as officers of the court."¹³¹

Another federal judge observed that Rule 11 was intended to reaffirm that "a lawyer's duty to his or her client cannot be permitted to override his or her duty to the justice system."¹³² Requiring attorneys to act as responsible officers of the court is a central tenet of Rule 11, and this policy applies at least as much to government attorneys as to lawyers representing private litigants.

Fortunately, unlike in the sovereign immunity context, policy matters here; no Supreme Court precedents analogous to the sovereign immunity waiver cases exist to prevent courts from giving effect to the apparent intent of Congress.¹³³

2. Qualified immunity.

The Court has been wary of the problems extending absolute immunity too far would pose, recognizing that "[w]hen government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication'" of individual rights.¹³⁴ At the same time, however, the Court has accepted that the "fear of

¹²⁹ *Id.* at 12.

¹³⁰ *Id.* at 19.

¹³¹ *International Shipping Company v Hydra Offshore, Inc.*, 875 F2d 388, 393 (2d Cir 1989).

¹³² *In re Ronco, Inc.*, 105 FRD 493, 497 (N D Ill 1985).

¹³³ In one absolute immunity case, the Supreme Court observed: "[O]ur cases have followed a 'functional' approach to immunity law"; they are only granted when they are necessary to enable an officer to perform her government function. *Harlow v Fitzgerald*, 457 US 800, 810 (1982). This is in stark contrast to the extremely formalistic approach to sovereign immunity issues described in Section I.

¹³⁴ *Anderson v Creighton*, 483 US 635, 638 (1987), citing *Harlow*, 457 US at 814.

personal monetary liability and harassing litigation" may "inhibit officials in the discharge of their duties."¹³⁵

The Court has therefore recognized a category of "qualified" immunities that avoids extending the scope of traditional absolute immunity unnecessarily, while shielding from liability those government officials whose behavior could reasonably have been thought consistent with the plaintiff's rights.¹³⁶ Examining the Court's test for finding such a limited immunity, however, shows that qualified immunity would never be recognized in the Rule 11 context.

The landmark case of *Harlow v Fitzgerald*¹³⁷ laid down the basic elements of the current qualified immunity standard. The *Harlow* court first acknowledged that its earlier decisions had generally required government officials only to meet a "good faith" standard to benefit from a qualified immunity defense.¹³⁸ The Court stated, however, that the "substantial costs [that] attend the litigation of the subjective good faith of government officials" justified a move to an objective standard.¹³⁹ Therefore, the Court held, limited immunity would henceforth be available only to officials whose actions did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹⁴⁰

Later cases have confirmed that the *Harlow* standard of objective reasonableness is the key to attaining qualified immunity.¹⁴¹ For this reason, a qualified immunity to Rule 11 sanctions would be nonsensical. If an attorney conducts a "reasonable" inquiry before filing papers with the court, she will not be subject to Rule 11 sanctions. And if she does not act reasonably in the Rule 11 context, it seems unlikely that her behavior could be "reasonable" for the purpose of attaining a qualified immunity. In other words,

¹³⁵ *Anderson*, 483 US at 638.

¹³⁶ See *id.* at 638-39. See also Note, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 Cornell L Rev 462, 470 (1990).

¹³⁷ 457 US 800 (1982).

¹³⁸ *Id.* at 815. *Harlow* was not a § 1983 action, but an action under the Constitution; however, Court decisions have established that "there is no difference between liability . . . under § 1983 and liability of federal officers under the Constitution." Paul T. Hardy and J. Devereux Weeks, *Personal Liability of Public Officials* 7 (Georgia, 4th ed 1988). See also *Butz v Economou*, 438 US 478, 504 (1978).

¹³⁹ 457 US at 816.

¹⁴⁰ *Id.* at 818.

¹⁴¹ See, for example, *Anderson v Creighton*, 483 US 635, 641-42 n 3 (1987) ("Our holding today does not extend official qualified immunity beyond the bounds articulated in *Harlow* . . .").

reading *Harlow* and Rule 11 together, an attorney who did not satisfy Rule 11's reasonableness standard probably would not satisfy *Harlow's*, either.¹⁴²

In short, government attorneys whose conduct would subject them to Rule 11 sanctions are not shielded from those sanctions either by the doctrine of sovereign immunity, or by any form of official immunity. Therefore, although the courts may not legally impose Rule 11 sanctions on the government itself, they may sanction the government's attorneys individually.

III. CONTROLLING THE TRIAL BEHAVIOR OF GOVERNMENT ATTORNEYS WITHIN THE LAW OF SOVEREIGN IMMUNITY

The district courts possess significant safeguards to control the government's trial behavior while remaining within the law as it is outlined in the preceding Sections. First, as this Comment has argued, the most potent tool that the courts have to control the government's trial conduct may be Rule 11 sanctions levied against government attorneys personally. This would both further the purposes of Rule 11 itself, and allow the court to retain considerable leverage over government litigants. It would also avoid the sovereign immunity quandary discussed in Section I.

Of course, in some cases, the government's attorneys may not be responsible for the sanctionable behavior. It may be members of the represented agency or department who have misbehaved.¹⁴³ In these cases, one could argue it would hardly be fair to visit the sins of the bureaucracy upon its attorneys.

But, as discussed in Section II, Rule 11 holds attorneys personally responsible for the contents of filings that they sign; they are to make a "reasonable inquiry" into the factual and legal foundations of all papers filed, and no special exceptions are made for situations in which sanctionable behavior is ordered by a client.¹⁴⁴ Nor are special exceptions made when government "clients" require attorneys to file unreasonable motions. As Judge Weinstein wrote in *Zimmerman*, if the ordered conduct appears to violate Rule 11, the government attorney simply should not act, or she will

¹⁴² Note, however, that the argument that "reasonable" may mean different things in the qualified immunity and Rule 11 contexts may not be a frivolous one. In *Anderson v Creighton*, the Court wrote that "reasonable" in the Fourth Amendment context and "reasonable" in the *Harlow* sense are not synonymous. 635 US at 643-44.

¹⁴³ *Johnson v Secretary*, 587 F Supp 1117 (D DC 1984), would appear to be such a case. For a discussion of *Johnson*, see text accompanying notes 149-51.

¹⁴⁴ See text accompanying notes 107-12.

be subject to sanctions under Rule 11.¹⁴⁵ Personal responsibility of the attorney is the very heart of Rule 11.¹⁴⁶

Nevertheless, if one were convinced that it would be "unfair" to hold a government attorney to the standard clearly dictated by Rule 11, the court would remain free to impose non-monetary sanctions under Rule 11 on the government itself. Nor are non-monetary sanctions under Rule 11 a novel idea: the Rule leaves the fashioning of an "appropriate sanction" to the trial court,¹⁴⁷ and a variety of non-monetary punishments have been imposed.¹⁴⁸ Indeed, some courts have already employed this tactic against the government.

Consider, for example, *Johnson v Secretary*, which presented a case of government agency misconduct. The court wrote that it did not wish to "attack . . . the United States Attorney assigned to this case."¹⁴⁹ Instead, it believed that the "egregious conduct" of the defendant was the fault of the "vast bureaucracy of the Department of Health and Human Services."¹⁵⁰ Therefore, invoking its Rule 11 powers, the court chose to sanction the Department by taking a number of disputed facts as established adversely to the government.¹⁵¹ This sanction surely had a deterrent effect on the government. At the same time, it avoided both the sovereign immunity issue and the possible "unfairness" of sanctioning the attorney, while still compensating the plaintiff.

In a similar vein, one could imagine extending the reasoning of *Johnson* even to judgment against the government. Although this sanction has never been employed against the government under Rule 11 in any reported case, it has been applied to private litigants and is theoretically available.¹⁵² Even if rarely utilized, the

¹⁴⁵ See note 107.

¹⁴⁶ See text accompanying notes 107-12.

¹⁴⁷ FRCP 11. The Advisory Committee Notes also state that the court "has discretion to tailor sanctions to the particular facts of the case."

¹⁴⁸ The courts' power to "fashion an appropriate sanction" is not an empty formula; their sanctions have included "issuing cautions or reprimands, requiring the circulation of the court's Rule 11 opinion . . . , referral to a bar association grievance committee or judicial disciplinary board, and suspension or disbarment from practice." See Wright and Miller, *Federal Practice* at 117 (cited in note 72).

¹⁴⁹ 587 F Supp 1117, 1121-22 (D DC 1984).

¹⁵⁰ *Id* at 1122.

¹⁵¹ *Id* at 1121. Unfortunately, the court did not explain why it chose this particular form of sanction. Perhaps it was concerned about the sovereign immunity implications of fining the government.

¹⁵² See Wright and Miller, *Federal Practice* at 117. Note, however, that while a majority of courts appear to believe that this is an appropriate sanction under Rule 11, some disagreement remains. *Id* at 117 n 92.

shadow of this severe sanction could be a potent deterrent to governmental violations of Rule 11. In short, non-monetary Rule 11 sanctions will leave courts with considerable influence over the government itself, while respecting the limitations imposed by the doctrine of sovereign immunity.

Finally, a number of non-Rule 11 methods of controlling the government's trial behavior are also open to the courts. Several prominent commentators have argued that Rule 11 was entirely redundant because it did not grant district courts any powers that they did not already have.¹⁵³ Surely, the courts' civil contempt power and extensive inherent powers give them additional leverage over government litigants.¹⁵⁴

It appears, then, that a two-tiered system of Rule 11 sanctions that incorporates monetary sanctions against government attorneys and non-monetary sanctions against the government itself, would leave the courts ample control over the government's trial conduct. Indeed, the only "problem" with this system, compared to the present practice in which courts apply monetary sanctions against the government itself, may be an occasional failure to compensate opposing litigants who have been harmed by the government's sanctionable behavior.

But as argued in Section II, this objection simply proves too much. The fact that sovereign immunity leaves victims of government misconduct uncompensated in the Rule 11 context is simply a truism: sovereign immunity leaves victims uncompensated by its very nature. Furthermore, Rule 11 was not intended to be a make-

¹⁵³ See Charles Schaffer, *Sanctions: Rule 11 and Other Powers* 16 (Schaffer & Sandler, 2d ed 1988); Charles A. Wright, letter to John B. Frank and Judge Mary M. Schroeder, quoted in Jeffrey A. Parness, *Groundless Pleadings and Certifying Attorneys in the Federal Courts*, 1985 Utah L Rev 325, 325 n 1 ("[N]othing [in new Rule 11] . . . authorizes courts to do things that they are not able to do and doing [or] . . . require[s] judges who do not want to do these things to do so.").

¹⁵⁴ Of course, 28 USC § 1927 and proceedings for violations of ethical norms might also give the courts greater control over the behavior of government litigants; the problem, of course, is that they are both directed against the government's attorneys, not the government itself. And, as Section II of this Comment argues, the government's attorneys are, in any case, subject to Rule 11.

Note also that punitive sanctions awarded for civil contempt or under the statute might be subject to the same sovereign immunity objections that exist in the Rule 11 context. See *In re Newlin*, 29 Bankr 781, 786-87 (E D Pa 1983) (upholding a fee award, but not a contempt sanction, against IRS); *Barry v Bowen*, 884 F2d 442, 443 (9th Cir 1989) (invalidating a fee award and stating "[nothing] suggests that the United States expressly has waived its sovereign immunity with respect to contempt sanctions"). See also *McBride v Coleman*, 955 F2d 571, 576-77 (8th Cir 1992) (expressing "grave doubts" that the contempt power may be used to award damages against the United States).

whole remedy. Instead, the Court has repeatedly stressed that “[t]he main objective of the Rule is not to reward parties . . . it is to deter baseless filings and curb abuses.”¹⁵⁵

CONCLUSION

The position taken by this Comment—that the government enjoys sovereign immunity from monetary sanctions under Rule 11—is uncomfortable, and almost sure to be unpopular. Certainly the federal courts have not been receptive to it. At the same time, however, this view best accords with the recent sovereign immunity jurisprudence of the Supreme Court. There can be little doubt that Rule 11 may “plausibly” be interpreted as not waiving the government’s immunity, and therefore no waiver should be recognized.

Still, current law permits a solution which protects against abuses by governmental actors in litigation while respecting the Supreme Court’s sovereign immunity jurisprudence. The courts may maintain control over the government’s trial behavior through means legitimately at their disposal, including sanctions on government attorneys individually and non-monetary sanctions levied against the government itself.

¹⁵⁵ *Business Guides, Inc. v Chromatic Communications Enterprises, Inc.*, 111 S Ct 922, 934 (1991); see also *Pavelic & LeFlore v Marvel Entertainment Group*, 493 US 120, 126 (1989) (“[T]he purpose of [Rule 11] . . . is not reimbursement but ‘sanction.’”).