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Michael J. McNamara

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JUDICIAL DISCRETION AND THE 1976 CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT: WHAT SPECIAL CIRCUMSTANCES RENDER AN AWARD UNJUST?

INTRODUCTION

In 1976, Congress enacted the Civil Rights Attorney's Fees Awards Act (Awards Act).¹ The Awards Act, which was designed to encourage the private enforcement of civil rights,² provides that courts "in [their] discretion, may allow the prevailing party . . . a reasonable attorney's fee"³ as part of his total recovery when an action is brought under one of the covered statutes.⁴

A major problem in the implementation of the Awards Act has been the discretionary nature of the fee awards. The legislative history indicates that Congress intended that prevailing plaintiffs⁵ "should

1. Pub. L. No. 94-559, § 2, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1976 & Supp. IV 1980)).

2. S. Rep. No. 1011, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5909-10 [hereinafter cited as Senate Report]; H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) [hereinafter cited as House Report]; *see* *Staten v. Housing Auth.*, 638 F.2d 599, 601 (3d Cir. 1980); *Coop v. City of South Bend*, 635 F.2d 652, 655 (7th Cir. 1980); *Sargeant v. Sharp*, 579 F.2d 645, 648 (1st Cir. 1978); *Shadis v. Beal*, 520 F. Supp. 858, 863 (E.D. Pa. 1981); *Skoda v. Fontani*, 519 F. Supp. 309, 310 (N.D. Ill. 1981); *Witherspoon v. Sielaff*, 507 F. Supp. 667, 669 (N.D. Ill. 1981).

3. 42 U.S.C. § 1988 (1976 & Supp. IV 1980).

4. The Awards Act permits recovery of attorney's fees "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.] or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.]" 42 U.S.C. § 1988 (1976 & Supp. IV 1980). Section 1981 guarantees equal rights under the law to all persons; § 1982 guarantees equal property rights to all citizens; § 1983 permits a civil action for any deprivation of rights under color of state law; § 1985 permits a civil action against conspirators who interfere with an individual's civil rights; § 1986 permits a civil action against any person who fails to enforce § 1985; §§ 2000d through 2000d-6 prohibit discrimination in federally funded programs based on race, color or national origin; and 20 U.S.C. §§ 1681-1686 (1976) prohibit discrimination in federally funded programs based on sex or blindness.

5. To ensure that plaintiffs would not be dissuaded from bringing meritorious claims for fear of paying their opponent's legal fees if unsuccessful, Congress directed that a dual standard should apply to fee requests by prevailing plaintiffs and defendants. Plaintiffs would recover fees unless special circumstances rendered the award unjust; defendants, however, could recover only if they could show that the suit was clearly frivolous, vexatious or brought for harassment purposes. Senate Report, *supra* note 2, at 4-5, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5912; House Report, *supra* note 2, at 6-7; *see* *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1980); *Crawford v. Western Elec. Co.*, 614 F.2d 1300, 1321 (5th Cir. 1980); *Lopez v. Arkansas County Indep. School Dist.*, 570 F.2d 541, 545 (5th Cir. 1978); *Unemployed Workers Org. Comm. v. Batterton*, 477 F. Supp. 509, 512 (D. Md. 1979);

ordinarily recover an attorney's fee unless *special circumstances* would render such an award unjust."⁶ This test creates a presumption in favor of fee awards.⁷ Federal courts, however, have not uniformly adhered to the special circumstances standard; even among those that have, there has been no consensus as to what constitutes special circumstances.

Some courts have suggested that this standard may not apply when a plaintiff seeks monetary damages in addition to injunctive relief.⁸ This approach, the so-called bright-prospects test,⁹ calls for an estimation of the plaintiff's chances of recovery at the outset of the litigation: If the likelihood of recovery is strong enough to attract competent counsel, fee awards may be unnecessary.¹⁰ Other courts have maintained that the Awards Act was intended to reimburse only those parties who benefit the public and promote important public policies, and that plaintiffs who do not fit this description are not entitled to fees.¹¹ Still others contend that special circumstances can be deter-

Wainwright v. Allen, 461 F. Supp. 293, 299 (D.N.D. 1978). *But see* Baker v. City of Detroit, 504 F. Supp. 841, 850-51 (E.D. Mich. 1980) (in the unique situation in which intervenor-defendants vindicate their rights, their procedural posture as defendants should not deprive them of fee consideration under the more liberal standard for plaintiffs).

6. Senate Report, *supra* note 2, at 4, reprinted in 1976 U.S. Code Cong. & Ad. News at 5912 (quoting Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968) (per curiam) (emphasis added)); House Report, *supra* note 2, at 6 (same); *see* Ellwest Stereo Theatre, Inc. v. Jackson, 653 F.2d 954, 955 (5th Cir. 1981); Busche v. Burkee, 649 F.2d 509, 521 (7th Cir.), *cert. denied*, 102 S. Ct. 396 (1981); Leeds v. Watson, 630 F.2d 674, 677 (9th Cir. 1980); Bills v. Hodges, 628 F.2d 844, 847 (4th Cir. 1980); Riddell v. National Democratic Party, 624 F.2d 539, 543 (5th Cir. 1980); Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127, 129-30 (10th Cir. 1980); David v. Travisono, 621 F.2d 464, 468 (1st Cir. 1980); Williams v. Miller, 620 F.2d 199, 202 (8th Cir. 1980); Northcross v. Board of Educ., 611 F.2d 624, 633 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); Skehan v. Board of Trustees, 590 F.2d 470, 496 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979); Mid-Hudson Legal Servs., Inc. v. G & U, Inc., 578 F.2d 34, 37-38 (2d Cir. 1978).

7. Zarcone v. Perry, 581 F.2d 1039, 1042 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); Imprisoned Citizens Union v. Shapp, 473 F. Supp. 1017, 1020 (E.D. Pa. 1979). The burden of showing special circumstances rests on the losing defendant. Williams v. Miller, 620 F.2d 199, 202 (8th Cir. 1980); Mid-Hudson Legal Servs., Inc. v. G & U, Inc., 578 F.2d 34, 38 (2d Cir. 1978); Loney v. Scurr, 494 F. Supp. 928, 929 (S.D. Iowa 1980).

8. Zarcone v. Perry, 581 F.2d 1039, 1044 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *accord* Buxton v. Patel, 595 F.2d 1182, 1184-85 (9th Cir. 1979). *Contra* Sargeant v. Sharp, 579 F.2d 645, 647-49 (1st Cir. 1978).

9. The phrase "bright-prospects" was coined by a student author. *See* Note, *Attorney's Fees in Damage Actions Under the Civil Rights Attorney's Fees Awards Act of 1976*, 47 U. Chi. L. Rev. 332, 338 (1980) [hereinafter cited as *Attorney's Fees in Damage Actions*].

10. Zarcone v. Perry, 581 F.2d 1039, 1044 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *accord* Buxton v. Patel, 595 F.2d 1182, 1184-85 (9th Cir. 1979).

11. *See* Martin v. Hancock, 466 F. Supp. 454, 456 (D. Minn. 1979); Naprstek v. City of Norwich, 433 F. Supp. 1369, 1370 (N.D.N.Y. 1977).

mined only by viewing all of the factors involved in a litigation.¹² This approach is characterized by a presumption in favor of fee awards that can only be rebutted by the existence of several factors which, when combined, render an award unjust.¹³

This Note contends that Congress intended that the special circumstances test was to be applied in every action arising under one of the covered statutes. Approaches that suggest that the special circumstances test may be inapplicable in certain cases are not following the guidelines set by Congress. In view of the legislative intent to promote the vindication of civil rights by private plaintiffs, this Note argues that any approach permitting fee denials on narrow policy grounds is inadequate. Fee awards should never be denied unless the totality of circumstances indicates that an award is unjustified.

I. BACKGROUND OF THE AWARDS ACT AND CONGRESSIONAL PURPOSE

During the past two decades Congress has enacted various laws that include provisions to shift the burden of attorney's fees onto the losing party in litigation.¹⁴ This approach was designed primarily to encourage the enforcement of laws that were deemed of special importance by the legislature and which governmental agencies, strapped by a lack of manpower and resources, were unable to enforce.¹⁵ Federal courts recognized the underlying policies that Congress was attempting to advance and began to exercise their equitable powers¹⁶ to award fees to private attorneys general even in the absence of statu-

12. *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979), *cert. denied*, 102 S. Ct. 1476 (1982); *see Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976) (title VII action).

13. *See Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979), *cert. denied*, 102 S. Ct. 1476 (1982); *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976) (title VII action).

14. *See, e.g.*, 15 U.S.C. § 1117 (1976) (trademark infringement); 33 U.S.C. § 1365(d) (1976) (environmental protection); 42 U.S.C. § 2000e-5(k) (1976) (employment discrimination). Currently more than 100 laws include fee-shifting provisions. *See* 5 Fed. Att'y Fee Awards Rep. 2-3 (June 1982).

15. Congress recognized that federal agencies were not equipped to deal with the numerous civil rights violations that occur regularly. *See* House Report, *supra* note 2, at 1. Laws that encourage private actions are the most satisfactory alternative to public enforcement. *See* Senate Report, *supra* note 2, at 3-5, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5910-12.

16. The Supreme Court recognized that courts possess the inherent power to shift the burden of attorney's fees to the losing party in certain limited situations. Essentially, fee-shifting is permitted on equitable grounds, when a suit is brought in bad faith, *F.D. Rich Co. v. Industial Lumber Co.*, 417 U.S. 116, 129 (1974), when a party willfully disobeys a court order, *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426-28 (1923), or when a party brings a suit that provides a common fund or benefit. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970) (common

tory authorization.¹⁷ Under this exception to the American rule, which prohibits attorney's fee awards,¹⁸ parties who benefited their class and effectuated a strong congressional policy were permitted to recover attorney's fees as part of their remedy.¹⁹

The practice of rewarding private attorneys general was particularly important to civil rights litigants. Frequently, parties whose fundamental rights had been violated would otherwise be financially unable to bring suit. This exception encouraged attorneys to act on their behalf with an expectation of fee awards if the suit were successful.²⁰ Moreover, the exception filled a large gap in civil rights laws. Although legislation enacted during the 1960's usually contained fee-shifting provisions, the Reconstruction Acts,²¹ passed after the Civil War, did not.²² Consequently, many fundamental rights protected by

benefit exception); *Trustees v. Greenough*, 105 U.S. 527, 536 (1882) (common fund exception). See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-60 (1975).

17. *Taylor v. Perini*, 503 F.2d 899, 905 (6th Cir. 1974), *vacated and remanded*, 421 U.S. 982 (1975); *Fowler v. Schwarzwalder*, 498 F.2d 143, 144 (8th Cir. 1974); *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1029-30 (D.C. Cir. 1974), *rev'd sub nom.* *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Brandenburger v. Thompson*, 494 F.2d 885, 888 (9th Cir. 1974); *Cole v. Hall*, 462 F.2d 777, 779-81 (2d Cir. 1972), *aff'd on other grounds*, 412 U.S. 1 (1973); *Knight v. Auciello*, 453 F.2d 852, 853 (1st Cir. 1972) (per curiam); *Lee v. Southern Homes Site Corp.*, 444 F.2d 143, 145-48 (5th Cir. 1971). *Contra* *Bradley v. School Bd.*, 472 F.2d 318, 327-31 (4th Cir. 1972), *vacated and remanded on other grounds*, 416 U.S. 696 (1974).

18. The traditional American rule requires that each party pay his own legal fees regardless of who is victorious. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-50 (1975). See *supra* note 16 and accompanying text.

19. *Sims v. Amos*, 340 F. Supp. 691, 694 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972). See *supra* note 17 and accompanying text.

20. The precipitous decline in the number of civil rights suits after *Alyeska* attests to the need for fee-shifting to attract attorneys to represent plaintiffs in civil rights actions. The severe hardships caused by this decline were a principal motivating factor in the enactment of the Awards Act. See House Report, *supra* note 2, at 2-3; Council For Public Interest Law, *Balancing the Scales of Justice: Financing Public Interest Law in America* 312, 314-20 (1976) [hereinafter cited as *Balancing the Scales*].

21. During the Reconstruction period, Congress enacted a variety of laws to ensure that newly enfranchised blacks would receive the same fundamental rights as whites. See 42 U.S.C. §§ 1981-1986 (1976 & Supp. III 1979). For a full description of the fundamental rights protected by these statutes, see *supra* note 4.

22. The Senate Report pointed out some of the anomalies created by the decision in *Alyeska*:

[After *Alyeska*] fees are now authorized in an employment discrimination suit under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. § 1982, a

the earlier civil rights acts would have been virtually unenforceable by private citizens if courts did not permit fee-shifting.²³

The private attorney general exception was rejected in *Alyeska Pipeline Service Co. v. Wilderness Society*.²⁴ In *Alyeska*, the Supreme Court reversed an award of fees that had been made to the respondents under the private attorney general exception.²⁵ The Court held that federal courts do not have the inherent authority to carve out equitable exceptions to the American rule, except in a few well-recognized areas,²⁶ without express statutory approval by Congress.²⁷ Although *Alyeska* involved an environmental rights issue, the Court made clear its disapproval of the private attorney general concept in civil rights cases as well.²⁸

The immediate consequences of *Alyeska* were a large gap in the civil rights laws²⁹ and a sharp reduction in the number of actions waged.³⁰ In response, Congress moved swiftly to "remedy anomalous gaps [in order] to achieve consistency in our civil rights laws."³¹

The Awards Act was thus designed "to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts"³² because "[a]ll of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain."³³

Reconstruction Act protecting the same rights. Likewise, fees are allowed in a suit under Title II of the 1964 Civil Rights Act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. § 1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws.

Senate Report, *supra* note 2, at 4, *reprinted in* 1976 U.S. Code & Cong. Ad. News at 5911.

23. See Senate Report, *supra* note 2, at 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5913; House Report, *supra* note 2, at 1.

24. 421 U.S. 240 (1975).

25. *Id.* at 241.

26. In *Alyeska*, the Court recognized that the judiciary could employ its equitable powers to award fees when a common fund or benefit is created by the litigation, when the defendants act in bad faith or when a party willfully disobeys a court order. *Id.* at 257-60. See *supra* notes 16, 18 and accompanying text.

27. 421 U.S. at 269.

28. *Id.* at 270 n.46.

29. See *supra* note 22 and accompanying text.

30. See House Report, *supra* note 2, at 2-3; Balancing the Scales, *supra* note 20, at 314-18.

31. Senate Report, *supra* note 2, at 1, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5909.

32. *Id.* at 2, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5909-10.

33. *Id.*, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5910.

The Awards Act specifically grants courts the authority to award fees "in [their] discretion."³⁴ Neither the Awards Act nor its accompanying legislative history, however, clearly defines guidelines that should inform this discretion. The legislative history indicates that the appropriate standard in considering fee requests under the Awards Act should be the same as under the 1964 Civil Rights Act.³⁵ As formulated by the Supreme Court in *Newman v. Piggie Park Enterprises*,³⁶ this test provides that a successful party seeking to enforce his rights under the covered statutes "should ordinarily recover an attorney's fee unless *special circumstances* would render such an award unjust."³⁷ The presumption under the *Newman* standard is that fees will be awarded in all but the most unusual circumstances.³⁸

Unfortunately, neither Congress nor the Supreme Court has indicated specifically what constitutes special circumstances,³⁹ although the legislative history provides some guidance. The Awards Act is not a "startling new remedy,"⁴⁰ but rather is intended to permit the continuation of case-law development in providing fees to meritorious plaintiffs. Thus, decisions prior to *Alyeska* are instructive in understanding the Awards Act.⁴¹ Also, courts should "use the broadest and most effective remedies available to achieve the goals of our civil rights laws."⁴² The Awards Act, therefore, is intended to be construed liberally to promote the vindication of civil rights.⁴³ In this respect,

34. Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976 & Supp. IV 1980).

35. Senate Report, *supra* note 2, at 4, reprinted in 1976 U.S. Code Cong. & Ad. News at 5912.

36. 390 U.S. 400 (1968) (per curiam).

37. *Id.* at 402 (per curiam) (emphasis added). See *supra* note 6.

38. See *supra* note 7 and accompanying text.

39. The Supreme Court has indicated its concept of injustice, however, by identifying three factors to consider: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Bradley v. School Bd.*, 416 U.S. 696, 717 (1974). Some courts have suggested that this language is important in determining whether special circumstances exist that would render an award unjust. See *Northcross v. Board of Educ.*, 611 F.2d 624, 634 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Wilson v. Chancellor*, 425 F. Supp. 1227, 1230 (D. Or. 1977). The approach has, however, received little attention from the courts.

40. Senate Report, *supra* note 2, at 6, reprinted in 1976 U.S. Code Cong. & Ad. News at 5913.

41. See *id.* at 3-6, reprinted in 1976 U.S. Code Cong. & Ad. News at 5910-13; House Report, *supra* note 2, at 2.

42. Senate Report, *supra* note 2, at 3, reprinted in 1976 U.S. Code Cong. & Ad. News at 5910-11 (footnote omitted).

43. See *Collins v. Chandler Unified School Dist.*, 644 F.2d 759, 763-64 (9th Cir.), *cert. denied*, 102 S. Ct. 322 (1981); *Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980); *Mid-Hudson Legal Servs., Inc. v. G & U, Inc.*, 578 F.2d 34, 37 (2d Cir. 1978); *Baker v. City of Detroit*, 504 F. Supp. 841, 850 (E.D. Mich. 1980); *Sharrock v. Harris*, 489 F. Supp. 913, 915 (S.D.N.Y. 1980).

fees may be awarded during the course of litigation,⁴⁴ when a party succeeds on an important matter but not on all the issues,⁴⁵ and when rights are vindicated by a consent decree or without obtaining formal relief.⁴⁶ Nonetheless, the Awards Act implicitly indicates that fee-shifting may sometimes be undesirable; in fact, mandatory fee awards were considered and rejected by Congress in favor of discretionary fee awards.⁴⁷ Thus, courts must determine when special circumstances render an award unjust.

II. VARIOUS APPROACHES TO JUDICIAL DISCRETION UNDER THE AWARDS ACT

Although the obvious factual differences from case to case make it difficult to establish a uniform approach to fee requests, some courts

44. Senate Report, *supra* note 2, at 5, reprinted in 1976 U.S. Code Cong. & Ad. News at 5912; House Report, *supra* note 2, at 8; see *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (per curiam); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 339 (5th Cir. 1981); *Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980), *cert. denied*, 450 U.S. 1012 (1981); *Westfall v. Board of Comm'rs*, 477 F. Supp. 862, 868 (N.D. Ga. 1979). *But see* *Planned Parenthood v. Citizens For Community Action*, 558 F.2d 861, 871 (8th Cir. 1977) ("At this embryonic stage of the litigation, it would be inequitable to shackle these officials with a sizable award of attorney's fees."). See generally Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 Colum. L. Rev. 346, 359 (1980) [hereinafter cited as *Promoting the Vindication of Civil Rights*].

45. Senate Report, *supra* note 2, at 5, reprinted in 1976 U.S. Code Cong. & Ad. News at 5912; see *Reel v. Arkansas Dep't of Correction*, 672 F.2d 693, 697 (8th Cir. 1982); *Fernandes v. Limmer*, 663 F.2d 619, 637 (5th Cir. 1981); *Busche v. Burkee*, 649 F.2d 509, 521 (7th Cir.), *cert. denied*, 102 S. Ct. 396 (1981); *Iranian Students Ass'n v. Edwards*, 604 F.2d 352, 353 (5th Cir. 1979); *Sethy v. Alameda County Water Dist.*, 602 F.2d 894, 897-98 (9th Cir. 1979) (per curiam), *cert. denied*, 444 U.S. 1046 (1980); *Lund v. Affleck*, 587 F.2d 75, 76-77 (1st Cir. 1978); *Espinoza v. Hillwood Square Mut. Ass'n*, 532 F. Supp. 440, 443-44 (E.D. Va. 1982); *Wattleton v. Ladish Co.*, 520 F. Supp. 1329, 1350 (E.D. Wis. 1981). Permitting fee denials when a party wins on less than all his claims has been criticized as adding to court congestion insofar as the plaintiff has no real incentive to limit his case. See *Promoting the Vindication of Civil Rights*, *supra* note 44, at 355.

46. Senate Report, *supra* note 2, at 5, reprinted in 1976 U.S. Code Cong. & Ad. News at 5912; House Report, *supra* note 2, at 7; see *Maher v. Gagne*, 448 U.S. 122, 129 (1980); *Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1980) (per curiam); *Harrington v. DeVito*, 656 F.2d 264, 266 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1621 (1982); *Williams v. Alioto*, 625 F.2d 845, 848 (9th Cir. 1980), *cert. denied*, 450 U.S. 1012 (1981); *Iranian Students Ass'n v. Edwards*, 604 F.2d 352, 353 (5th Cir. 1979); *Nadeau v. Helgemoe*, 581 F.2d 275, 280 (1st Cir. 1978); *Ross v. Saltmarsh*, 521 F. Supp. 753, 756 (S.D.N.Y. 1981); *Connor v. Winter*, 519 F. Supp. 1337, 1339 (S.D. Miss. 1981); *Cleary v. Blum*, 507 F. Supp. 514, 517 (S.D.N.Y. 1981).

47. At the time of subcommittee hearings on the legislation, three bills concerning counsel fees were proposed. One of these, H.R. 7828, provided for mandatory fee awards. This version of the bill was rejected in favor of the current version which provides for discretionary fee awards. See House Report, *supra* note 2, at 3.

have asserted general principles for fee request determination.⁴⁸ Each of these approaches reflects a somewhat different understanding of the purposes of the Awards Act.

48. Certain cases in which fee awards were denied to prevailing plaintiffs involve fact patterns that are so idiosyncratic as to be of negligible value as general principles under special circumstances analysis. In short, fees have been denied when the plaintiff's conduct was egregious, *Scheriff v. Beck*, 452 F. Supp. 1254, 1260 (D. Colo. 1978) (plaintiff engaged in a deliberate scheme to entrap the defendant in litigation), when the plaintiff's counsel was incompetent, *Bacica v. Board of Educ.*, 451 F. Supp. 882, 889 (W.D. Pa. 1978) (plaintiff's counsel failed to marshal evidence and make a clear presentation of controlling facts), and when counsel made excessive fee requests. *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980) (counsel submitted grossly inflated fee requests including requests for time volunteered by law students).

Although these cases are not treated at length in this Note, the narrow-based approach taken in each of them is not commended. In general, fee requests should be carefully scrutinized and awards should be denied only when the totality of circumstances renders an award unjust. See *infra* pt. II(C). Moreover, the conduct of counsel should never be a consideration. Even though counsel is normally the direct beneficiary of fee awards, the Awards Act does not speak of attorneys, but rather of "prevailing parties." 42 U.S.C. § 1988 (1976 & Supp. IV 1980). Courts possess sufficient weapons to punish counsel in appropriate instances; the Awards Act was not intended to supplement the courts' contempt powers. The quality of counsel's presentation more properly goes to the determination of the size of the award rather than to the threshold question of entitlement. See Senate Report, *supra* note 2, at 6, reprinted in 1976 U.S. Code Cong. & Ad. News at 5913; House Report, *supra* note 2, at 8.

Courts consistently have held that certain categories of cases are not covered by the Awards Act. For example, plaintiffs who litigate their claims without the benefit of counsel, so-called *pro se* litigants, have consistently been denied fee awards. *Wright v. Crowell*, 674 F.2d 521, 522 (6th Cir. 1982) (per curiam); *Cofield v. City of Atlanta*, 648 F.2d 986, 987-88 (5th Cir. 1981); *Lovell v. Snow*, 637 F.2d 170, 171 (1st Cir. 1981); *Davis v. Parratt*, 608 F.2d 717, 718 (8th Cir. 1979) (per curiam); *Owens-El v. Robinson*, 498 F. Supp. 877, 880 (W.D. Pa. 1980); *Rheuark v. Shaw*, 477 F. Supp. 897, 928-29 (N.D. Tex. 1979), *aff'd*, 628 F.2d 297 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981); *cf.* *Grooms v. Snyder*, 474 F. Supp. 380, 384 (N.D. Ind. 1979) (lay advisor is not entitled to fee awards under the Awards Act). The rationale commonly advanced for this position is that the Awards Act was intended to remove barriers to obtaining an attorney; therefore, a fee request requires an attorney-client relationship. See *Cofield v. City of Atlanta*, 648 F.2d 986, 988 (5th Cir. 1981); *Lovell v. Snow*, 637 F.2d 170, 171 (1st Cir. 1981); *Davis v. Parratt*, 608 F.2d 717, 718 (8th Cir. 1979) (per curiam); *Owens-El v. Robinson*, 498 F. Supp. 877, 879-80 (W.D. Pa. 1980); *Rheuark v. Shaw*, 477 F. Supp. 897, 928-29 (N.D. Tex. 1979), *aff'd*, 628 F.2d 297 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981). The rationale is objectionable insofar as it neglects the positive impact successful civil rights actions can have even when an attorney is not the fee recipient. Courts adopting this narrow view completely ignore the important deterrent effects of the Awards Act. See *Carey v. Phipus*, 435 U.S. 247, 257 n.11 (1978) ("[The Awards Act] provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights.").

In addition, the courts have found that plaintiffs may not recover under the Awards Act when the United States government is the defendant. *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118, 1125 (9th Cir. 1981); *NAACP v. Civiletti*,

A. Bright-Prospects Test

The Courts of Appeals for the Second and Ninth Circuits both have endorsed a bright-prospects approach⁴⁹ in considering fee requests under the Awards Act.⁵⁰ This approach distinguishes, in some cases, between actions in which plaintiffs seek only injunctive relief and those in which monetary damages are also sought.⁵¹ When a party seeks injunctive relief alone, the special circumstances standard of *Newman* is always applied. When monetary damages are also sought, courts must consider whether the "prospects" for success at the outset are "sufficiently bright" to warrant a fee denial.⁵² The rationale for this approach is that the Awards Act was intended to lower the barriers to litigation for those who could not otherwise afford to bring suit.⁵³

In *Zarcone v. Perry*,⁵⁴ a coffee vendor was handcuffed by a deputy sheriff and severely berated by a traffic court judge for serving poor-quality coffee.⁵⁵ The plaintiff retained counsel under a contingent fee

609 F.2d 514, 515 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 922 (1980); *Shannon v. United States Dep't of Hous. & Urban Dev.*, 577 F.2d 854, 855-56 (3d Cir.) (per curiam), *cert. denied*, 439 U.S. 1002 (1978). The Awards Act has been held insufficiently specific to waive the traditional sovereign immunity the United States government and its agencies enjoy. *NAACP v. Civiletti*, 609 F.2d 514, 515 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 922 (1980); *Shannon v. United States Dep't of Hous. & Urban Dev.*, 577 F.2d 854, 856 (3d Cir.) (per curiam), *cert. denied*, 439 U.S. 1002 (1978). This glaring omission from the coverage of the Awards Act is remarkable because private enforcement is the only effective way to vindicate constitutional rights when the federal government is the defendant. The failure of Congress to waive the government's immunity means that private citizens will be largely unable to redress civil rights violations visited upon them by the federal government.

49. See *supra* note 9.

50. *Buxton v. Patel*, 595 F.2d 1182 (9th Cir. 1979); *Zarcone v. Perry*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). *Contra Sanchez v. Schwartz*, No. 81-2509, slip op. (7th Cir. Sept. 13, 1982).

51. *Zarcone v. Perry*, 581 F.2d 1039, 1044 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *accord Buxton v. Patel*, 595 F.2d 1182, 1184 (9th Cir. 1979); see *Milwe v. Cavuoto*, 653 F.2d 80, 83 (2d Cir. 1981); *Aho v. Clark*, 608 F.2d 365, 367 (9th Cir. 1979). See generally Note, *The Civil Rights Attorney's Fees Awards Act of 1976: A View From the Second Circuit*, 29 Buffalo L. Rev. 559 (1980) [hereinafter cited as *A View From the Second Circuit*]; Note, *The Civil Rights Attorney's Fees Awards Act of 1976*, 52 St. John's L. Rev. 562 (1978); *Attorney's Fees in Damage Actions*, *supra* note 9.

52. *Zarcone v. Perry*, 581 F.2d 1039, 1044 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *accord Buxton v. Patel*, 595 F.2d 1182, 1184-85 (9th Cir. 1979). *Contra Sethy v. Alameda County Water Dist.*, 602 F.2d 894, 898 (9th Cir. 1979) (per curiam) ("The Act's legislative history states that 'the mere recovery of damages should not preclude the awarding of counsel fees.'"), *cert. denied*, 444 U.S. 1046 (1980).

53. *Zarcone v. Perry*, 581 F.2d 1039, 1043-44 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

54. 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

55. The plaintiff was the owner of a mobile food vending truck. One night, while the plaintiff was working outside a county courthouse, the defendant Perry, a district

arrangement and sued the defendants seeking compensatory and punitive damages.⁵⁶ The jury awarded the plaintiff \$80,000 in compensatory damages and \$61,000 in exemplary damages.⁵⁷ The trial judge denied a motion for attorney's fees, however, finding that because the injury was essentially private, the benefit to the public was indirect, and therefore an award of attorney's fees would be unjust.⁵⁸

The Second Circuit affirmed the denial, but on different grounds. The court rejected the view that entitlement depends on any showing of public benefit,⁵⁹ but noted that "where a plaintiff sues for damages and the prospects of success are sufficiently bright to attract competent private counsel on a contingent fee basis, the underlying rationale of the [special circumstances] rule may be inapplicable."⁶⁰ The court stated that when damages are sought, the principal factor in considering a fee request is whether the plaintiff's prospects of recovery are sufficiently bright at the outset of the litigation to attract competent counsel.⁶¹ Other factors that the court *may* consider are the size of the benefits conferred by the suit on the public, the amount of any fund created, the presence or absence of bad faith by the defendant, and any unjust hardship that a grant might impose.⁶² In reviewing *Zarcone* in light of these factors, the court held that the plaintiff was not entitled to a fee award primarily because of his "bright prospects."⁶³ The plaintiff's ability to retain counsel on a contingent basis was strong evidence of his bright prospects.⁶⁴

The Ninth Circuit accepted the bright-prospects test in *Buxton v. Patel*.⁶⁵ In *Buxton*, the plaintiffs filed a complaint alleging violations of their rights to lease real property.⁶⁶ They sought lost profits, com-

judge, sent co-defendant Windsor, a deputy sheriff, out for coffee. The judge was very dissatisfied with the coffee, and he dispatched Windsor and two officers to bring the vendor to his chambers. Windsor and the officers brought the plaintiff through the crowded courtroom in handcuffs to the judge, who belittled and threatened him. He was released, but an hour later he was again summoned to the judge's chambers. The judge sought an admission from the plaintiff that he had put something in the coffee. Plaintiff contended at trial that this mistreatment caused anxiety, persistent headaches and stuttering. As a result, he required hospitalization, experienced marital difficulties and was unable to work. *Id.* at 1040.

56. *Id.*

57. *Id.* Under the contingent fee arrangement, the attorney was entitled to \$46,496.63 of this amount. *Id.*

58. *Id.*

59. *Id.* at 1042.

60. *Id.* at 1044.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*; see *Buxton v. Patel*, 595 F.2d 1182, 1184-85 & n.3 (9th Cir. 1979).

65. 595 F.2d 1182 (9th Cir. 1979).

66. *Id.* at 1183.

pensatory damages, punitive damages, costs and attorney's fees.⁶⁷ A jury awarded each of the plaintiffs \$7,500 in compensatory damages and \$7,500 in punitive damages.⁶⁸ The trial judge denied a motion for attorney's fees stating that the damage award was adequate.⁶⁹ On appeal, the Ninth Circuit followed the *Zarcone* approach, holding that the *Newman* standard does not necessarily apply to all fee requests and that courts should be more reluctant to shift fees when damages are sought.⁷⁰ The court noted that the appellants were enforcing a single violation of their civil rights, the incident was an isolated event, the chances of success were bright enough to attract counsel, adequate compensation was provided from the recovery and there was no indication of a bad faith defense by the appellants.⁷¹

1. Criticism of the Bright-Prospects Approach

The bright-prospects approach to fee requests adopted by the Second and Ninth Circuits is contrary to the policies of the Awards Act. First, it contravenes the express desire of Congress that fee requests be viewed under the *Newman* standard. Second, it creates an impermissible separate standard of review for actions in which monetary damages are recoverable. Moreover, this approach is unsatisfactory insofar as it does not provide lower courts with any tangible guidelines to inform their discretion.

It is beyond cavil that Congress intended that fee requests under the Awards Act be considered under the special circumstances standard. The legislative history expressly provides that "[i]t is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce [his rights] if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'"⁷² Congress clearly did not intend the availability of monetary damages to influence the availability of fees. The legislative history notes that "the mere recovery of damages should not preclude the awarding of counsel fees."⁷³

Also, by focusing narrowly on the issue of whether a plaintiff's prospects at the outset are bright enough to attract competent counsel, the *Zarcone* approach incorrectly views the purpose of the Awards Act

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 1184-85.

71. *Id.* at 1185.

72. Senate Report, *supra* note 2, at 4, reprinted in 1976 U.S. Code Cong. & Ad. News at 5912 (quoting *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam)).

73. House Report, *supra* note 2, at 8 (footnote omitted).

as merely lowering the barriers to litigation.⁷⁴ Clearly, if the Awards Act and similar legislation are to have their intended broad effect of promoting civil rights, not only must plaintiffs know they can recover their expenses, but defendants must also be aware that they will be assessed the full cost of litigation.⁷⁵ In this respect, fee-shifting can discourage civil rights violations as well as encourage the enforcement of the laws. Moreover, a denial of fee requests will inhibit civil rights litigation because plaintiffs who might be willing to pursue their remedies in court, if fees were available, may be deterred by the prospect of having to share their recovery with an attorney.⁷⁶ Significantly, the Awards Act was specifically enacted to avoid this problem.⁷⁷

An additional problem posed by the bright-prospects approach is the confusing manner in which it has been applied by circuit court panels since *Zarcone* and *Buxton*. Particularly in the Second Circuit, recent decisions have led to speculation that the bright-prospects standard may no longer be the rule.⁷⁸ This confusion creates difficulties for trial judges who must decide fee requests and for potential litigants who are calculating the pros and cons of vindicating their rights in court.

In *Milwe v. Cavuoto*,⁷⁹ the plaintiff brought suit against five local law enforcement officials seeking compensatory and punitive damages. The complaint alleged that the defendants had exercised unconstitutionally excessive force against her and further violated her rights by making a false affidavit to procure her arrest.⁸⁰ The plaintiff was successful on the constitutional issues at trial, but the jury awarded only modest damages.⁸¹ The trial court, citing the Second Circuit

74. *Zarcone v. Perry*, 581 F.2d 1039, 1043 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

75. Although fee awards under the Awards Act are not punitive measures, an assessment of attorney's fees undoubtedly has a positive impact insofar as it will discourage defendants from committing future civil rights violations. See *infra* note 109 and accompanying text.

76. As a threshold matter, litigants will be less willing to undertake the substantial demands of a court action if they know their recovery will be diminished by attorney's fees. While this outcome arguably has a salutary effect on court congestion, it is contrary to the result Congress intended to achieve by passage of the Awards Act. See *Promoting the Vindication of Civil Rights*, *supra* note 44, at 350-52; Note, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 34 Wash. & Lee L. Rev. 205, 216-17 (1977).

77. Congress recognized that absent fee-shifting, the civil rights laws would be "hollow pronouncements" for most people. Senate Report, *supra* note 2, at 6, reprinted in 1976 U.S. Code Cong. & Ad. News at 5913; see House Report, *supra* note 2, at 1.

78. See *Sanchez v. Schwartz*, No. 81-2509, slip op. at 3 & n.5 (7th Cir. Sept. 13, 1982) ("There is some doubt that [the] 'bright prospects' standard is still applied in the Second Circuit." (footnote omitted)).

79. 653 F.2d 80 (2d Cir. 1981).

80. *Id.* at 81.

81. *Id.* The jury found for the plaintiff on every count but awarded only \$1,322. *Id.*

decision in *Zarcone*, denied a motion for a fee award because the action was "essentially private"⁸² and the plaintiff was able to retain competent counsel.⁸³

The Second Circuit held that the trial court abused its discretion in denying the fee request.⁸⁴ The court noted that it had already rejected the public benefit test relied upon by the trial court⁸⁵ and distinguished *Milwe* from *Zarcone* because "the likelihood that Mrs. Milwe would be able to obtain a substantial recovery against the five Bridgeport law enforcement officials named in her complaint was not great."⁸⁶ The court explained that the plaintiff's prospects were not bright enough at the outset of the litigation to warrant a fee denial.⁸⁷ The opinion is unclear, however, as to whether this was because of the identity of the defendants or the magnitude of the injuries.⁸⁸

Although the circuit court stressed that the principal factor to consider in deciding if bright-prospects exist is whether a similarly situated plaintiff would be deterred from enforcing his constitutional rights absent the likelihood of a fee award,⁸⁹ the decision seems to undercut the policy rationale of *Zarcone*.⁹⁰ In view of the district court's finding that the plaintiff was financially able to retain competent counsel on her own,⁹¹ attorney's fees were not essential for the vigorous promotion of civil rights in this particular case. Thus, the award of fees here indicates that bright-prospects is concerned solely with the facts of the claim rather than the barriers to litigation that an individual claimant might encounter. After *Milwe*, the major thrust of the bright-prospects approach appeared to be that a trial judge should examine the underlying claims and determine both whether the liability was certain and the likelihood of a large monetary recovery was sufficiently bright at the outset of the action to remove any barriers to litigation. This interpretation, however, was effectively undermined in the Second Circuit's most recent decision under the Awards Act.

82. *Id.* at 82.

83. *Id.*

84. *Id.* at 84.

85. *Id.* at 83.

86. *Id.*

87. *Id.*

88. *Id.* In reaching its decision, the court cited a commentator who suggests that cases involving illegal arrests and searches generally result in very modest awards. *Id.* (citing Newman, *Suing the Law-breakers: Proposals to Strengthen § 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L.J. 447, 465 (1978)). This means either that the prospects of recovery in any such action will normally not be bright enough to warrant a fee denial because of the identity of the offenders, or that such actions do not usually bring large awards. This confusion proves the negligible precedential value of the *Zarcone* approach.

89. 653 F.2d at 83.

90. See *Zarcone v. Perry*, 581 F.2d 1039, 1044 (2d Cir. 1978), cert. denied, 439 U.S. 1072 (1979).

91. 653 F.2d at 82.

In *Wheatley v. Ford*,⁹² the plaintiff retained counsel on a contingent fee basis⁹³ and brought suit against members of the Nassau County Police Department, alleging unlawful arrest and excessive use of force in violation of his constitutional rights.⁹⁴ A jury found for the plaintiff on both counts and awarded him \$800 for the unlawful arrest, but only \$1 for the excessive use of force.⁹⁵ On appeal, the Second Circuit reversed and remanded the case to the district court for retrial solely on the question of damages for the excessive force.⁹⁶ On remand, a jury awarded the plaintiff \$55,000⁹⁷ and the trial judge awarded \$39,742 in attorney's fees.⁹⁸

On a second appeal, the circuit court held that the damage award was excessive and that it would again remand the damage issue unless the plaintiff would accept \$25,000 as his award.⁹⁹ Surprisingly, the Second Circuit substantially affirmed the fee award¹⁰⁰ despite the magnitude of the damage verdict, the relative certainty of liability¹⁰¹ and the contingency arrangement between the plaintiff and his attorney.¹⁰² Discussing the fee award, the court stated, as it had in *Milwe*,¹⁰³ that the principal factor to consider in determining the appropriateness of a fee award is whether a similarly situated plaintiff would be deterred from bringing suit.¹⁰⁴ Remarkably, the circuit court held that the plaintiff might well have been deterred absent the likelihood of a fee award.¹⁰⁵ Under the circumstances,¹⁰⁶ this result is extremely difficult to reconcile with the bright-prospects standard.

Perhaps one way to rationalize the confusing results in both *Milwe* and *Wheatley* is to focus on the fact patterns. Both cases involved police overreaching.¹⁰⁷ In *Zarcone*, the Second Circuit pointed out that in an appropriate case a court could consider whether the claim

92. 679 F.2d 1037 (2d Cir. 1982).

93. *Id.* at 1041.

94. *Id.* at 1039.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1040.

100. *Id.* at 1040-41. The district court had granted the plaintiff \$29,742 in hourly charges and awarded a bonus of \$10,000. The circuit court determined that neither the legal nor the factual issues were especially complex, and that the defendant's liability was relatively certain so that the bonus was unwarranted. The final award was only \$29,742. *Id.*

101. *Id.*

102. *Id.* at 1041. The plaintiff had agreed to give 40 percent of his final recovery to his attorney. The circuit court exercised supervisory power to limit the attorney's fee to the amount of the § 1988 award. *Id.*

103. See *supra* note 89 and accompanying text.

104. 679 F.2d at 1040.

105. *Id.*

106. See *supra* notes 99-102 and accompanying text.

107. 679 F.2d at 1039-40; 653 F.2d at 81, 84.

involves civil rights of broad significance in deciding whether fees should be awarded.¹⁰⁸ Although neither *Milwe* nor *Wheatley* was a class action suit, the circuit court panels in both cases paid special attention to the societal benefits conferred by actions that redress police misconduct.¹⁰⁹ The decisions, therefore, may reflect a judicial bias in favor of actions that provide broad social benefits. The social importance of the underlying claims in *Milwe* and *Wheatley* arguably distinguish them from *Zarcone*, in which the civil rights violation was unlikely to recur.¹¹⁰

Despite these recent decisions in the Second Circuit, it would be premature to assume that the bright-prospects standard is no longer the rule. In both *Milwe* and *Wheatley*, the circuit court adhered to the deterrence analysis of *Zarcone* in determining the fee request.¹¹¹ Although the courts seemed to reach unlikely results in their analyses, the continued application of the standard reaffirms rather than refutes the viability of the standard.*

The Ninth Circuit, on the other hand, does not apply the bright-prospects standard consistently. In *Sethy v. Alameda County Water District*,¹¹² the Ninth Circuit held that a lower court abused its discretion by denying fees in a case in which the plaintiff was awarded \$35,000 in compensatory damages, and remanded the case to the trial court.¹¹³ Surprisingly, the court pointed out that Congress intended that "the mere recovery of damages should not preclude the awarding of counsel fees."¹¹⁴ In remanding the case, the court completely failed to call the attention of the trial court to *Buxton*, which had been decided only three months earlier.¹¹⁵

Obviously, one cannot easily understand the decisions in the Second and Ninth Circuits. The only certainty is that such conflicting views make it impossible for trial judges to rely on any consistent guidelines. More importantly, potential litigants cannot be sure that they will

108. *Zarcone v. Perry*, 581 F.2d 1039, 1044 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

109. 679 F.2d at 1040; 653 F.2d at 84.

110. 581 F.2d at 1044.

111. See *supra* notes 89, 103-04 and accompanying text.

* After this Note was printed, a Second Circuit panel reaffirmed the viability of the bright-prospects standard in *Kerr v. Quinn*, No. 82-7244 (2d Cir. Nov. 4, 1982). In *Kerr*, a two-prong test for fee decisions under the Awards Act was established. *Id.* at 183. In future cases, the trial judge must first determine if the merits of the claim are strong and the probable damage award is high. Only if the judge finds that these "bright-prospects" exist may he then proceed to the second prong of the test, that of exercising discretion. *Id.* at 182-83. In the Second Circuit, therefore, the absence of bright-prospects would seem to preclude the judicial discretion required by the Awards Act and essentially mandate a fee award.

112. 602 F.2d 894 (9th Cir. 1979) (*per curiam*), *cert. denied*, 444 U.S. 1046 (1980).

113. *Id.* at 896-97.

114. *Id.* at 898 (quoting House Report, *supra* note 2, at 8).

115. The decision in *Buxton* was handed down on May 1, 1979. *Sethy* was decided on August 16, 1979.

recover fees when they also seek damages. This uncertainty can only lead to fewer actions and less vigorous promotion of civil rights.¹¹⁶

B. *Private Attorney General Approach*

Prior to the Awards Act, courts used their equitable powers to award fees to private attorneys general who both benefited their class and effectuated a strong congressional policy.¹¹⁷ Congress itself mentioned the term "private attorneys general" repeatedly in the legislative history of the Awards Act.¹¹⁸ Some courts continue to view fee requests in terms of whether the plaintiff benefits any class and effectuates a strong congressional policy.¹¹⁹

In *Martin v. Hancock*,¹²⁰ the plaintiff brought an action against three Minneapolis police officers for illegal arrest, excessive force in making the arrest and failure to control a police dog.¹²¹ A jury found that the arrest was legal and the force was reasonable, but one of the defendants was found liable for failing to control the police dog, and¹²² the plaintiff was awarded \$2,550.¹²³ The plaintiff's motion for a fee award was denied by the trial court.¹²⁴ The court found that the primary intent of the Awards Act was to ensure that plaintiffs with fundamental civil rights cases which further an important public interest are not discouraged from bringing suit.¹²⁵ The court noted that the plaintiff did not benefit any class and, therefore, a fee award would be inappropriate under circumstances that included an unintentional deprivation of civil rights and the fact that the plaintiff was not a member of a disadvantaged minority group.¹²⁶

The second aspect of the private attorney general concept, the effectuation of a strong congressional policy, has also been used to

116. The overall purpose of the Act is to encourage the private enforcement of civil rights. See *supra* note 2 and accompanying text. The reduction in the volume of cases brought about by fee denials is contrary to this salutary purpose. See *generally Promoting the Vindication of Civil Rights*, *supra* note 44, at 366-67. Further, fee denials can possibly result in attorneys putting forth less than a best effort for fear they will not be compensated for their time. See *A View From the Second Circuit*, *supra* note 51, at 560.

117. See *supra* note 17 and accompanying text.

118. Senate Report, *supra* note 2, at 3-5, reprinted in 1976 U.S. Code Cong. & Ad. News at 5910-12; House Report, *supra* note 2, at 2.

119. *Leeds v. Watson*, 630 F.2d 674, 677 (9th Cir. 1980); *Riddell v. National Democratic Party*, 624 F.2d 539, 543 (5th Cir. 1980); *Francia v. White*, 594 F.2d 778, 781 (10th Cir. 1979); *Grooms v. Snyder*, 474 F. Supp. 380, 382 (N.D. Ind. 1979); *Martin v. Hancock*, 466 F. Supp. 454, 456 (D. Minn. 1979); *Naprstek v. City of Norwich*, 433 F. Supp. 1369, 1370 (N.D.N.Y. 1977).

120. 466 F. Supp. 454 (D. Minn. 1979).

121. *Id.* at 455.

122. *Id.*

123. *Id.*

124. *Id.* at 456.

125. *Id.*

126. *Id.*

justify a fee denial. In *Naprstek v. City of Norwich*,¹²⁷ the plaintiffs successfully enjoined the enforcement of a local ordinance that established curfew guidelines for minors.¹²⁸ The plaintiffs' motion for a fee award was denied by the trial court on the ground that the case was too trivial to merit fee consideration under the Awards Act.¹²⁹ The court found that while parties are usually entitled to fee awards when serious threats to constitutional rights are posed, "this case simply [did] not rise to the [necessary] level of national priority or constitutional dimension,"¹³⁰ and thus the *Newman* standard was inapplicable.

The private attorney general approach, as represented by these lower court decisions, is an unsatisfactorily narrow approach to the problem of special circumstances. The twin elements of the test are untenable. The legislative history¹³¹ as well as case law interpreting the Awards Act,¹³² suggest a rejection of the public-benefit test. Moreover, plaintiffs who bring suit under the covered statutes are presumed to be effectuating important congressional policies.¹³³

127. 433 F. Supp. 1369 (N.D.N.Y. 1977).

128. *Id.* at 1369.

129. *Id.* at 1370 ("We do not think . . . that attorneys' fees must be awarded in all civil rights actions, in order to encourage 'private attorneys general' to commence all sorts of actions of whatever magnitude, even if negligible constitutional priority.").

130. *Id.* In *Naprstek*, the court suggested that if it were to use the *Newman* standard, special circumstances existed that would render an award unjust. *Id.* The special circumstances were: 1) The plaintiffs were attacking an "antiquated, poorly-drafted, rarely-enforced juvenile curfew ordinance" and 2) they had spurned the defendant's pretrial offers to discuss possible redrafting to correct the statute's deficiencies. *Id.* at 1370-71. This approach was cited with approval by the First Circuit in *Nadeau v. Helgemoe*, 581 F.2d 275, 279 n.3 (1st Cir. 1978).

131. Senate Report, *supra* note 2, at 2, reprinted in 1976 U.S. Code Cong. & Ad. News at 5910 ("If private citizens are to be able to assert their civil rights . . . citizens must have the opportunity to recover what it costs them to vindicate these rights in court."). The legislative history offers no indication that plaintiffs must bring class actions to benefit parties other than themselves. Implicit, however, is the notion that private actions must benefit the cause of civil rights to the extent that any action which vindicates one's rights promotes civil rights: "All of these civil rights laws depend heavily upon private enforcement." *Id.*, reprinted in 1976 U.S. Code Cong. & Ad. News at 5910.

132. Courts have consistently rejected the notion that the plaintiff must benefit a class of persons to be eligible under the Awards Act. See *Wheatley v. Ford*, 679 F.2d 1037, 1043 (2d Cir. 1982); *Milwe v. Cavuto*, 653 F.2d 80, 83 (2d Cir. 1981); *Gibbs v. Town of Frisco City*, 626 F.2d 1218, 1221 n.4 (5th Cir. 1980); *Zarcone v. Perry*, 581 F.2d 1039, 1042 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). Interestingly, the *Hancock* court cited the "perceptive" reasoning of the lower court in *Zarcone* as support for its holding. *Martin v. Hancock*, 466 F. Supp. 454, 456 (1979) (citing 438 F. Supp. 788 (E.D.N.Y. 1977)), even thought that "perceptive" reasoning had been expressly rejected by the Second Circuit the year before. 581 F.2d 1039, 1042 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

133. See generally Lipson, *Beyond Alyeska—Judicial Response to the Civil Rights Attorney's Fees Act*, 22 St. Louis U.L.J. 243, 255-56 (1978).

The problem with the private attorney general approach as formulated by these lower courts is that it emphasizes narrow definitions to the detriment of broader policy goals. The public-benefit test, which served as the rationale for fee denial in *Hancock*, considers only the bald fact that the plaintiff brought suit alone. It fails to take into account the indirect benefits that might accrue to other individuals because of the litigation. Clearly, the enforcement of civil rights laws, even in this "dogbite" case, might deter law enforcement officials from violating civil rights laws in the future.¹³⁴

Congress recognized that the enforcement of civil rights laws was the most important consideration in permitting fee-shifting and that broad social benefits could be derived from the encouragement of private actions. For this reason, Congress did not limit eligibility under the Awards Act to plaintiffs in class actions.¹³⁵ The legislative history points out that "[a]ll of these civil rights laws depend heavily upon private enforcement."¹³⁶ Congress desired that private citizens be able to vindicate violations of their civil rights. Decisions such as *Hancock* make it less likely that civil rights suits will be brought.¹³⁷

134. In a related case, *Grooms v. Snyder*, 474 F. Supp. 380 (N.D. Ind. 1979), the trial court denied a fee award to a plaintiff who had successfully brought suit against local law enforcement officials with the assistance of a lay advisor. The jury found that his arrest and detention had violated his civil rights and awarded him \$11,250 in damages. *Id.* at 381. The court declined to award fees because the plaintiff was not acting on behalf of a class and because non-attorneys were not the intended beneficiaries of the Awards Act. *Id.* at 384. As in *Hancock*, however, at the very least it seems clear that members of police departments would be more circumspect in their conduct if fee awards were routinely assessed. The imposition of fee awards, regardless of the private nature of the suit, should deter future civil rights violations. The Supreme Court has recognized the deterrent feature of the Awards Act. In *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978), the Court noted that "[the Awards Act] provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights." See generally, *Attorney's Fees in Damage Actions*, *supra* note 9, at 347-49. The Second Circuit has recently noted that "actions such as this which deter police overreaching benefit society as a whole." *Wheatley v. Ford*, 679 F.2d 1037, 1040 (2d Cir. 1982). Similarly, the Fifth Circuit has pointed out that special circumstances usually do not exist in police brutality cases. *Gibbs v. Town of Frisco City*, 626 F.2d 1218, 1221 n.4 (5th Cir. 1980).

135. The Awards Act and the accompanying legislative history are silent on the need for class actions to recover fee awards. To the contrary, the legislative history indicates that individual actions are compensable. Fee awards may be made to any prevailing party. Senate Report, *supra* note 2, at 4, reprinted in 1976 U.S. Code Cong. & Ad. News at 5912; House Report, *supra* note 2, at 6-8.

136. Senate Report, *supra* note 2, at 2, reprinted in 1976 U.S. Code Cong. & Ad. News at 5910; see House Report, *supra* note 2, at 1.

137. In general, plaintiffs will be less likely to bring suit if they know that fees may not be awarded. Moreover, lawyers will be less likely to accept cases such as *Hancock* in the future as a simple matter of economics. In *Hancock*, the total damage award was only \$2,550 while the fee request amounted to \$11,630. 466 F. Supp. at 455. Obviously, neither the plaintiff nor the attorney was fully recompensed as envisaged by the Awards Act.

Naprstek raises a more perplexing problem. There, the trial court decided that the plaintiffs' claim did not rise to sufficient constitutional stature to merit fee consideration under the Awards Act.¹³⁸ This arbitrary conclusion, tenuously supported by the notion that Congress did not intend to reward certain types of actions, effectively substitutes the court's judgment for that of Congress. The legislative history of the Awards Act provides that a successful party should ordinarily recover attorney's fees in the absence of special circumstances when an action is brought under one of the covered statutes. Although the Awards Act gives trial courts discretion in deciding when special circumstances exist, it does not permit courts to select which actions are eligible for fee consideration.¹³⁹

On another level, *Hancock* underscores the reluctance of courts to shift fees when damages are recovered.¹⁴⁰ Despite the clear language of the legislative history that damage awards should not preclude awards of counsel fees,¹⁴¹ courts are less willing to shift fees in such cases. Whether this difficulty arises because of some notion that the plaintiff has been adequately compensated, that the defendant has paid enough in damages, or that plaintiff has been able to secure competent counsel is unclear. Certainly, the result hampers the promotion of civil rights.¹⁴²

C. Totality of Circumstances

Some courts have looked at the totality of circumstances to determine whether special circumstances exist which warrant the denial of a fee award.¹⁴³ Under this view, a court will examine all the relevant factors in a particular litigation to determine whether a fee award would be unjust.¹⁴⁴ Prior to the Awards Act, the Fourth Circuit had adopted this view for actions brought under 1960's civil rights legislation. In *Chastang v. Flynn & Emrich Co.*,¹⁴⁵ a Title VII action, the plaintiffs alleged that a profit-sharing and retirement plan, the management of which was vested in a committee that determined the benefit schedule, was illegally discriminatory because it provided different benefits to male and female participants.¹⁴⁶ The plaintiffs pre-

138. 433 F. Supp. at 1370.

139. See *supra* note 133 and accompanying text.

140. See *supra* pt. II(A).

141. House Report, *supra* note 2, at 8.

142. See *supra* notes 75-77 and accompanying text.

143. See *supra* notes 12-13.

144. *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979), *cert. denied*, 102 S. Ct. 1476 (1982); *Johnson v. Synder*, 470 F. Supp. 972, 974 (N.D. Ohio 1979), *aff'd*, 639 F.2d 316 (6th Cir. 1981); see *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976) (Title VII action).

145. 541 F.2d 1040 (4th Cir. 1976).

146. *Id.* at 1041.

vailed on the merits, but the trial court declined to award fees.¹⁴⁷ The Fourth Circuit affirmed the denial, holding that a fee award would be unjust after considering all of the circumstances: 1) The plan was not illegal when it was originated in 1943; 2) the company tried quickly to bring the plan into conformity with federal guidelines after being informed that it was illegally discriminatory; 3) the plaintiffs brought suit on behalf of themselves rather than any class; 4) the suits did not motivate the change in company policy because they were filed after the policy had already been amended; 5) the company had no pecuniary interest in the trust fund it had created; and 6) the company could not unilaterally alter the schedule of benefits without the approval of the committee.¹⁴⁸ Additionally, the court noted that the net effect of a fee award would be to penalize innocent participants in the plan if the fees were paid out of the trust fund. This result also would be unjust because the suit did not directly or indirectly benefit the participants, as the plan had already been amended.¹⁴⁹ Special circumstances, therefore, in a pre-Awards Act situation were measured by weighing all the factors. While no single factor would have been dispositive, the combination mandated a fee denial.¹⁵⁰

The Fourth Circuit has indicated its approval of this approach for fee requests under the Awards Act as well. This continuity is strongly endorsed by Congress, which desired that the standards for fee awards be the same under the Awards Act as prior civil rights legislation.¹⁵¹ In *Bonnes v. Long*,¹⁵² the Fourth Circuit set forth the approach that lower courts should consider when deciding fee requests. The court noted that *Chastang* was "illustrative"¹⁵³ and stated that any inquiry into special circumstances "should . . . be an intensely pragmatic one. Its focus is rightly upon the justice *under the total range of circumstances* of conferring the benefit and imposing the concomitant burden represented by the fee award."¹⁵⁴

The Fourth Circuit approach is much broader than either the bright-prospects or private attorney general approach. An example of the pragmatic inquiry suggested by the Fourth Circuit is *Green v. Carbaugh*.¹⁵⁵ In *Green*, the plaintiffs, white male owners of a success-

147. *Id.*

148. *Id.* at 1045.

149. *Id.*

150. *See id.*

151. Senate Report, *supra* note 2, at 4, reprinted in 1976 U.S. Code Cong. & Ad. News at 5912.

152. 599 F.2d 1316 (4th Cir. 1979), *cert. denied*, 102 S. Ct. 1476 (1982).

153. *Id.* at 1318.

154. *Id.* at 1319 (emphasis added).

155. 460 F. Supp. 1193 (E.D. Va. 1978).

ful tobacco warehouse, sued a state administrator who had directed that their license to sell tobacco during the first two weeks of the season be withheld because of their suspected illegal sales activities.¹⁵⁶ The trial court rescinded the directive, finding that it was a denial of property without due process. In a separate proceeding, the trial court refused to award attorney's fees, however, in light of special circumstances.¹⁵⁷

Although the court did not expressly mention *Chastang* or *Bonnes*, it considered the following circumstances: 1) The plaintiffs were not disadvantaged; 2) they suffered no injury; 3) the defendant was acting in the public interest; and 4) he did not stand to benefit from his actions.¹⁵⁸ The court noted that "[this is] a case, that apparently meets all of the language set forth in 42 U.S.C. § 1988 but which seems to meet none of its spirit."¹⁵⁹

This broad-based approach meets the technical requirements of the Awards Act, giving lower courts controlled discretion while also alerting litigants that fees will be awarded unless the weight of circumstances renders an award unjust. This approach is sufficiently flexible insofar as it leaves a large amount of discretion with the trial judge,¹⁶⁰ while at the same time it gives some guidelines as to what should be considered in evaluating a fee request. Moreover, the Awards Act requirement that fee requests be considered in light of the special circumstances standard is met.¹⁶¹ Fee awards under this approach will be denied only when a strong imbalance shifts the normal presumption of an award. This strong imbalance will occur only in very unusual cases such as *Chastang* and *Green*.

Furthermore, litigants can be assured that their fee requests will not be denied arbitrarily if they seek damages or fail to meet the narrow criteria of a private attorney general.¹⁶² Arguably, these factors would be part of the totality of circumstances in a case such as *Chastang* in

156. *Id.* at 1194.

157. 465 F. Supp. 372, 372 (E.D. Va. 1979).

158. 460 F. Supp. at 1194.

159. *Id.*

160. Unlike the bright-prospects approach or the private-attorney general test, this test allows the trial court to weigh all the relevant factors. A trial court is not prohibited arbitrarily from weighing all the factors and reaching a just conclusion because of the presence of a single factor. This approach, therefore, seems to comport with the Awards Act's grant of discretion to the court. See 42 U.S.C. § 1988 (1976 & Supp. IV 1980).

161. Senate Report, *supra* note 2, at 4, reprinted in 1976 U.S. Code Cong. & Ad. News at 5912.

162. At the very least, litigants can be assured that their entire case will be reviewed before any decision on an attorney's fee is made. See *supra* note 7 and accompanying text.

which the plaintiffs recovered damages and the suit provided no direct or indirect benefits to the other participants in the fund. There, a fee award would have deprived the participants in the plan of some of their benefits. It would not, however, be dispositive on the issue of fee awards. In sum, litigants can be assured they will receive fees in successful actions under the Awards Act unless the totality of circumstances suggests that an award would be unjust.

The Fifth Circuit, however, has consistently awarded fees and refused to find special circumstances even in the presence of several factors.¹⁶³ The case law is unclear as to whether this refusal marks the rejection of the totality of circumstances approach or merely indicates that a sufficiently strong set of circumstances has not yet been presented to the circuit court. This confusion is well illustrated in *Concerned Democrats v. Reno*,¹⁶⁴ in which a partisan political organization brought suit to preliminarily enjoin the operation of a statute that prohibited political endorsement of candidates for judicial office.¹⁶⁵ The plaintiff was successful on the merits, but the trial court held that a fee award would be "inappropriate."¹⁶⁶ On appeal, the circuit court reversed and remanded the case to the trial court for reconsideration of the fee request.¹⁶⁷ On remand, the trial court considered all of the factors present in the litigation and again declined to award fees.¹⁶⁸ The trial court pointed out: 1) the defendants acted in good faith because the preservation of non-political judicial elections is a "salutary purpose"; 2) the statute did not intentionally discriminate against any particular group; 3) the plaintiffs were not educationally, economically or politically deprived like most civil rights plaintiffs; 4) a political group 4000 members strong "could certainly pay for [its] own counsel"; 5) the defendant believed in good faith that the challenged statute was valid; and 6) the burden of any fee award

163. *E.g.*, *Johnson v. Mississippi*, 606 F.2d 635, 637 (5th Cir. 1979) (factors included: 1) the defendant's good faith belief that a challenged statute was constitutional; 2) the defendant acted in conformity with the law; 3) the case did not involve invidious discrimination; and 4) the burden of attorney's fees would fall on the taxpayers); *Henderson v. Fort Worth Indep. School Dist.*, 574 F.2d 1210, 1212-13 (factors included: 1) a lack of intention to discriminate or any showing of discrimination; 2) the defendant's conduct was mandated by the state legislature; and 3) the financial burden would fall on the taxpayers), *vacated en banc*, 584 F.2d 115 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979).

164. 458 F. Supp. 60 (S.D. Fla. 1978), *vacated and remanded*, 601 F.2d 891 (5th Cir. 1979), *on remand*, 493 F. Supp. 660 (S.D. Fla.), *rev'd*, 634 F.2d 629 (5th Cir. 1980), *reh'g en banc denied*, 638 F.2d 1234 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1426 (1982).

165. 458 F. Supp. at 61-62.

166. 493 F. Supp. at 661.

167. 601 F.2d at 892.

168. 493 F. Supp. at 664.

would fall on the taxpayers.¹⁶⁹ After considering all of these circumstances,¹⁷⁰ the trial court stated that "[i]f the attorney's fee statute is to mean anything resembling what its words indicate, and if the judicially created exception 'special circumstances' is to have any life at all, then the court must deny plaintiff's motion in this case."¹⁷¹

The circuit court, however, reversed the decision in an unpublished memorandum decision.¹⁷² The summary reversal¹⁷³ of the district court's fee denial did not elaborate the grounds for the reversal, and thus conflicting interpretations are conceivable. The case can be read narrowly to indicate that the totality of circumstances present in *Concerned Democrats* did not rise to the level of special circumstances, or more broadly, as a blanket rejection of the entire totality of circumstances approach. In view of the summary disposition of the fee denial and the purposes of the Awards Act, a narrow reading is preferable.

Initially, it seems likely that if the circuit court wished to criticize the approach rather than just this isolated application, it would have written an explanatory opinion. The summary reversal in *Concerned Democrats* probably indicates that the court wished to reverse the fee denial only on the facts of this case. The appropriate inference¹⁷⁴ is that the court wished to preserve the approach but grant a fee award to the plaintiffs.

Moreover, because of the Fifth Circuit's persistent refusal to permit fee denials based on individual factors,¹⁷⁵ a rejection of the totality of

169. *Id.* at 663-64.

170. *Id.* at 664.

171. *Id.* at 663.

172. No. 80-5482 (5th Cir. Dec. 8, 1980).

173. The circuit court reversed the trial court's denial of fees. *Id.* Plaintiff's counsel was awarded fees for the time he spent on the matter prior to the first appeal with instructions to the parties to agree upon a reasonable fee for the two subsequent appeals. The failure to publish the opinion has caused a great deal of confusion. A district court in the Fourth Circuit recently discussed the lower court opinion in *Concerned Democrats* without noting that the case had subsequently been reversed. See *Espinoza v. Hillwood Square Mut. Ass'n*, 532 F. Supp. 440, 445 (E.D. Va. 1982). Furthermore, several attorneys have contacted plaintiff's counsel, Steven Wisotsky, to determine the disposition of the case. The confusion apparently stems from the fact that Shepard's Federal Citations does not reflect that the district court opinion at 493 F. Supp. 660 has been reversed. As a result of this confusion, plaintiff's counsel has recently moved to have the previously unpublished opinion published in the Federal Reporter. Appellant's Motion to Publish Unpublished Opinion, No. 80-5482 (5th Cir. Sept. 17, 1982).

174. Arguably, the circuit court held the totality of circumstances approach was so unpersuasive that it declined to comment at all on its merits. In light of the Fourth Circuit's acceptance of the approach, it seems unlikely that the circuit court would reject the entire approach without comment.

175. See 493 F. Supp. at 662-63 and cases cited therein.

circumstances approach would effectively mandate fee awards.¹⁷⁶ This result would be unsatisfactory in two respects: First, Congress itself rejected the idea of mandatory fee awards,¹⁷⁷ and second, Congress intended that trial judges, rather than circuit court judges, decide fee requests.¹⁷⁸ Thus, it seems likely that the totality of circumstances approach espoused by the district court in *Concerned Democrats* has continued vitality although the Fifth Circuit has not given any indication as to what combination of circumstances would be sufficient to overcome the strong presumption¹⁷⁹ in favor of fee awards.¹⁸⁰

Like the Fourth Circuit's totality of circumstances approach,¹⁸¹ the district court in *Concerned Democrats* takes a common-sense approach to fee requests under the Awards Act and denies fees only in cases in which the circumstances indicate fee-shifting would be manifestly unjust. This approach ensures that civil rights laws may be vigorously enforced by private litigants, and it provides guidelines to exclude improper plaintiffs whose actions in no way advance the cause of civil rights. Congressional policy, which ordinarily favors fee awards to promote the private enforcement of civil rights in the absence of special circumstances, is satisfied by this broad-based approach.

176. If single factors are not dispositive and the totality of circumstances approach is untenable, it is difficult to imagine what factor or set of factors would be sufficient to warrant a fee denial. In effect, fee awards would be mandatory in the Fifth Circuit. While this approach would encourage civil rights enforcement, it goes beyond what Congress intended in enacting the Awards Act. See *supra* note 47 and accompanying text.

177. *Id.*

178. See *Riddell v. National Democratic Party*, 624 F.2d 539, 543 (5th Cir. 1980). The amount of discretion that is granted to the district court is a matter of some dispute. Compare *Dawson v. Pastrick*, 600 F.2d 70, 79 (7th Cir. 1979) (trial court has narrow discretion to deny fee awards) with *Sargeant v. Sharp*, 579 F.2d 645, 647 (1st Cir. 1978) (trial court has broad discretion to deny fee awards). Circuit courts, however, are only authorized to decide whether the trial court has abused its discretion. See *Aho v. Clark*, 608 F.2d 365, 366, 368 (9th Cir. 1979).

179. *Riddell v. National Democratic Party*, 624 F.2d 539, 543 (5th Cir. 1980).

180. Although the very high barrier to fee denials erected in cases like *Concerned Democrats* effects the important purpose of promoting civil rights litigation, the continued reluctance of the circuit court to state a comprehensible standard of review for special circumstances impedes economical litigation. District courts repeatedly have denied fee awards to plaintiffs only to have the circuit court reverse. See *supra* note 163 and accompanying text. At a minimum, the Fifth Circuit should articulate the factors a court should consider in deciding whether a fee award is appropriate. Assuming that the totality of circumstances approach has continued vitality after *Concerned Democrats*, the Fifth Circuit should delineate which combination of factors will be sufficient. Such an illustration would provide lower courts with tangible guidelines and thereby reduce the number of costly appeals. Because many of these appeals involve state agencies, public treasuries would be directly benefited by such an enumeration.

181. See *supra* notes 144-62 and accompanying text.

CONCLUSION

Narrow-based approaches such as the bright-prospects test or the private attorney general requirements are unsatisfactory methods of identifying special circumstances. The primary focus of these approaches unduly emphasizes the nature of the suit or the identity of the plaintiff without regard to the broad purposes of the Awards Act. These approaches result in the chilling, rather than the promotion, of civil rights litigation. The Awards Act requires the broader-based vision of special circumstances such as that provided by the totality of circumstances approach. By viewing all the relevant factors with an eye toward justice to the respective parties, this approach promotes the vindication of civil rights by favoring the award of attorney's fees and excluding only those claims that do not merit consideration because of their overall failure to advance civil rights.

Michael J. McNamara