

## Western New England Law Review

---

Volume 22 (1979-1980)

Issue 2

Article 9

---

1-1-1979

# STRANGULATION OF THE AMERICAN RULE: AN OVERVIEW OF PENDING CONGRESSIONAL ATTORNEYS' FEES LEGISLATION

Leslie A. Williamson Jr.

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

---

### Recommended Citation

Leslie A. Williamson Jr., *STRANGULATION OF THE AMERICAN RULE: AN OVERVIEW OF PENDING CONGRESSIONAL ATTORNEYS' FEES LEGISLATION*, 2 W. New Eng. L. Rev. 321 (1979), <http://digitalcommons.law.wne.edu/lawreview/vol2/iss2/9>

This Recent Development is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact [pnewcombe@law.wne.edu](mailto:pnewcombe@law.wne.edu).

# RECENT DEVELOPMENTS

## STRANGULATION OF THE AMERICAN RULE. AN OVERVIEW OF PENDING CONGRESSIONAL ATTORNEYS' FEES LEGISLATION

### I. INTRODUCTION

Under the "American Rule" of awarding attorneys fees, each party must pay his or her own litigation expenses.<sup>1</sup> Courts, however, may exercise their equitable power and award fees under the bad faith,<sup>2</sup> common fund<sup>3</sup> or common benefit<sup>4</sup> exceptions. In addition, fee awards may be granted when there is statutory authorization.<sup>5</sup>

It is through the latter exception that Congress has attempted to restrict the application of the American Rule." Congress has attempted this restriction by broadening the courts statutory authorization to award attorneys fees. There are numerous attorneys fees bills pending in Congress. This article provides an overview of

---

1. The American Rule is contrasted by the "English Rule" wherein the award of attorneys fees is provided to successful litigants. *See* *Alveska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) ("American Rule"); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967) ("English Rule").

2. Under the "bad faith" exception an award of attorneys fees is appropriate where the nonprevailing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. The bad faith doctrine has allowed the award of attorneys fees when there was willful disobedience of court order. or when the nonprevailing party acted in bad faith, vexatiously, wantonly or for oppressive reasons. *Alveska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975).

3. Common fund awards are made where prevailing party preserves or creates fund for himself or herself as well as for others. The prevailing party may require the beneficiaries of that fund to share in the attorney compensation. *See* *Trustees of the Internal Improvement Fund v. Greenough*, 105 U.S. 527 (1881).

4. The common benefit doctrine, also known as the substantial benefit doctrine, is an expansion of the common fund doctrine. Its justification is the same as the common fund doctrine but its focus is directed more toward non-monetary benefits. *See* *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-96 (1970).

5. There is plethora of statutory exceptions to the American Rule. Probably the best known is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1976). For an extensive listing of the statutory exceptions see Cohen, *Awards of Attorneys Fees Against the United States: The Sovereign Is Still Somewhat Immune*, 2 W. NEW ENG. L. REV. 177-184-91 (1979).

those bills.<sup>6</sup> The basis of the overview is the bills referred to the House Committee on the Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice. Primary focus is on Senate bill 265. This bill provides a model for an in-depth discussion of the pending legislation as well as a basis by which to evaluate other attorneys fees bills. In addition, several Senate bills which are moving through Congress are reviewed. Finally a listing of all current bills are compiled in the appendix.

## II. BILLS REFERRED TO THE JUDICIARY SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE

### A. S 265—"Equal Access to Justice"

Senate bill 265,<sup>7</sup> as are the other bills discussed in this article, is premised upon a fundamental philosophical concept of the American jurisprudence system. Individuals who are poor must not be denied access to the judicial system. The bill is designed to award litigation expenses, in certain circumstances, to certain parties who prevail against the United States provided that the government's action was not substantially justified. The bill would allow recovery of attorneys fees in almost all administrative and judicial civil proceedings involving the government.<sup>8</sup>

The title, "Equal Access to Justice Act, clearly enunciates the Act's fundamental purpose. The Act is designed to eliminate deferral to unreasonable governmental action because of inordinate costs. The Senate is concerned that certain individuals may not exercise their legal rights because they simply cannot afford the expense. In addition, there is the concern that government will effec-

---

6. The listing contained in this article is current to October 25, 1979. Undoubtedly additional legislation on this topic will be submitted prior to publication of this article. See note 110 *infra*.

7 S. 265, 96th Cong., 1st Sess. (1979) was reported to the Senate from the Senate Committee on the Judiciary on July 20, 1979. It was called up by unanimous consent on July 31, 1979. On the same day the Senate considered and passed the measure by 94-3 vote. Senators Chiles (D., Fla.), Proxmire (D., Wis.) and Roth (R., Del.) voted nay. Senators Bayh (D., Ind.), Ford (D., Ky.) and Huddleston (D., Ky.) did not vote, although the *Congressional Record* indicates that were Senator Bayh present he would have voted yea. 125 CONG. REC. S10,924 (daily ed. July 31, 1979).

8. Civil actions sounding in tort are excluded from coverage. S. 265, 96th Cong., 1st Sess. § 4(d)(1) (1979). In addition, the bill is intended to augment not supercede existing legislation. *Id.*

tuates acquiescence by economically brow-beating its opponents.<sup>9</sup> This concern was expressed repeatedly in the legislative debate on the bill.<sup>10</sup> The Senate also concluded that every prevailing litigant against the United States asserts a public as well as a private cause of action. Thus, as quasi-private attorneys generals, prevailing nongovernment litigants should be provided with litigation compensation.<sup>11</sup>

The bill allows awards of attorneys fees in certain administrative<sup>12</sup> and judicial proceedings.<sup>13</sup> With regard to agency proceed-

9. "Congress finds that certain individuals may be deterred from seeking review of or defending against, unreasonable governmental action because of the exposure involved. S. 265, 96th Cong., 1st Sess. § 2(a) (1979).

"Congress further finds that because of the greater resources and expertise of the Federal Government the standard for an award of fees against the United States should be different from the standard governing an award against private litigant, in certain situations. *Id.* § 2(b).

"It is the purpose of this Act—

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees.

*Id.* § 2(c)(1).

10. The Senators concern over the harshness and potentially arbitrary application of bureaucratic regulations and red tape which is directed toward the small businessperson was evident throughout the remarks on the bill. Only several examples need be cited to replicate the tone of the argument.

If bureaucrats knew that more of their actions would be subjected to questions in court, I believe that the tendency of many bureaucrats to be careless, arbitrary, and irresponsible would cease. S. 265 provides the tools that are sorely needed by most Americans to fight back when unreasonable rules and regulations are wrongly enforced.

Senator Dole (R., Kan.) 125 CONG. REC. S10,915 (daily ed. July 31, 1979).

The legislation would mark the beginning of a new stage. It would mark the readjustment of the tension which exists between the citizen and the Federal agencies which govern their lives.

[W]e also woke up to the fact that the average American, the small businessman, the average citizen, is now besieged with regulatory bureaucracy, with arbitrary decisions, with small fines from the numerous agencies that are in charge of being sure that we are healthy and safe, and cannot afford to fight their own Government.

Senator Domenici (R., N.M.) 125 CONG. REC. S10,916 (daily ed. July 31, 1979).

11. Senator DeConcini (D., Ariz.) stated this concept during the floor debate when he observed that the bill recognizes that those who choose to litigate an issue against the Government are not only representing their own vested interests. They are also refining public policy, correcting errors and helping to define the limits of Federal authority. In short, these people are serving public policy and a public purpose. 125 CONG. REC. S10,914 (daily ed. July 31, 1979).

12. The bill specifically excludes administrative adjudication involving the establishment or fixing of a rate or in cases involving license granting or renewal. S. 265, 96th Cong., 1st Sess., § 3(a) (1979).

13. See note 8 *supra*.

ings,<sup>14</sup> litigation expenses may be awarded to a prevailing party. If, however, the agency determines that its action was "substantially justified" or that special circumstances make an award of attorneys fees unjust, no award need be made.<sup>15</sup> The burden of proving a substantially justified action, however, is placed on the agency.<sup>16</sup> The agency is also authorized to reduce or deny an award if the other party "engaged in conduct which unduly and unreasonably protracted" the final resolution.<sup>17</sup> A party dissatisfied with the agency's determination may appeal to a federal court. The court may deny the petition for appeal, in which case no further appeal is allowed, or the court may modify the agency's decision, but only if the agency abused its discretion.<sup>18</sup> Should an agency or a court award fees, the bill calls for the expenditure to be taken from the agency's existing budget.<sup>19</sup> The agency is not allowed to have a separate budgetary item specifically designed to pay expenses incurred under the Act.

With regard to judicial proceedings,<sup>20</sup> a prevailing party in any civil litigation<sup>21</sup> brought by or against the United States may be awarded reasonable attorneys fees. As with the administrative proceedings, the court may not award fees if it "finds that the position of the United States was substantially justified or that special circumstances [would] make [the] award unjust."<sup>22</sup> The court may also deny or reduce the award if the nongovernmental prevailing party "unduly and unreasonably protracted the final resolution of the matter in controversy."<sup>23</sup>

The court may award fees for adjudication conducted at the administrative level unless the government's position was substantially justified or unless the existence of special circumstances would make the award unjust.<sup>24</sup> As with the previous section, an agency which is required to pay a fee award may not have a special

---

14. The bill amends 5 U.S.C. § 5 (1976) by adding an additional section to it covering the awarding of attorneys fees. S. 265, 96th Cong., 1st Sess. § 3(a) (1979).

15. *Id.*

16. D. DECONCINI, EQUAL ACCESS TO JUSTICE, S. REP. NO. 253, 96th Cong., 1st Sess. 21 (1979).

17. *Id.*

18. S. 265, 96th Cong., 1st Sess. § 3(a) (1979). It is assumed that modification of an award could be either an increase or decrease.

19. *Id.*

20. The bill is designed to amend 28 U.S.C. § 2412 (1976).

21. Cases in tort are not included. See note 8 *supra*.

22. S. 265, 96th Cong., 1st Sess. § 4(a) (1979).

23. *Id.*

24. *Id.*

appropriation for such an expenditure. The award must be paid out of the agency's existing budget.<sup>25</sup>

The bill bases compensation on the prevailing market rate, but limits that compensation rate to a maximum of \$75 per hour. There are provisions for a rate increase if there is an increase in the cost of living or a special factor necessitating such an increase.<sup>26</sup>

The bill broadly defines government to include the United States, or any agency or official acting in his or her official capacity.<sup>27</sup> This factor is important when it comes time to pay the award since the award will be paid from an agency's budget.

The bill carries with it a three-year sunset provision.<sup>28</sup> It does, however, allow for the completion of pending litigation should the program not be continued.<sup>29</sup> The bill also establishes various economic utilization parameters. A party eligible for a fee award is defined as an individual who has not accumulated a net worth in excess of \$1 million at the time the adjudication was initiated or the civil action filed. In addition, any sole owner of an unincorporated business or any partnership, corporation, association or organization which has a net accumulated worth of \$5 million at the time the adjudication was initiated or the civil action was filed is excluded from the fee provision.<sup>30</sup> There is, however, one exception to this latter category. An agricultural cooperative is considered a valid party regardless of economic worth.<sup>31</sup>

---

25. *Id.* § 1(a).

26. An agency, by regulation, or court, based on discretion, may increase the award because of an increase in the cost of living or the advent of a special circumstance such as the "limited availability of qualified attorneys for the proceeding involved." *Id.* §§ 3(a), 4(a). As Senator Kennedy (D., Mass.) notes, the intent of the committee was that "the prevailing market rate apply regardless of the attorneys' financial arrangement with their clients." 125 CONG. REC. S10,923 (daily ed. July 31, 1979).

27. S. 265, 96th Cong., 1st Sess. § 4(a) (1979).

28. A sunset provision requires that a legislative body affirmatively continue the provisions of a bill. Otherwise, the bill's provisions are terminated on a specified date. In the case of S. 265, the sunset provision terminates the bill's provisions at the conclusion of three years. This sunset provision clearly demonstrates the experimental nature of the bill. At the conclusion of the three years, Congress has an opportunity to re-evaluate the effectiveness of the bill. If Congress determines that implementation of the sunset provision coincides with its legislative intent, Congress could continue the bill's provisions through enactment of new legislation. Cases arising prior to the sunset date, but not reaching final disposition by that date, are still covered by the bill until final disposition. *See* note 16 *supra*, at 8.

29. S. 265, 96th Cong., 1st Sess. § 4(c) (1979).

30. *Id.* §§ 3(a), 4(a).

31. *Id.* This exception was not in the original bill which came out of committee. It was added as an amendment during the floor debate. The amendment

It is difficult to dispute the philosophical basis of the bill. Yet, as with any piece of legislation, numerous concerns have been raised. While the bill is directed toward equal access to justice, the practical basis of the bill is directed against government intrusion and bureaucratic red tape.<sup>32</sup> If the Senate's primary concern was total access to equal justice, it should award fees to any nongovernmental party engaged in litigation with the government.<sup>33</sup> If the bill is actually designed to make "the bureaucracy more accountable in the exercise of its powers and more responsive to its citizens' needs,"<sup>34</sup> then Congress should eliminate the subterfuge of this bill and enact powerful legislation which would result in the discharge of bureaucrats who have wronged others.

While the bill purports to authorize fee awards to prevailing parties, it limits those awards to actions in which the government was not substantially justified. The legislative history, however, indicates that the action must be unreasonable.<sup>35</sup> The substantially

---

was sponsored by Senator Hayakawa (R., Cal.). In his proposal he stated:

The net worth of the cooperative as an entity is not significant for the purpose of the definition. This amendment would remove the net worth test for agricultural cooperatives which meet the definition of the Agricultural Marketing Act. [42 U.S.C. § 1141 j(a) (1976)]. In substance, compliance with the tests would insure that only legitimate self-help agricultural associations formed by the farmers would be entitled to this treatment under the bill.

125 CONG. REC. S10,918 (daily ed. July 31, 1979).

32. As Senator McClure (R. Idaho) stated:

[T]he American people are so frustrated with their Government's intrusion into every aspect of their lives we in Congress, whose responsibility it is to set the policy of this government, must respond. . . . [R]egulations are too often subject to arbitrary interpretation and application by Federal functionaries who are now vested with very broad discretionary powers.

125 CONG. REC. S10,920 (daily ed. July 31, 1979).

33. See Dunlap, *Attorneys' Fees Against Government Defendants: Economics Requires A New Proposal*, 2 W. NEW ENG. L. REV. 311 (1979).

34. Senator DeConcini (D., Ariz.), 125 CONG. REC. S10,914 (daily ed. July 31, 1979).

35. The legislative history is replete with references to reasonable and unreasonable actions by the government as the basis for the award.

Senator DeConcini (D., Ariz.): "It is also intended to affirmatively encourage citizens to challenge actions which they believe to be unreasonable or irresponsible." 125 CONG. REC. S10,914 (daily ed. July 31, 1979).

Senator Culver (D., Iowa): "Unless the agency can prove its position was reasonable, it would have to pay the attorneys fees. . . ." *Id.* at S10,915.

Statement by Senator Ford (D., Ky.) quoting the Senate Judiciary Committee report:

"The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case has a reasonable basis both in law and fact, no award will be made.

justified standard will be ripe for definitional debate and litigation. Critics see this as a drawback to the Act.<sup>36</sup> In addition, special circumstances may excuse the awarding of a fee. The determination of such special circumstances will be left to the agency or the courts since neither the Act nor the legislative history provides enough guidance. The legislative history does state that an award should not be made when "equitable considerations dictate"<sup>37</sup> or when the government is advancing a good faith argument but that an award should be made in cases in which there is a "novel extension of the law to areas and there is insufficient legal precedent to establish the reasonableness of the agency action."<sup>38</sup>

Not only are the standards vague, but also the government has the burden of proving that its action was substantially justified, or that special circumstances existed.<sup>39</sup> Critics suggest that placing the burden on the government will "chill" enforcement of federal laws and increase trial time.<sup>40</sup> An alternative measure, proposed by the United States Department of Justice, would utilize the standard set down by the United States Supreme Court in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*.<sup>41</sup> If the prevailing party can demonstrate an unreasonable or frivolous action on the part of the government, then attorneys' fees would be

---

However, where the Government's position is not reasonably based in the law or in fact, fees will be awarded."

*Id.* at S10,918.

Several Senators, however, used the substantially justified phraseology, merely replicating the text of the Act. For example, Senator Thurmond (R., S.C.), *id.* at S10,920 and Senator Nelson (D., Wis.), *id.* at S10,922.

36. Letter from John H. F. Shatluck, Director, and Karen Christensen, Legislative Counsel of the American Civil Liberties Union, Washington, D.C. to Hon. Edward M. Kennedy (July 12, 1979) (hereinafter cited as ACLU):

The standard of "substantially justified" lends it self [sic] to numerous different interpretations. Although the drafters of S. 265 intend the standard to cover unreasonable and harassing government action, the standard is dangerously vague. . . . substantial judicial time will be wastefully expended in gleaning what Congress intended by this language. If S. 265 is intended to apply to only unreasonable or frivolous cases, it should state so explicitly.

37. Note 16 *supra*, at 7.

38. Senator Kennedy (D., Mass.) 125 CONG. REC. S10,923 (daily ed. July 31, 1979).

39. The Report stated "[t]he committee believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the Government was unreasonable." Note 16 *supra*, at 6.

40. ACLU, *supra* note 36, at 2.

41. 434 U.S. 412 (1978).



awarded.<sup>42</sup> The Senate rejected the use of the *Christiansburg* criteria as "inadequate because it simply would not overcome the strong disincentives to the exercise of legal rights which now exist in litigation with the Government."<sup>43</sup>

An important concern of the critics revolves around the potential chilling effect the bill may have on the assertive enforcement of federal laws. Enforcement may be limited because of the economic position in which individual agencies may find themselves. This criticism seems to lack the substance found in other expressed concerns. For example, the Justice Department asserts, without supportive material, that "the costs of this legislation in terms of the deterrent effect on legitimate law enforcement efforts could well exceed its cost in dollars and cents."<sup>44</sup> Legislative history, however, indicates that bureaucratic administrators might become more effective if there is a slight chill.<sup>45</sup>

Budgetary considerations are another area of concern. The estimated cost of the bill over the experimental three-year period will be in excess of \$367 million.<sup>46</sup> The legislative history, however, indicates a concern about the cost of litigation to the businessperson, but fails to discuss the cost to the government.<sup>47</sup>

---

42. The Department of Justice's position and a copy of its proposed bill was sent to the House Committee on the Judiciary subsequent to the passage of S. 265 in the Senate. Letter from Alan A. Parker, Assistant Attorney General to Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, House of Representatives (October 17, 1979) (hereinafter cited as Justice).

See also ACLU, *supra* note 36, at 3; Letter from Mark Green, Director, Nancy Drabble, Staff Attorney, Public Citizen, Washington D.C. to Judiciary Committee Members (July 9, 1979) (hereinafter cited as Public Citizen).

43. Note 16 *supra*, at 6.

44. Justice, *supra* note 42, at 3. See also ACLU, *supra* note 36, at 2; Public Citizen, *supra* note 42, at 2.

45. Senator Nelson (D., Wis.) seems to believe a slight 'chill' will be invigorating for the bureaucrat:

[W]here the Government agency goes ahead without a strong case against a business; or where it is proceeding carelessly; or where it now imposes a fine, secure in the knowledge that its action will not be challenged because of the cost involved, I would be very happy if the enactment of this legislation caused some chilling effect on Government regulatory efforts.

125 CONG. REC. S10,922 (daily ed. July 31, 1979).

46. Note 16 *supra*, at 9-12. The Congressional Budget Office estimates the cost at \$108 million for 1980, \$122 million for 1981, and \$137 million for 1982. *Id.* at 10.

47. Representative of the comments made during the floor debate are those by Senator Dole (R., Kan.), "Ironically, it appears that American justice has become too costly for the average American budget," and by Senator Helms (R., N.C.) "Justice simply will not be done when one side cannot afford to fight." 125 CONG. REC. S10,915, 10,922 (daily ed. July 31, 1979).

In fact, it appears that, according to at least one Senator, the federal government is the ultimate deep pocket.<sup>48</sup> The budgetary aspects of S. 265, however, are a major concern of the critics. Funds, assert the critics, will be directed away from law enforcement activities.<sup>49</sup> In addition, the American Civil Liberties Union contends:

[T]axpayers will be paying three times for enforcement of federal statutes—first for the enforcement activity, second for attorney fees where enforcement efforts are unsuccessful, and third through an effective subsidy to businesses which are even now allowed to deduct costs of litigation, including attorney fees, from their income taxes. This price is simply too high to ask the taxpayers to pay.<sup>50</sup>

The Department of Justice concurs that the cost of the legislation is too high. It states: “[T]he annual cost of S. 265 would likely exceed \$125 million—an amount equal to 30 percent of the current operating budget for the federal courts.”<sup>51</sup>

The cost of this bill may have an unfortunate result despite its philosophical appeal. Agencies, faced with expending unbudgeted monies will either cut back on established programs or inflate future budgetary requests. In addition, the government agencies may find it more cost efficient to abdicate enforcement of legislatively mandated programs or to abdicate asserting the reasonableness of their position in order to save money. In some cases, it may cost less merely to give up. Such a result would not only be counter to the intent of the legislation, but also may unjustly enhance the economic position of the prevailing party.

The final concern of the critics is that the legislation sweeps too broadly. It brushes aside the American rule too suddenly.<sup>52</sup> It

---

48. Remarks by Senator McClure (R., Idaho):

State and local government, and therefore taxpayers, normally operate on tight budgets, as do labor organizations and business corporations. However, the Federal Government is not under similar constraints. Normally, the agency or bureau is funded to bring suits, to enforce the laws, to implement social policies. The imbalance is clear.

125 CONG. REC. S10,921 (daily ed. July 31, 1979).

49. ACLU, *supra* note 36, at 3.

50. *Id.*

51. Justice, *supra* note 42, at 2. The letter goes on to state that the Congressional Budget Office only estimated direct costs of the legislation and did not include indirect costs such as government attorney and court personnel time. *Id.* See also ACLU, *supra* note 36, at 3.

52. See ACLU, *supra* note 36, at 1.

applies to too many areas, from contract disputes to environmental protection enforcement.<sup>53</sup> The Senate does not appear to address the issue of impact, except where it focuses on the impact exerted on businesspersons.

The concerns raised by critics, however, do not and should not negate the important philosophical intent of the legislation. If citizen cynicism of the government and government harassment of the citizens are cured by the passage of S. 265, perhaps the effort and expense will be worthwhile.

#### B. *H.R. 2846 a Bill Entitled Equal Access to Justice*

H.R. 2846 is the second in a trilogy of Equal Access to Justice bills pending in the House's Subcommittee on Courts, Civil Liberties and the Administration of Justice. Its basic structure is identical to S. 265.<sup>54</sup> There are, however, notable exceptions. While H.R. 2846 limits the parties who may take advantage of the fee award,<sup>55</sup> it does not include either the sole owner of an unincorporated business or an agricultural cooperative. The most significant difference between the two bills is that the House bill authorizes payment of the fee award to be made by the General Accounting Office (GAO) instead of the specific agency involved in the administrative or judicial controversy.<sup>56</sup> This method of payment diminishes the 'chilling effect' in enforcement that may occur with agencies that are required to pay fee awards directly from their budget.

---

53. [T]he legislation would apply in contract disputes, social security matters, land condemnation suits, environmental enforcement actions, and almost every other type of case that the Government litigates without any showing that the availability of a fee-shifting provision is necessary to enable litigants effectively to vindicate their rights in such cases.

Justice, *supra* note 42, at 2.

54. H.R. 2846 is based upon the same philosophical concept as S. 265. In his remarks in the House, Representative Udall (D., Ariz.) stated the premises of the bill:

We all recognize that our society has grown from a simple agrarian culture. . . . Accompanying that growth has been an increase in the size of government and in the number of Government rules and regulations. And as this regulatory maze increases in complexity the costs of dealing with it and with the Government have increases [sic] as well. . . . the Equal Access to Justice Act insures that when that regulation is onerous, perhaps unjust or unnecessary, small firms will be able to go to court for an objective, unbiased hearing.

125 CONG. REC. H7423-24 (daily ed. Sept. 6, 1979).

55. H.R. 2846, 96th Cong., 1st Sess. § 3(a) (1979).

56. *Id.*

H.R. 2846 contains potentially limiting language when it authorizes fee awards for "agency adjudication." S. 265 uses the broader term "proceeding." While both bills are apparently attempting to address the same issue, it would be a broader focus to use the term "proceeding."

Another difference between S. 265 and H.R. 2846 is that the latter does not contain a provision dealing with action initiated before, but not completed by the end of the three-year experimental sunset provision. The exclusion of such a provision may protract litigation in hopes that it will result in either default or less than adequate settlement.

C. *H.R. 5342 a Bill Entitled "Equal Access to Justice Act"*

The final Equal Access bill follows S. 265 more closely than did H.R. 2846. There are, however, two notable distinctions between H.R. 5342 and S. 265. First, the maximum allowable attorneys' fee rate is \$100 per hour<sup>57</sup> as compared to \$75 per hour contained in S. 265 (and H.R. 2846). Second, and more importantly, the standard used to judge the government's action is changed from a "substantially justified" basis to a "clearly justified" basis.<sup>58</sup> Since there is, however, no legislative debate available on the bill, it would be inappropriate to speculate whether this standard will translate into the "reasonableness" standard that the Senate felt defined the substantially justified standard.

D. *H.R. 302 a Bill to Provide That in Civil Actions Where the United States Is Plaintiff, a Prevailing Defendant May Recover a Reasonable Attorney's Fee and Other Reasonable Litigation Costs*

This bill<sup>59</sup> is simplistic in form and approach. In any civil action, a prevailing nongovernmental party is to be awarded reasonable attorneys' fees and litigation costs. The bill's lack of comprehensiveness leaves numerous questions unanswered. From whose budget is the prevailing party paid? Does United States terminology include agencies and officials acting in their official capacity? Does the term civil action exclude administrative proceedings?

The indefiniteness of the bill, however, does not detract from its philosophically appealing aspect. Defendants, regardless of

---

57. H.R. 5342, 96th Cong., 1st Sess. § 3(a) (1979).

58. *Id.* § 4(a).

59. H.R. 302 is identical to several other bills introduced in the House during the 96th Congress: H.R. 436, 670, 1365, 1384, 2371, 3513.

wealth, may obtain reasonable fee awards provided that they prevail against the government.

E. *H.R. 3516 a Bill to Provide for the Recovery by the Prevailing Party of Attorneys' Fees from the United States in Civil Actions Where the United States Is a Party Which Does Not Prevail*

This bill, while similar in approach to H.R. 302, broadens the scope of the award by including an award for prevailing in a civil action regardless of whether the nongovernmental party is a plaintiff or a defendant. As with the previous bill, however, the conceptual framework of the bill leaves many important questions unanswered.

F. *H.R. 3517 a Bill to Authorize the Payment of Attorneys' Fees in Tax Cases*

Cited as the "Taxpayer's Attorney Fee Award Act of 1979," the bill authorizes the awarding of reasonable attorneys' fees to nongovernmental prevailing parties where tax liability is an issue. A prevailing party apparently may be either a plaintiff or defendant.<sup>60</sup>

G. *H.R. 5467 a Bill to Amend Title 35, United States Code to Provide That, Except in Exceptional Cases, Attorneys' Fees Should Be Awarded in Cases Involving Patent Infringements*

The substantive portion of the bill amends section 285,<sup>61</sup> by inserting in lieu of the existing phraseology the sentence: "The court, except in exceptional cases, may award reasonable attorney's fees to the prevailing party." This bill demonstrates the broad and sweeping desire by members of Congress to limit the application of the American rule.

H. *H.R. 5009 a Bill to Provide That Attorneys' Fees And Other Reasonable Costs Shall Be Reimbursed to Taxpayers Who Substantially Prevail in Any Proceeding, Litigation, or Court Action Which Is Brought By or Against the United States for the Determination, Collection or Refund of any Tax, Interest, Penalty, or Other Matter Arising Under the Internal Revenue Code*

---

60. See notes 73-90 *infra* and accompanying text (discussion of S.1444, 96th Cong., 1st Sess. (1979) (a more comprehensive tax bill)).

61. 35 U.S.C. § 285 (1976) currently reads: "The court in exceptional cases may award reasonable attorney fees to the prevailing party." *Id.*

This bill is a variation of S. 265. Its focus is limited to tax issues. While the bill is entitled "Taxpayers' Litigation and Equity Award Act of 1979," its purpose is identical to that of S. 265. In this case, the economic disparity between government and individuals may deter the individuals or organizations from seeking revenue or defending against governmental action.<sup>62</sup> Thus, the purpose of the Act is to diminish the deterrent effect of such disparity by providing, in specified situations, the litigation costs involved in asserting a position against the government.

In order to accomplish its objective, the bill provides for the awarding to the prevailing or substantially prevailing party of reasonable attorneys' fees in any proceeding, litigation or court action arising under the Internal Revenue Code.<sup>63</sup> If the government withdraws from the action, a party is considered to have substantially prevailed.<sup>64</sup>

The bill provides a different method of determining the limitation of the award than has been found in previous bills. Reasonable award costs may not exceed \$20,000. In addition, however, there is an alternative computation method. It provides that the reasonable cost, if greater than \$20,000, may not exceed the monies expended by or allocated to the United States. There is a limitation on who may use this latter fee award formula. A party, such as an individual, a partnership, a corporation, an association or organization, must have net assets less than \$1 million at the time the action was commenced, in order to take advantage of the second fee award formula. Reasonable attorney rates will be based upon the prevailing market rate.<sup>65</sup>

The bill defines "United States" broadly to include any agency and officials acting in their official capacity.<sup>66</sup> In other bills where the term "United States" has been broadly defined, the expenditure for the award comes from the agency's budget. This approach is only partly true in this bill. The bill calls for the expenditure to be made through the GAO "unless the basis for an award is a finding that the United States acted in bad faith or unreasonably in which case the award shall be paid by the Internal Revenue Service out of its appropriation."<sup>67</sup>

---

62. H.R. 5009, 96th Cong., 1st Sess. § 2 (1979).

63. *Id.* § 3(a).

64. *Id.*

65. *Id.* § 3(b)(c).

66. *Id.* § 3(c)(1)(ii).

67. *Id.* § 3(F).

Because of the bill's language, it would appear that the terminology "through the General Accounting Office" means that the GAO does not serve as a conduit for the monies awarded, but is the paying agent in all cases except where the agency's position was unreasonable or in bad faith. If the latter circumstances occurred, the agency would pay the award. The bill does not indicate whether the agency may set up a separate budgetary item to cover a potential fee award.

H.R. 5009 is broader in scope than S. 265 in that it does not require unreasonable governmental action as a condition to an award. The chilling effect on the Internal Revenue Service (IRS), however, may be the same as the chilling effect on agencies covered under S. 265, if it must pay the award because of an unreasonable position.<sup>68</sup>

This bill, unlike S. 265, does not state where the burden of proof is placed in order to determine the unreasonableness or bad faith action of the agency. The distinction does not affect the prevailing party as much as it will affect the IRS and the GAO. Presumably, both would prefer the other to pay. It would be ironic if one of the agencies had to litigate the question of reasonableness of action in order to determine which agency paid the prevailing party.

The award may be appealed to a federal court. If it is, the court may reduce, deny or increase the award. An increase in award may be implemented by the court when the United States engages in actions which serve to unduly and unreasonably protract the final resolution of the issue, or where special circumstances make the award unjust. Likewise, a reduction or denial of the award to the prevailing party may be made for the same reasons.<sup>69</sup>

Many of the concerns expressed about S. 265 are not present in H.R. 5009. For example, the prevailing party will recover merely by prevailing unless the award is unjust. In the latter instance, the burden of proof required to deny or reduce the award would appear to be on the agency. The chilling effect on the IRS is, compared to S. 265, potentially diminished, although not eliminated because the party will recover regardless of the reasonableness of the agency's action.<sup>70</sup>

---

68. See notes 7-53 *supra* and accompanying text (discussing S. 265, 96th Cong., 1st Sess. (1979)).

69. H.R. 5009, 96th Cong., 1st Sess. § 3(c) (1979).

70. S. 1444 is more likely to get favorable treatment than H.R. 5009. See notes 73-90 *infra* and accompanying text (discussing S. 1444, 96th Cong., 1st Sess. (1979)).

I. *H.R. 1780 a Bill to Provide for the Recovery By a Prevailing Defendant in Federal Criminal Cases of a Reasonable Attorney's Fee and Other Reasonable Litigation Costs*

H.R. 1780 is designed to accomplish in criminal law what previous bills have been designed to accomplish in civil and administrative law, the awarding of fees to prevailing parties. Payment is made to any defendant in a federal criminal case "who is not convicted after trial, whose prosecution is dismissed with prejudice, or whose conviction is ultimately vitiated (unless such conviction is vitiated by pardon on grounds other than innocence). . . ."71

The purpose of this bill is apparently the same as the other bills discussed. It, like others,<sup>72</sup> suffers from lack of elaboration. The bill's specifics must await committee hearings and floor debate.

III. BILLS WHICH APPEAR TO BE MOVING

A. *S. 1444 a Bill to Amend the Internal Revenue Code of 1954 and Title 28 of the United States Code to Provide for the Award of Reasonable Court Costs, Including Attorneys' Fees, to Prevailing Parties in Civil Tax Actions, and for Other Purposes*

S. 1444 may be viewed as a complement to S. 265. Its title, the "Taxpayer Protection and Reimbursement Act," is certainly not as philosophically oriented as S. 265. While the basis of the bill, however, is similar,<sup>73</sup> there are several significant differences between them. The focus of S. 1444 is narrow, applying to cases brought under the Internal Revenue Code.<sup>74</sup> Despite the narrower

---

71. H.R. 1780, 96th Cong., 1st Sess. (1979).

72. H.R. 302, 3516, 3517, 5407, 96th Cong., 1st Sess. (1979).

73. The same philosophical purpose is to be found in the two bills. During his introduction of S. 1444 Senator Baucus (D., Mont.) stated:

While recognizing that IRS generally exercises its authority justly and with restraint, the fact remains that in an organization as large and complex as IRS, which must administer a myriad of complicated tax laws, errors are bound to occur. There are instances where IRS has acted arbitrarily, where certain taxpayers may feel subjected to IRS harassment or abuse. . . . Such taxpayers, who have to endure the turmoils of litigation through no fault of their own, must still pay the legal expenses incurred in the course of court action. . . . In such circumstances, the expense of litigation often makes a court victory meaningless for taxpayers.

125 CONG. REC. S8,712 (daily ed. June 27, 1979).

74. During the legislative debate on S. 265, the discussion focused, for a short while on S. 1444. Senator Baucus (D., Mont.) proposed an amendment which would limit the affect of S. 265 or the internal revenue laws for six months after the enactment of S. 265. This amendment was adopted and became § 7(b) of S. 265.

Since there are differences in the two bills, and S. 265 would only apply to areas



focus of the bill, S. 1444 is attempting to broaden existing fee recovery legislation. Currently, nongovernmental prevailing parties may recover attorneys' fees when they are involved in a civil action or proceeding involving the Internal Revenue Code. The authority for this is from the Civil Rights Attorney's Fees Awards Act of 1976.<sup>75</sup> As noted in the legislative history of S. 1444, there are limitations to the current award availability. First, courts have limited recovery to prevailing defendants.<sup>76</sup> Second, courts have allowed awards only where the government has "acted in bad faith, for purposes of harassment or vexatiously or frivolously."<sup>77</sup>

In its attempt to broaden current legislation, the bill incorporates many of the same provisions as can be found in S. 265, as well as some different provisions. For instance, the bill specifies a maximum \$20,000 reasonable award limitation for any one civil action or proceeding.<sup>78</sup> In addition to attorneys, any individual authorized to practice before the tax court may be awarded fees.<sup>79</sup>

In order to be eligible for an award, the nongovernmental party must prevail. Prevailing entails meeting two conditions. First, the bill requires that the party "is sustained (whether by judicial determination or agreement of the parties) as to all, or all but an insignificant portion, of the amount in controversy, or . . . if no amount is in controversy, . . . as to all, or all but an insignificant portion, of the issue or issues presented. . . ."<sup>80</sup> Second, the pre-

---

not previously covered by fee award legislation, Senator Baucus implied that the six month delay would allow enough time for him to assure passage of S. 1444. As the Senator stated, "[i]t is also my understanding that if S. 265 is enacted, that the provisions of S. 1444 will supersede the provisions of S. 265 inasmuch as S. 265 states that all specific attorneys' fees provisions will supersede the general provisions contained in this bill." 125 CONG. REC. S10,919 (daily ed. July 31, 1979).

75. 42 U.S.C. § 1988 (1976).

76. Remarks of Senator Baucus (D., Mont.):

First of all, courts have been in virtual agreement that reimbursement for attorneys' fees may only be made where the taxpayer is the defendant. . . .

Second, courts have held that even if the taxpayer is the defendant in a civil tax litigation and prevails against the Government, that taxpayer nevertheless may recover attorney's fees from the Government only if the Government acted in bad faith, for purposes of harassment or vexatiously or frivolously. Few taxpayers are able to meet such a highly restrictive burden of proof, even though they prevail in the litigation.

125 CONG. REC. S8,713 (daily ed. June 27, 1979).

77. *Id.* It should be noted that the defendant has the burden of proving that the government acted vexatiously, frivolously or in bad faith, for purposes of harassment.

78. S. 1444, 96th Cong., 1st Sess., §§ 101(a), 201 (1979).

79. *Id.* § 101(a). Section 201 of the bill (applicable to 28 U.S.C. § 2412 (1976)) does not contain this wording.

80. S. 1444, 96th Cong., 1st Sess. §§ 101(a), 201 (1979).

vailing party must establish that the position of the United States was unreasonable.<sup>81</sup> Reimbursement is thus available to both nongovernmental plaintiffs and defendants in most civil actions and proceedings under the Internal Revenue Code.<sup>82</sup>

There appears to be a third hurdle for the prevailing party to overcome. While the terminology of the Act, buttressed by legislative history, indicates an award may be made for prevailing at the administrative level,<sup>83</sup> it appears that the prevailing party must go to court in order to prove that the position of the agency was unreasonable, and thus be eligible for the award. There is no provision for the agency to make the award. While the sponsor's intent to "encourage the parties to settle thereby lessening court congestion"<sup>84</sup> may be a laudable idea, the provisions of the bill do not accommodate it.

Payment of the award is to be made from the general appropriations of the agency involved.<sup>85</sup> The granting or denial of the award, however, may be appealed.<sup>86</sup>

The bill carries with it a sunset provision,<sup>87</sup> but has an extended retroactive implementation date. Its provisions apply to civil tax actions or proceedings instituted after December 31, 1978, and before January 1, 1983.<sup>88</sup>

Although S. 1444 is closely related to S. 265, there are differences between the bills. Several of the concerns expressed about S. 265 are eliminated by S. 1444. In particular, the chilling effect on the agency is diminished partly because of the burden of proving unreasonable action by the government lies with the prevailing nongovernmental party. The bill is not breaking new ground as

---

81. *Id.*

82. The bill does limit the award by excluding certain civil actions and proceedings. These relate to various actions for declaratory judgment. *See* S. 1444, 96th Cong., 1st Sess. § 101(a) (1979).

83. The Act calls for an award in the case of any civil action or proceeding. *Id.* Senator Baucus remarked during the introduction of the bill, "Furthermore, the rule that a party can be sustained either by judicial determination or settlement of the parties encourage the parties to settle thereby lessening court congestion." 125 CONG. REC. S8,713 (daily ed. June 27, 1979). A broad and appropriate reading of these words indicates that resolution of the issue at the administrative level would lead to the award of reasonable fees.

84. 125 CONG. REC. S8,713 (daily ed. June 27, 1979).

85. This would most likely be either the Internal Revenue Service or the Justice Department. S. 1444, 96th Cong., 1st Sess. § 101(a) (1979).

86. *Id.*

87. *See* note 28 *supra*.

88. S. 1444, 96th Cong., 1st Sess. §§ 103, 203 (1979).

much as it is expanding old ground. It is merely extending the definition of "prevailing party" from that found in the Civil Rights Attorney's Fees Awards Act of 1976 to include nongovernmental plaintiffs as well as defendants. This expanded definition may cost the taxpayers, as a whole, more money.<sup>89</sup>

The bill's sponsor claims that the bill "provides needed protection and assistance to those parties who become embroiled in court disputes with [the] IRS through no fault of their own, but does not penalize [the] IRS for fair, responsible, and reasonable performance of its duties."<sup>90</sup> Time, congressional debate and possible implementation will determine if such an objective can be achieved.

*B. S. 1385 a Bill to Amend Title 28 of the United States Code to Provide for the Payment of Reasonable Attorneys' Fees and Other Costs in Certain Civil Actions*

S. 1385 is another hybrid of S. 265. It has distinguishing characteristics. An attorney's fee award may be given to a nongovernmental prevailing party who is a defendant in an action brought by the government and to a nongovernmental prevailing plaintiff who brings an action against the government "in connection with the collection or recovery of any internal revenue tax or of any penalty or other sum under the internal revenue laws."<sup>91</sup>

The bill's intent is to expand the Civil Rights Attorney's Fees Awards Act of 1976 by removing the "bad faith" burden of proof required to be shown by nongovernmental prevailing defendants and by allowing plaintiffs in IRS cases to be awarded fees. The emphasis is on prevailing, not prevailing against an "unreasonable" position.

Party is defined as "any individual who had at the time the civil action was filed, net assets less than . . . [\$1 million] and any partnership, corporation, association, or organization that employed, at the time the civil action was filed, not more than one hundred persons."<sup>92</sup> This definition seemingly leaves a large area for a party to maneuver. A partnership of two persons with assets in excess of \$1 million could be awarded the fee. If the partnership had assets in excess of \$50 million, there would be an apparent inconsistency between the intent of the limitation and its practical

---

89. Since S. 1444 has not reached the same stage as S. 265, no Congressional Budget Office Cost Estimate is available.

90. 125 CONG. REC. S8,713 (daily ed. June 27, 1979).

91. S. 1385, 96th Cong., 1st Sess. (1979).

92. *Id.*

application. There is no limit, other than reasonableness, on the fee award, although the rate is calculated on the prevailing market rate.<sup>93</sup>

The bill broadly defines "United States" to include any agency and official acting in his or her official capacity.<sup>94</sup> In so doing, the bill is consistent with most other bills because it calls for any award to be paid from the losing agency's existing budget. No special allocations are allowed.<sup>95</sup>

*C. S. 330 a Bill to Amend Title 38, United States Code, to Establish Certain Procedures for the Adjudication of Claims for Benefits Under Laws Administered by the Veterans' Administration; to Apply the Provisions of Section 553 of Title 5, United States Code, to Rulemaking Procedures of the Veteran's Administration; to Provide for Judicial Review of Certain Final Decisions of the Administrator of Veteran's Affairs; to Provide for the Payment of Attorneys' Fees*

S. 330, the "Veterans' Administration Adjudication Procedure and Judicial Review Act," is a comprehensive bill covering areas in addition to the awarding of attorneys' fees.<sup>96</sup> This overview, however, will focus on the attorneys' fees provision.

The bill allows the Veterans' Administration (VA) to award reasonable attorneys' fees for services before that agency for claims made in connection with VA related laws. The bill, however, has a unique method of determining compensation levels. It does not allow a fee award in excess of \$10 if the claim is resolved prior to the receipt of a statement of the case.<sup>97</sup> If the claim is resolved after

---

93. *Id.*

94. *Id.*

95. *Id.*

96. The bill has four major sections designed to provide for judicial review of Veteran Administration (VA) decisions (title III) and the payment of attorneys' fees (title IV). In addition, the bill requires that the VA complies with the Administrative Procedures Act (title II) and clarify and codify existing adjudicatory procedures (title I).

97. The legislative history is illuminating on this particular point. Senator Cranston (D., Cal.), provides an in depth review of the background of title IV regarding attorneys' fees. It appears that the internal claim procedures of the Veterans Administration do not require the claimant to have the services of a lawyer during the initial stages of processing a claim. Once a claim is filed, the VA performs most of the background investigation work and makes a determination. If the claimant disagrees with the finding, the claimant need only file a notice of disagreement in order to obtain a review. Should this second review not be to the satisfaction of the claimant, the VA will prepare and send to the claimant a statement of the case. This statement contains: (A) a summary of the evidence on the issues in disagreement; (B) a citation of the legal basis for the determination and (C) a decision of the issues in controversy.

the receipt of a statement of the case, the administrator may approve an award not in excess of the lesser of the fee agreed between the attorney and the claimant or \$500.<sup>98</sup> If, however, no fee is payable unless the attorney prevails, the award is limited to "25 percent of the total amount of any past-due benefits awarded on the basis of the claim."<sup>99</sup> If the claimant is not satisfied with the result of the VA proceedings, there may be an appeal to the United States District Court.<sup>100</sup> A prevailing claimant is entitled to reasonable attorneys' fees or, if a contingent fee arrangement was entered, an amount not to exceed 25 percent of the total due.<sup>101</sup> If the claimant does not prevail, attorneys' fees may still be awarded by the court "taking into consideration the extent to which there could have appeared to have been a reasonable probability of success for such an action at the time it was filed. . . ."<sup>102</sup> The maximum allowable recovery available to the nonprevailing attorney is \$750.<sup>103</sup> The attorney's fee provision allowed by this bill results in an assessment against the veteran's claim and not against the Veterans' Administration.<sup>104</sup> In addition, a prevailing party is broadly defined to include a claimant who is granted "all or any part of the relief sought."<sup>105</sup> If the attorney questions the award of the fees, that issue may be appealed, but only to determine if the Administrator's action was an abuse of discretion.<sup>106</sup>

---

It is interesting to note that the ten dollar fee had historical precedent dating back to the Civil War and World War I. It seemed to Congress that "lawyers of that day were unscrupulous and were taking unfair advantage of veterans by retaining an unwarranted portion of the veterans' statutory entitlement in return for very limited legal assistance." 125 CONG. REC. S12,712 (daily ed. Sept. 17, 1979).

98. S. 330, 96th Cong., 1st Sess. § 401 (1979).

99. *Id.*

100. *Id.* §§ 4025-29.

101. *Id.* § 401.

102. *Id.*

103. *Id.* The legislative history of this Act places a limitation on the courts in the awarding of this fee. "[T]he \$750 fee allowable under this section is not to be regarded as the amount to be approved automatically but rather that the court should act so as to discourage attorney representation in cases lacking in any significant merit by approving fee amounts at lower levels when appropriate." 125 CONG. REC. S12,713 (daily ed. Sept. 17, 1979).

104. The Congressional Budget Office produced a cost estimate of S. 330. It concluded that enactment of the attorneys' fee title would entail no cost. Obviously, this is because neither the VA nor the United States is required, as with other bills, to pay for attorneys' fees.

105. S. 330, 96th Cong., 1st Sess. § 401 (1979).

106. *Id.* The "abuse of discretion" standard was placed in the bill because the standard "would serve to discourage frivolous challenges to a fee approval or challenges in arguable cases in which there may be disagreement but the Administrator's

S. 330 is a unique attorneys' fees bill. It is not designed to provide the "equal access to justice" that the previously discussed bills provide. Perhaps this is because, and the legislative history bears this out, the role of the VA is viewed by Congress as assistance oriented rather than advocacy oriented.<sup>107</sup> The major congressional concern over this bill appears to be the judicial review issue.<sup>108</sup>

#### IV. CONCLUSION

Alexis de Tocqueville asserted that in a democracy, "Government is not a benefit, but a necessary evil."<sup>109</sup> Congress is apparently attempting to minimize the effects of this evil by the force of economics. Attorneys' fees legislation is an attempt at curtailing the bureaucratic giant that Congress has helped to create while at the same time providing an economic and philosophical incentive to the American people to stand up and fight. In so doing, Congress is sounding the death knoll of the "American Rule." Two hundred years of common law is being strangled by the potential enactment of attorneys' fees legislation. The merits of such a move will be left to others to discuss.

*Leslie A. Williamson, Jr.*

---

judgment is clearly not without reasonable foundation." 125 CONG. REC. S12,713 (daily ed. Sept. 17, 1979).

107. *See, e.g.*, 125 CONG. REC. S12,721 (daily ed. Sept. 17, 1979).

108. *Id.* (remarks of Senator Humphrey (R., N.H.)).

109. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 238 (1961) (published in English 1835).

## APPENDIX

### ATTORNEYS' FEES BILLS INTRODUCED DURING THE 96TH CONGRESS AS OF OCTOBER 25, 1979<sup>110</sup>

- H. R. 162—A bill to provide for judicial review of administrative determinations made by the Board of Veterans Appeals.
- H. R. 204—A bill to provide for the safeguarding of taxpayer rights.
- H. R. 254—A bill to amend chapters 5 and 7 of title 5, United States Code, to require formal rulemaking procedures in the establishment of grant, loan, benefit, and contract practices, to authorize payment of expenses to certain participants in administrative proceedings, to waive sovereign immunity where judicial relief other than money damages is sought, and to require the establishment of enforcement procedures for grant-in-aid programs.
- H. R. 284—A bill to amend chapters 5 and 7 of title 5 of the United States Code to provide for the award of reasonable attorney fees, expert witness expenses, and other costs reasonably incurred in proceedings before federal agencies.
- H. R. 436—A bill to provide that in civil actions where the United States is a plaintiff, a prevailing defendant may recover a reasonable attorney's fee and other reasonable litigation costs.
- H. R. 664—A bill to amend the Occupational Safety and Health Act of 1970 to provide that any employer who successfully contests a citation or penalty shall be awarded a reasonable attorney's fee and other reasonable litigation costs.
- H. R. 670—A bill to provide that in civil actions where the United States is a plaintiff, a prevailing defendant may recover a reasonable attorney's fee and other reasonable litigation costs.
- H. R. 687—A bill to amend title II of the Social Security Act to provide that attorney's fees allowed in administrative or judicial proceedings under that title (or under title XVIII of such act), in cases where the claimants are successful, shall be paid by the Secretary of Health, Education, and Welfare rather than deducted from the amounts awarded claimants.
- H. R. 966—A bill to amend title XVI of the Social Security Act to provide that attorneys' fees allowed in administrative or judicial proceedings under such title, in cases where the claimants are successful, shall be paid by the Secretary of Health, Education, and Welfare.
- H. R. 1005—A bill to amend the Magnuson-Moss Federal Trade Commission Improvement Act to extend the protections contained in such Act to owners of new passenger motor vehicles.

---

110. The following bills have been introduced into Congress since October 25, 1979: S. 751; S. 1991; H.R. 5200; H.R. 5337; H.R. 5837; H.R. 5843.

- H. R. 1023—A bill to amend the Miller Act to authorize the payment of attorney fees and litigation cost to a prevailing plaintiff from performance bonds furnished by federal contractors.
- H. R. 1064—A bill to provide for the safeguarding of taxpayer rights.
- H. R. 1365—A bill to provide that in civil actions where the United States is a plaintiff, a prevailing defendant may recover a reasonable attorney's fee and other reasonable litigation costs.
- H. R. 1378—A bill to amend the Occupational Safety and Health Act of 1970 to provide that any employer who successfully contests a citation or penalty shall be awarded a reasonable attorney's fee and other reasonable litigation costs.
- H. R. 1384—A bill to provide that in civil actions where the United States is a plaintiff, a prevailing defendant may recover a reasonable attorney's fee and other reasonable litigation costs.
- H. R. 1503—A bill to amend title 38 of the United States Code to allow judicial review of decisions made by the Administrator of the Veterans' Administration.
- H. R. 1813—A bill to amend title 38, United States Code, to establish a Court of Veterans' Appeals and to prescribe its jurisdiction and functions.
- H. R. 1838—A bill to provide for judicial review of administrative determinations made by the Board of Veterans Appeals.
- H. R. 2170—A bill to provide for the reimbursement of legal expenses incurred by the City of Fairfax with respect to a 1971 entry and search by employees of the Federal Government.
- H. R. 2361—A bill to amend the Act entitled An Act to provide for the termination of federal supervision over the property of the Klamath Tribe of Indians located in the State of Oregon and the individual members thereof, and for other purposes, approved August 13, 1954 (25 U.S.C. 564w-2) to provide for federal reimbursement to such tribe of reasonable litigation expenses incurred by such tribe.
- H. R. 2371—A bill to provide that in civil actions where the United States is a plaintiff, a prevailing defendant may recover a reasonable attorney's fee and other reasonable litigation costs.
- H. R. 2596—A bill to amend chapter 5 of title 5, United States Code (commonly known as the Administrative Procedure Act), to permit awards of reasonable attorneys' fees and other expenses for public participation, in federal agency proceedings, (and for other purposes).
- H. R. 2659—A bill to amend title 28 of the United States Code to provide for an exclusive remedy against the United States in suits based upon acts or omissions of the U.S. employees, to provide a remedy against the United States with respect to constitutional torts, to establish procedures whereby a person injured by a constitutional tort may initiate and participate in a disciplinary inquiry with respect to such tort.



- H. R. 3389—A bill to amend chapter 19 of title 38, United States Code, to permit the unrestricted assignment of a beneficiary's interest in the proceeds of a Government Life Insurance policy in cases involving contested claims, and to increase the amount an attorney may receive for representing a claimant in such cases; to authorize the Administrator to establish a program of dividends for certain types of National Service Life Insurance.
- H. R. 3424—A bill to deter the charging of replacement and non-replacement fees by blood banks.
- H. R. 3466—A bill to amend the Occupational Safety and Health Act of 1970 to provide that any employer who successfully contests a citation or penalty shall be awarded a reasonable attorney's fee and other reasonable litigations costs.
- H. R. 3515—A bill to provide that in civil actions where the United States is a plaintiff, a prevailing defendant may recover a reasonable attorney's fee and other reasonable litigation costs.
- H. R. 3814—A bill to amend the Act of December 22, 1974.
- H. R. 3866—A bill to provide for the distribution of certain funds appropriated to pay judgments in favor of the Delaware Tribe of Indians and the Absentee Delaware Tribe of Western Oklahoma in Indian Claims Commission dockets 27-A and 241, 289, and 27-B and 338.
- H. R. 3884—A bill to amend the Internal Revenue Code of 1954 to provide for payment by the Government of all reasonable litigation expenses to prevailing taxpayers in legal action.
- H. R. 3929—A bill to amend title 28, United States Code, to require that the United States reimburse defendants for the costs incurred in the defense against any civil action filed by the United States on behalf of any Indian or Indian tribe.
- H. R. 4047—A bill to clarify the standards pertaining to unreasonable attorney delay and to expand the sanctions for such conduct.
- H. R. 4257—A bill to help states assist the innocent victims of crime.
- H. R. 4297—A bill to amend section 1875 of title 28, United States Code, with respect to the appointment and compensation of counsel for a juror claiming a violation by his employer of rights guaranteed by such section.
- H. R. 4321—A bill to amend the Social Security Act to reform the program of aid to families with dependent children, to make improvements in the standards for eligibility and benefits in the program of supplemental security income and to provide for the improved administration of both programs, to make related amendments to the Internal Revenue Code of 1954.
- H. R. 4584—A bill to amend the Internal Revenue Code of 1954 to authorize the payment of attorneys' fees to taxpayers who prevail in tax litigation.
- H. R. 4674—A bill to promote the foreign policy of the United States by strengthening and improving the Foreign Service of the United States.

- H. R. 4766—A bill to amend title 28 of the United States Code to make the United States liable for damages, arising from certain nuclear tests at the Nevada Test Site, to individuals residing for a year in the affected area and having cancer, to individuals present at the site during a test, and to certain sheep herds.
- H. R. 4827—A bill to prohibit the appropriation or use of funds for the compensation of attorneys, witnesses, or experts for intervening or participating in any rulemaking proceeding of any Federal agency unless such appropriation is specifically authorized by law.
- H. R. 4927—A bill to amend title 38, United States Code, to establish a Court of Veterans' Appeals and to prescribe its jurisdiction and functions.
- H. R. 5008—A bill to provide for judicial review of administrative determinations made by the Administrator of the Veterans' Administration; to apply the provisions of chapter 5 of title 5, United States Code, to the rules, regulations, and orders of the Veterans' Administration; to provide for the use of a reasonable fee for attorneys in rendering legal assistance to veterans with claims before the Veterans' Administration.
- H. R. 5087—A bill to amend the Immigration and Nationality Act.
- H. R. 5103—A bill to provide for better access to the Federal courts for small businesses and others with small to moderate size claims, to expand the duties of the Office of Advocacy of the Small Business Administration.
- H. R. 5262—A bill to amend the Act of December 22, 1974 (88 Stat. 1712; 25 U.S.C. 640d).
- S. Res. 96—A resolution authorizing payment out of the contingent fund of the Senate of expenses incurred by Senator Morgan in supporting a motion to quash certain subpoenas served in the case of Zenith Radio Corporation against Matsushita Electric Industrial Company, Limited.
- S. 209—A bill to amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1954 for the purposes of simplifying, clarifying, and improving federal law relating to the regulation of employee benefit plans, and to foster the establishment and maintenance of plans.
- S. 251—A bill to amend the Occupational Safety and Health Act of 1970 to insure equal protection of the laws for small business and to provide that any employer who successfully contests a citation or penalty shall be awarded a reasonable attorney's fee and other reasonable litigation costs.
- S. 270—A bill to amend the Occupational Safety and Health Act of 1970 to insure equal protection of the laws for small business and to provide that any employer who successfully contests a citation or penalty shall be awarded a reasonable attorney's fee and other reasonable litigation costs.
- S. 300—A bill to restore fair and effective enforcement of the antitrust laws.

- S. 326—A bill entitled the Taxpayers' Bill of Rights Act.
- S. 695—A bill to amend title 28 of the United States Code to provide for an exclusive remedy against the United States in actions based upon acts or omissions of United States employees, and to amend title 5 of the United States Code to permit a person injured by a constitutional tort to initiate and participate in a disciplinary inquiry of the offending act or omission.
- S. 754—A bill to amend chapter 19 of title 38, United States Code, to permit the unrestricted assignment of a beneficiary's interest in the proceeds of a Government Life Insurance policy in cases involving contested claims, and to increase the amount an attorney may receive for representing a claimant in such cases; to authorize the Administrator to establish a program of dividends for certain types of National Service Life Insurance; to authorize the Administrator to use a flexible interest rate in cases where the beneficiary of Government Life Insurance receives the proceeds of such insurance under certain settlement options.
- S. 955—A bill to provide for the safeguards of taxpayer rights.
- S. 1077—A bill to amend the Act of December 22, 1974, to relocate certain members of the Navajo and Hopi tribes.
- S. 1187—A bill to amend title 28 of the United States Code with regard to the appointment and compensation of counsel for jurors claiming a violation by their employers of certain rights guaranteed by such title.
- S. 1290—A bill to amend the Social Security Act to reform the program of aid to families with dependent children, to make improvements in the standards for eligibility and benefits in the program of supplemental security income and to provide for the improved administration of both programs, and to make related amendments to the Internal Revenue Code of 1954.
- S. 1291—A bill to amend title 5 of the United States Code to improve the procedures for agency rule making, to require agencies to adhere to a pro-competition standard, to require the Congress and the President to review certain regulatory agencies, and to provide public participation funding.
- S. 1450—A bill to promote the foreign policy of the United States by strengthening and improving the Foreign Service of the United States.
- S. 1466—A bill to provide for the distribution of certain funds appropriated to pay judgments in favor of the Delaware Tribe of Indians and the Absentee Delaware Tribe of Western Oklahoma in Indian Claims Commission dockets 27-A and 241, 289, and 27-B and 338.
- S. 1701—A bill to amend the Magnuson-Moss-Federal Trade Commission Improvement Act to extend the protections contained in such Act to owners of new passenger motor vehicles, and for other purposes.