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UNITED STATES LIABILITY FOR ATTORNEYS' FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT

[*Premachandra v. Mitts*, 753 F.2d 635
(8th Cir. 1985)]

INTRODUCTION

Government resources and expertise can have a substantial chilling effect on an individual challenging unreasonable government action.¹ In a suit against the United States, a private party is economically weak by comparison, and is made more feeble by a deprivation of constitutional rights.² This helplessness is magnified by the government's inherent power and image of invulnerability.

Vindication of constitutional rights depends heavily on private enforcement.³ Attorneys' fees, however, often prove to be a formidable, if not insurmountable, obstacle to private challenges.⁴ Consequently, fee awards are an essential remedy if private citizens are to have a meaningful opportunity to vindicate their rights.

Congress enacted the Equal Access to Justice Act⁵ (EAJA) in order to reduce the disparity of resources between the government and individuals challenging the United States.⁶ Section 2412(b) of the EAJA provides that the United States shall be liable for fee awards to

1. Note, *Civil Procedure—Attorney's Fees—Recovery of Attorney's Fees Against the United States—The Equal Access to Justice Act*, Pub. L. No. 96-481, 94 Stat. 2325 (1980), 10 FLA. ST. U.L. REV. 723, 726 (1983).

2. *Smith v. Puett*, 506 F. Supp. 134, 146 (M.D. Tenn. 1980) (failure to award fees frustrates the policy of § 1988).

3. In *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975), Justice White portrayed the importance of providing individuals with the means to vindicate fundamental constitutional rights:

And, if any statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a court deny attorneys' fees to private litigants in actions under 42 U.S.C. § 1983 seeking to vindicate constitutional rights?

Id. at 264.

4. There are three categories of expenditures associated with pursuing a claim in a judicial proceeding: expenses, attorneys' fees, and taxable costs. The Equal Access to Justice Act treats these categories as separate and distinct, creating different standards for each. The scope of this Comment is limited to attorneys' fees. For an expanded discussion, see generally Hughes, *Attorneys' Fees and Expenses Under the Equal Access to Justice Act*, ARMY LAW., Oct. 1983, at 1.

5. Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, 94 Stat. 2325 (1980) (codified at 5 U.S.C. § 504; 25 U.S.C. § 2412 (1982)).

6. See H.R. Rep. No. 1418, 96th Cong., 2d Sess., reprinted in 1980 U.S. CODE CONG. & AD. NEWS, 4984, 4984.

the same extent that any other party would be liable.⁷ Failure to charge the United States with attorneys' fees where state government would be liable under virtually identical circumstances frustrates the purpose of the EAJA.⁸

In *Premachandra v. Mitts*,⁹ however, the Eighth Circuit held that notwithstanding the EAJA, the United States is not liable for fee awards to the same extent as state governments.¹⁰ Premachandra, successful in a civil rights action against the United States, sought recovery of attorneys' fees. Such recovery of fees is permitted in virtually identical cases involving deprivation of rights under color of state law.¹¹ The issue in *Premachandra* was whether section 2412(b) of the United States Code permits fee awards in analogous suits involving deprivation of rights under color of federal law.¹² The Eighth Circuit held that the United States can not be charged with attorneys' fees under section 2412(b) in a suit based on a constitutional violation.¹³

The Eighth Circuit found no basis in the statutes or their legislative history to support an award of attorneys' fees.¹⁴ The court stated that an expansive reading of section 2412(b) would upset the balance of the EAJA.¹⁵ The court also found that Congress failed to use specific language to impose liability on the United States for fees in constitutional deprivation actions.¹⁶ Accordingly, the Eighth Circuit resolved, in the government's favor the uncertainty that shrouds the statute.¹⁷

The Eighth Circuit in *Premachandra* resorted to a strict reading of section 2412(b) that ignores the clear intent of Congress and shelters the United States. Section 2412(b) imposes liability on the United States to the same extent as any other party. State governments are held accountable for constitutional violations by statute. Whereas

7. 28 U.S.C. § 2412(b) (1982).

8. *Smith*, 506 F. Supp. at 146 (cause of action brought under § 1983).

9. 753 F.2d 635 (8th Cir. 1985).

10. *Id.* at 641-42.

11. *Id.* at 643 (Gibson, J., dissenting).

12. *Id.* at 638.

13. *Id.* at 641.

14. *Id.* at 636.

15. *Id.* at 636-37. *Accord* Lauritzen v. Lehman, 736 F.2d 550, 557 (9th Cir. 1984) (balance struck by Congress would be upset if § 2412(b) were interpreted to allow awards in analogous suits to § 1983).

16. The Eighth Circuit stated that "Congress could have clearly made the United States liable for fees in constitutional deprivation actions but chose not to do so. A concise amendment to section 2414(b) or a modification of section 1988 could have accomplished this purpose. Failure to take these specific steps casts doubt on whether Congress intended the result urged by Premachandra." *Premachandra*, 753 F.2d at 641 (citations omitted).

17. *Id.*

the United States is held accountable under common law. The *Premachandra* court held that the United States does not violate the Constitution the same as "any other party" since it acts under color of federal law. Thus, the United States was not liable for Premachandra's attorneys' fees.

The significance of *Premachandra* is that the United States is still not on a par with other defendants in terms of liability for attorneys' fees. Litigants whose constitutional rights are violated by the federal government must meet a higher standard to recover fees.¹⁸ This immunity will continue to hinder the enforcement of important societal rights.

This Comment employs *Premachandra* as a vehicle for discussion of the recovery of attorneys' fees under section 2412(b) in constitutional deprivation actions. First, the Comment will examine the common law of the American Rule 22 and sovereign immunity. Second, sovereign immunity and the various statutes that affect fee shifting will be examined. Finally, the *Premachandra* case will be analyzed in depth.

I. HISTORY OF ATTORNEYS' FEES

Generally, prevailing litigants in the United States are not entitled to collect their attorneys' fees from the losing party.¹⁹ Congress has complemented common law exceptions to this rule with fee shifting statutes to encourage private enforcement of important societal goals.²⁰ The United States, however, has historically been immune from the taxing of attorneys' fees, even under fee shifting statutes.²¹ This doctrine of sovereign immunity has currently fallen into disfavor as the courts and the legislatures carve out exceptions.²²

18. See *id.*

19. *F.D. Rich Co. v. United States*, 417 U.S. 116, 128-31 (1974); *Hall v. Cole*, 412 U.S. 1, 4-5 (1973); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18 (1967); *Ehrenzweig, Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 793 (1966) (American rule is more restrictive than the general rule that prevails in other nations); *Kuenzel, The Attorneys Fees: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 78 (1963); *McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619, 623 (1931); *Stoebuck, Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202, 204 (1966) (calling for liberalization of American Rule); *Comment, The Allocation of Attorney's Fees After Mill v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316, 317-23 (1971); *Note, Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1217 (1967).

20. *Alyeska Pipeline Co.*, 421 U.S. at 263 (Congress has opted to rely heavily on private enforcement to implement public policy by providing fee awards).

21. *Id.* at 267-68 n.42 (well known that a sovereign is not liable unless specific provision for such liability is made by law); *NAACP v. Civiletti*, 609 F.2d 514, 517 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 922 (1980) (sovereign immunity is a formidable barrier to recovery from United States).

22. *Taylor v. New Jersey Highway Auth.*, 126 A.2d 313, 319 (N.J. 1956) (hostility

A. Common Law Background

1. *The American Rule v. English Rule*

It is well established in American common law that each party in litigation bears his own attorneys' fees regardless of the merits of the case.²³ This doctrine, known as the "American Rule" is the antithesis of the "English Rule" which grants fees to prevailing parties.²⁴ The premise of the American Rule is grounded in the belief that a losing party should not be penalized for merely exercising his right to defend or prosecute a lawsuit.²⁵

The federal judiciary has carved out two common law exceptions to the American Rule: specifically, the "bad faith" exception²⁶ and the "common benefit" rule.²⁷ Under the bad faith exception, fees

toward sovereign immunity is evidenced in the states); see Ehrenzweig, *supra* note 19, at 792-93.

23. See generally *Alyeska Pipeline Co.*, 421 U.S. at 247-62 (reviewing common law and legislative developments creating exceptions to the general rule that a litigant may not recover attorneys' fees from the United States); *Fleischmann Distilling Corp.*, 386 U.S. at 717-18 (discussing historical changes in recovery of attorneys' fees).

24. See generally *Avery, The Recovery of Attorneys' Fees by Government Contractors and Grantees*, 16 NAT'L CONF. MGMT. J. 25, 25 n.3 (1982); Goodhart, *Costs*, 38 YALE L.J. 849 (1929).

In a brief review of the historical background of awards of attorneys' fees, the Supreme Court stated the following:

As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs. Rules governing administration of these and related provisions have developed over the years. It is now customary in England, after litigation of substantive claims has terminated, to conduct separate hearings before special "taxing Masters" in order to determine the appropriateness and the size of an award of counsel fees. To prevent the ancillary proceedings from becoming unduly protracted and burdensome, fees which may be included in an award are usually prescribed, even including the amounts that may be recovered for letters drafted on behalf of a client.

Fleischmann Distilling Corp., 386 U.S. at 717 (citations omitted).

25. *Fleischmann Distilling Corp.*, 386 U.S. at 718 (the poor might be unjustly discouraged from vindicating their rights if the penalty for losing included their opponent's fees); see *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235 (1964). "Thus, one of the . . . purposes of the American Rule is not to discourage or deter litigation." See H.R. Rep. No. 1418, 96th Cong., 2d Sess., reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4984, 4988.

26. *F.D. Rich Co.*, 417 U.S. at 126-31 (citing *Vaughan v. Atkinson*, 369 U.S. 527 (1962)) (attorneys' fees assessed as a sanction); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426-28 (1923) (fees assessed against a party who willfully disobeyed a court order).

27. See, e.g., *Boeing Co. v. Van Gemert*, 444 U.S. at 481-82 (1980) (application of common-fund doctrine for a violation of federal securities law); *Mills v. Electric Auto Lite Co.*, 396 U.S. 375, 391-93 (1970) (extended common benefit theory to include nonmonetary benefits as a basis for award in stockholder's derivative suit); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166-67 (1939) (permitting equitable award of at-

may be assessed against a party who "has acted in bad faith, vexatiously, wantonly, or for oppressive reason."²⁸ The common benefit exception is established when a litigant has, by virtue of winning his suit, conferred a "common benefit" on a group of people in addition to himself.²⁹ Under the common benefit exception the successful litigant may recover fees from the beneficiaries.³⁰

Under the doctrine of sovereign immunity,³¹ the United States cannot be charged with attorneys' fees absent express statutory waiver of its immunity.³² Thus, the common law exceptions to the American Rule do not apply to actions involving the United States as

torneys' fees and costs from the proceeds of bond sales); *Miller-Wohl Co. v. Montana Comm'r of Labor and Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) (common benefit exception applies when the court can accurately shift the litigant's expenses to those who benefited from them; *amicus curiae* not entitled to award of attorneys' fees under common benefit exception).

The common benefit exception is also known as the "equitable trust" or "common fund" exception. Hughes, *supra* note 4, at 3. For an excellent discussion of the common fund exception, see Comment, *Attorney Fees: Slipping from the American Rule Straight Jacket*, 40 MONT. L. REV. 308, 309-12 (1979).

Attorneys' fees have also been awarded pursuant to contractual provision. *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516, 521-24, 334 N.E.2d 391, 396-97, 381 N.Y.S.2d 459, 463-65 (1976); see *Venus v. Goodman*, 556 F. Supp. 514, 520 n.10 (W.D. Wis. 1983) (equitable power to permit a party that preserves a fund for others to collect fees).

28. *Hall*, 412 U.S. at 5 (underlying rationale is punitive, and an essential element is the existence of bad faith); see *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.4 (1968); *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962); *Bell v. School Bd. of Powhatan County*, 321 F.2d 494, 500 (4th Cir. 1951). The bad faith exception may be invoked against a party that has willfully disobeyed an order of the court. *Toledo Scale Co.*, 261 U.S. at 426-28.

29. *F.D. Rich Co.*, 417 U.S. at 130-31; *Fleischmann Distilling Corp.*, 386 U.S. at 718-19; accord *Lipsig v. National Student Mktg. Corp.*, 663 F.2d 178, 180 (D.C. Cir. 1980) (per curiam); cf. *Universal Oil Prods Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946).

The "common benefit" exception may be applied to two types of situations. First, the party may preserve a non-pecuniary benefit for a group or class (common benefit). Second, the party may create a fund or preserve a fund of money or assets for the benefit of a group or class (common fund). *Dods & Kennedy, The Equal Access to Justice Act*, 50 UMKC L. REV. 48, 59 (1981).

30. *Boeing Co.*, 444 U.S. at 480-81; *Mills*, 396 U.S. at 392-97 (petitioners awarded attorneys' fees since expenses were incurred for the benefit of the corporation); see *Spencer v. NLRB*, 712 F.2d 539, 543 (D.C. Cir. 1983).

31. The doctrine of sovereign immunity is deeply rooted in ancient common law. The doctrine is based on the tenet that the king can do no wrong. A present policy reason for retaining this immunity is the protection of the state from interference with state funds, property, and instrumentalities. *Glassman v. Glassman*, 309 N.Y. 436, 439, 131 N.E.2d 721, 723 (1956).

32. 28 U.S.C. § 2412(a); see *Alyeska Pipeline Co.*, 421 U.S. at 267-68; *Spencer*, 712 F.2d at 545; *Fenton v. Federal Ins. Adm'r*, 633 F.2d 1119, 1122 (5th Cir. 1981); *E.E.O.C. v. Kenosha Unified School Dist. No. 1*, 620 F.2d 1220, 1227 (7th Cir. 1980).

a litigant.³³ Moreover, even fee shifting statutes are not applicable to the United States unless the statute expressly includes federal parties.³⁴ The immunity of the United States is absolute and unqualified absent consent to suit.³⁵ Accordingly, statutes waiving sovereign immunity are narrowly construed so as not to imply liability where it has not been expressly and clearly imposed by Congress.³⁶

2. Assault of the American Rule

The restrictive American Rule has been the subject of persistent attack by both the courts and the legislature.³⁷ Congress relies heavily on private litigation to implement policy and enforce important personal rights.³⁸ Congress has made specific provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights.³⁹

33. See, e.g., *Pealo v. Farmers Home Admin.*, 562 F.2d 744, 748 (D.C. Cir. 1977) (rejecting common benefit exception); *Rhode Island Comm. on Energy v. GSA*, 561 F.2d 397, 405 (1st Cir. 1977) (refusing to apply bad faith exception).

34. See, e.g., *NAACP*, 609 F.2d at 516-17 (waiver cannot be implied but must be unequivocally expressed); *Shannon v. HUD*, 577 F.2d 854, 856 (3rd Cir.), cert. denied, 439 U.S. 1002 (1978).

35. *Shannon*, 577 F.2d at 855-56 (attorneys' fees may not be awarded without express statutory authority); see *Alyeska Pipeline Co.*, 421 U.S. at 265-68; *Fitzgerald v. United States Civil Serv. Comm.*, 554 F.2d 1186, 1189 (D.C. Cir. 1977); cf. *Richerson v. Jones*, 551 F.2d 918, 925 (3rd Cir. 1977) (denying award of interest on claim against United States).

36. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983); *NAACP*, 609 F.2d at 516-17; *Shannon*, 577 F.2d at 855-56; *Monark Boat Co. v. NLRB*, 708 F.2d 1322, 1326-27 (8th Cir. 1983).

37. See generally *Ehrenzweig*, supra note 19, at 792; *Goodhart*, supra note 24, at 849; *Mause*, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 IOWA L. REV. 26 (1969); *Stoebuck*, supra note 19, at 202; *Note*, *Attorney's Fees*, 43 MISS. L.J. 238 (1972); *Note*, *Attorney's Fees as an Element of Damages*, 15 U. CIN. L. REV. 313 (1941); *Comment*, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 648-55 (1974); *Note*, supra note 19, at 1216; *Note*, *Distribution of Legal Expense Among Litigants*, 49 YALE L.J. 699 (1940).

38. See, e.g., *Alyeska Pipeline Co.*, 421 U.S. at 263; *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 265-66 (1972) (fee shifting in connection with treble-damages awards under the antitrust laws); *Newman*, 390 U.S. at 402 (1968) (fee shifting unwarranted because Civil Rights Act is intended to encourage individuals injured by racial discrimination to seek relief).

39. There are numerous statutory exceptions to the American Rule. See, e.g., *Packers and Stockyards Act of 1921*, § 309, 7 U.S.C. § 210(f) (1982); *Trust Indenture Act of 1939*, § 323, 15 U.S.C. § 77www(a) (1982); *Securities Exchange Act of 1934*, § 9, 15 U.S.C. § 78i(E) (1982); *Norris-LaGuardia Act*, § 7(e), 29 U.S.C. § 107(E) (1982); *Fair Labor Standards Act*, § 16(B), 29 U.S.C. § 216(b) (1982); *Longshoremen's and Harbor Workers' Compensation Act*, § 28, 33 U.S.C. § 928 (1982); *Federal Water Pollution Control Act*, § 505(d), 33 U.S.C. § 1365(d) (1982); *Civil Rights Act of 1964*, tit. II, § 204(b), 78 Stat., 244, 42 U.S.C. § 2000a-3(b); *Fair Housing Act of 1968*, § 812(c), 42 U.S.C. § 3612(c) (1982); *Noise Control Act of 1972*, § 12(d), 42 U.S.C. § 4911(d) (1982).

In the 1960's and early 1970's, courts began to experiment with more liberal fee shifting rules, the most notable being the private attorney general concept.⁴⁰ This doctrine provided attorneys' fees to successful litigants vindicating rights deemed to be important to the public.⁴¹ Parties were permitted to recover fees as private attorneys general when their suit resulted in the enforcement of "important societal rights."⁴²

The Supreme Court halted this judicially-managed doctrine in the case of *Alyeska Pipeline Service Co. v. Wilderness Society*.⁴³ The Wilderness Society, an environmental group, had been successful in the underlying action to enjoin the construction of a pipeline.⁴⁴ The lower court awarded attorneys' fees to the society because it was performing the services of a private attorney general.⁴⁵ The Supreme Court held that in the absence of statutory authority, courts could not ex-

40. See Note, *The Award of Attorney's Fees Under the Equal Access to Judgment Act*, 11 HOFSTRA L. REV. 307, 309-10; Comment, *supra* note 37, at 657, 666-70. The doctrine of sovereign immunity and former 28 U.S.C. § 2412 continued to bar recovery against the United States under this theory. *Id.* at 679. In these circumstances, however, litigants often joined and fees recovered from private litigants. *Id.*

41. Comment, *supra* note 37, at 666-70.

42. See, e.g., *Souza v. Travisono*, 512 F.2d 1137 (5th Cir. 1975); *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974); *Fowler v. Schwarzwalder*, 498 F.2d 143 (8th Cir. 1974); *Cornist v. Richland Parish School Bd.*, 495 F.2d 189 (5th Cir. 1974); *Hoitt v. Vitek*, 495 F.2d 219 (1st Cir. 1974); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Fairley v. Patterson*, 493 F.2d 598 (5th Cir. 1974); *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972).

In contrast, the Fourth Circuit Court of Appeals has refused to adopt the private attorney general rule. *Bradley v. School Bd.*, 472 F.2d 318, 327-31 (4th Cir. 1972), *vacated on other grounds*, 416 U.S. 696 (1974). *But cf.* *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n*, 497 F.2d 1113, 1115 (2d Cir. 1974) (affirming district court decision in a § 1983 action where attorneys' fees were not awarded because the defendant's conduct could not be characterized as "unreasonable obdurate obstinancy" as per the *Strolberg v. Trustees for the State Colleges of Connecticut* test).

43. *Alyeska Pipeline Co.*, 421 U.S. at 240. Although the Supreme Court had summarily affirmed the award of attorneys' fees under the private attorney general doctrine in *Sims v. Amos*, 409 U.S. 942 (1972), the *Alyeska Pipeline Co.* pointed out that *Sims* involved state officials and an eleventh amendment defense. *Cf.* *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974) (Eleventh Amendment is a bar to monetary award against state parties).

The private attorney general concept has been drawing criticism in recent years. See, e.g., *McLaughlin, The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972).

44. *Wilderness Soc'y v. Morton*, 479 F.2d 842, 849 (D.C. Cir. 1973), *rev'd*, 421 U.S. 240 (1975); see Comment, *The Alaska Pipeline: Wilderness Society v. Morton and the Trans-Alaska Pipeline Authorization Act*, 23 AM. U.L. REV. 337 (1973).

45. *Wilderness Soc'y*, 479 F.2d at 849.

ceed the common law limits of the American Rule.⁴⁶

*B. Civil Rights Attorneys' Fees Award Act & Civil Action
or Deprivation of Rights*

Just one year after *Alyeska*, Congress responded by enacting the Civil Rights Attorneys' Fee Award Act of 1976, which is codified at 42 U.S.C. § 1988.⁴⁷ Congress, realizing that private individuals must sue to enforce their civil rights, provided the necessary attorneys' fees.⁴⁸ Section 1988, a fee shifting statute, provides reasonable attorneys' fees to the prevailing party in any action or proceeding to enforce enumerated civil rights acts.⁴⁹ Although fee awards under section 1988 are discretionary, a prevailing party should be awarded fees unless special circumstances render the award unjust.⁵⁰

One of the substantive statutes enumerated in section 1988 is 42 U.S.C. § 1983. Section 1983 establishes a civil cause of action for the deprivation of federal constitutional rights.⁵¹ Section 1983 establishes a cause of action to any person who *under color of state law* has been subject to the deprivation of any rights, privileges, or im-

46. *Alyeska Pipeline Co.*, 421 U.S. at 267-71.

47. Pub. L. No. 94-559, § 2, 90 Stat. 2641, amended by Act of Oct. 21, 1980, Pub. L. No. 96-481, tit. II, § 205cc, 94 Stat. 2630 (codified at 42 U.S.C. § 1988 (1982)). *NAACP*, 609 F.2d at 518 (§ 1988 passed in response to *Alyeska*); see *Spencer*, 712 F.2d at 544.

48. *Smith*, 506 F. Supp. at 145-46 (well-established that prevailing party in § 1983 action is entitled to attorneys' fees).

49. Section 1988 of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. provides in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 or this title, title IX of Public Law 92-318 [42 U.S.C. 2000d et seq.], or title VI of the Civil Rights Act of 1964 [20 U.S.C. 1681 et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id.

50. *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978); *Teitelbaum v. Sorenson*, 648 F.2d 1248, 1249 (9th Cir. 1981); *Collins v. Chandler Unified School Dist.*, 644 F.2d 759, 763 (9th Cir.), cert. denied, 454 U.S. 863 (1981); *Riddell v. National Democratic Party*, 624 F.2d 539 (5th Cir. 1980); *Sethy v. Alameda County Water Dist.*, 602 F.2d 894, 897 (9th Cir. 1979) (per curiam) (citing legislative history of § 1988), cert. denied, 444 U.S. 1046 (1980); see also *Alyeska Pipeline Co.*, 421 U.S. at 262; *Northcross v. Board of Educ. of the Memphis Schools*, 412 U.S. 427 (1973); *Newman*, 390 U.S. at 402.

51. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

munities secured by federal law or the Constitution.⁵²

C. Equal Access to Justice Act

The doctrine of sovereign immunity bars the award of fees against the United States in the absence of express statutory authorization.⁵³ The EAJA was enacted to diminish the economic deterrent to challenges of government actions.⁵⁴ Intended to put the United States on a par with other litigants,⁵⁵ the EAJA substantially broadens the liability of the United States for fees in a wide variety of circum-

52. *Id.*

53. *See, e.g., NAACP*, 609 F.2d at 521 (denying attorneys' fees against United States).

EAJA became effective October 1, 1981. The EAJA provides that a party prevailing against the federal government may be awarded fees: "The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. § 2412(b) (emphasis added). Congress recognized that individuals who could not afford the high costs of litigation were precluded from vindicating important personal rights. "[T]he costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process." H.R. Rep. No. 1418, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4988.

54. *Goldhaber v. Foley*, 698 F.2d 193, 197 (3rd Cir. 1983); *Wolverton v. Schweiker*, 533 F. Supp. 420, 422 (D. Idaho 1982); *Ellis v. United States*, 550 F. Supp. 674, 676 (Ct. Cl. 1982); H.R. Rep. No. 1418, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984.

The "Findings and Purpose" of EAJA are stated in the Equal Access to Justice Act, 5 U.S.C. § 504 (repealed 1980).

(a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of this title—

(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, expert witness fees, and other costs against the United States; and

(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

Id.

The EAJA was enacted in response to the *Alyeska* Court's invitation. *Spencer*, 712 F.2d at 544-45.

55. Section 2412 was aimed at removing the federal government's unfair advantage. *Lauritzen*, 736 F.2d at 563 (quoting House Report at 9, 1980 U.S. CODE CONG. & AD. NEWS at 4987).

stances.⁵⁶ The United States is now subject to statutory as well as common law exceptions to the American Rule.⁵⁷

Although the EAJA retains a general provision barring awards of attorneys' fees⁵⁸ against the United States, sections 2412(b) and 2412(d) provide broad exceptions.⁵⁹ Section 2412(b), a discretionary subsection, provides that the United States is liable to the same extent that other parties are liable under fee shifting statutes or common law exceptions to the American Rule.⁶⁰

56. *Lauritzen*, 546 F. Supp. at 1224 (EAJA substantially broadens the liability of the United States); *Spencer*, 712 F.2d at 545 (EAJA applies to all civil actions involving United States and allows attorneys' fees in wide variety of circumstances). There have been conflicting and confusing judicial interpretations of section 2412(d). Congress left most of section 2412(d)'s terms undefined. See generally Wheeler & Lavan, *The Equal Access to Justice Act: The "American Rule" Revisited*, 15 PUB. CONT. L.J. 60 (1984).

57. *Premachandra*, 548 F. Supp. at 120; 14 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 3659, at 186 (1985). Hughes, *supra* note 4, at 6.

58. Prior to adoption of the EAJA, 28 U.S.C. § 2412 barred awards of attorneys' fees against the United States absent express statutory authority to the contrary. *Shannon*, 577 F.2d at 855-56; *Bush v. Bays*, 463 F. Supp. 59, 63 (E.D. Va. 1978); Prior to amendment, § 2412(a) provided in relevant part:

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, *but not including the fees and expenses of attorneys*, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action.

28 U.S.C. § 2412(a) (emphasis added).

59. Prior to amendment, § 2412 was consistently construed as immunizing the United States against attorneys' fees awards absent clear or express statutory authority to the contrary. *NAACP*, 609 F.2d at 516.

Although § 2412(d) expired October 1, 1984, under a sunset clause, this provision continues to apply through final disposition of any action commenced before that date. President Reagan declined to sign H.R. 5479, the reenactment of § 504 and § 2412(d) of EAJA with modifications. Memorandum of Disapproval, Office of the Press Secretary (Santa Barbara, California), November 9, 1984. Reagan pledged to make the retroactive enactment of the Act a high legislative priority of the next Congress. *Id.* at 1. Reagan withheld approval of the bill because of changes which expanded the scope of the attorneys' fees provision to apply to underlying agency actions. *Id.*

60. Section 2412(b) provides:

Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412(b) (1982).

Congress, through enactment of subsection (b) of § 2412, sought to make the common law exceptions to the American Rule applicable to the United States. *Laurit-*

The second exception of the EAJA, section 2412(d), was an experimental, but mandatory exception to the American Rule.⁶¹ Section 2412(d) provided that a court *shall* award attorneys' fees to a party who prevails over the United States, unless the position of the United States is substantially justified or special circumstances make the award unjust.⁶² This subsection shifts fees in most situations where an award is not authorized under common law or by a specific statute.⁶³ The standard of section 2412(d) is more difficult to satisfy than section 2412(b), since the government can escape subsection (d) liability by showing that its position was "substantially justified."⁶⁴

1. Prevailing Parties

A party must be "prevailing" in the underlying action to qualify for an award under any fee shifting statute. Although the EAJA does not define "prevailing party," its legislative history indicates that the term is to be read consistently with its use in other fee shifting statutes.⁶⁵ In addition, the Supreme Court has held that similar attor-

zen, 736 F.2d at 554; see H.R. REP. NO. 1434, 96th Cong., 2d Sess. 25, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4953, 5003, 5014 ("[This subsection] reflects the belief that, at a minimum, the United States should be held to the same standards in litigating as private parties."); H.R. REP. NO. 1418 art. 9, 17 (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4987, 4996; see also *Spencer*, 712 F.2d at 545.

61. Section 2412(d)(1)(A) provides:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (1982).

Although the experimental period of this provision has currently expired, it is expected that it will be re-enacted with modifications. See generally Breger, *Don't Open a Pandora's Box!*, 71 A.B.A. J. 40 (1985) (rebuilding EAJA); Crassley, *How Should the Equal Access to Justice Act be Rebuilt?: Congress Wants a Wide Reaching EAJA*, 71 A.B.A. J. 40 (1985); Freeman, *Attorney's Fees and Costs in § 1983 Actions Under the Civil Rights Attorney's Fees Awards Act of 1976*, 42 U.S.C. 1988, and *Eleventh Amendment Immunity*, 56 OKLA. B.J. 1746, 1751 (1985); Middleton, *Congress to Try Again on EAJA? Bill Vetoed by President Reagan*, 7 NAT'L L.J. 3 (1984).

62. 28 U.S.C. § 2412(d)(1)(A).

63. *Id.*

64. 28 U.S.C. § 2412(d)(1)(B); see *Rawlings v. Heckler*, 725 F.2d 1192, 1196 (9th Cir. 1984) (in determining whether the government's position was "substantially justified," the court must evaluate the position under a "reasonableness" test). The standard "substantially justified" was adopted from rule 37 of the Federal Rules of Civil Procedure, which provides for sanctions against parties who abuse the discovery process. See Note, *Will the Sun Rise Again for the Equal Access to Justice Act?*, 48 BROOKLYN L. REV. 265, 290-95 (1982).

65. See H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11, reprinted in 1980 U.S. CODE

neys' fee provisions should be interpreted *pari passu*.⁶⁶

A litigant may be a "prevailing party" without having obtained a final judgment after a full trial on the merits.⁶⁷ Thus, parties may be considered to have prevailed without formally obtaining relief when their rights are vindicated through a consent judgment.⁶⁸ Moreover, courts have allowed a litigant to be defined as a "prevailing party" and eligible for attorneys' fees when subsequent remedial action by a defendant effectively moots the controversy after the initiation of a lawsuit.⁶⁹ Indeed, a prevailing party need not succeed on every theory.⁷⁰ A plaintiff who succeeds on any significant issue which

CONG. & AD. NEWS 4984, 4990; *see also* NLRB v. Doral Bldg. Serv., Inc., 680 F.2d 647, 647 (9th Cir. 1982) (for purpose of defining term "prevailing party," EAJA and 42 U.S.C. § 1988 are indistinguishable).

The EAJA provides:

Under existing fee-shifting statutes, the definition of prevailing party has been the subject of litigation. It is the committee's intention that the interpretation of the term in S. 265 be consistent with the law that has developed under existing statutes. Thus, the phrase "prevailing party" should not be limited to a victor only after entry of a final judgment following a full trial on the merits. A party may be deemed prevailing if he obtains a favorable settlement of his case; if the plaintiff has sought a voluntary dismissal of a groundless complaint; or even if he does not ultimately prevail on all issues.

H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4990 (citations omitted).

66. *Northcross*, 412 U.S. at 428. *Pari passu* means by an "equal progress, without preference." 5 BLACK'S LAW DICTIONARY 1004 (5th ed. 1979).

67. *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (quoting H.R. REP. NO. 94-1558 (1976)); *see also* *United States v. 329.73 Acres of Land*, 704 F.2d 800, 808-09 (5th Cir. 1983) (en banc); *Doe v. Busbee*, 684 F.2d 1375, 1379 (11th Cir. 1982); *United States ex rel. Heydt v. Citizens State Bank*, 668 F.2d 444, 447 (8th Cir. 1982); *Robinson v. Kimbrough*, 652 F.2d 458, 462-63, 465-66 (5th Cir. 1981) (test is whether plaintiff essentially succeeds in obtaining the relief he seeks).

68. *329.73 Acres*, 704 F.2d at 808-09; *Busbee*, 684 F.2d at 1379; *Citizens State Bank*, 668 F.2d at 447.

The legislative history of the EAJA states: "The phrase prevailing party should not be limited to a victor only after entry of a final judgment following a full trial on the merits. A party may be deemed prevailing if he obtains a favorable settlement of his case."

69. *Harrington v. DeVito*, 656 F.2d 264, 266 (7th Cir. 1981); *United Handicapped Fed'n v. Andre*, 622 F.2d 342, 346-48 (8th Cir. 1980); *Nadeau v. Helgemoe*, 581 F.2d 275, 279-80 (1st Cir. 1978); *Connor v. Winter*, 519 F. Supp. 1337, 1340 (S.D. Miss. 1981); *see also* *Hensley*, 461 U.S. at 440; *Williams v. Alioto*, 625 F.2d 845, 847-48 (9th Cir. 1980) (plaintiff who obtained preliminary injunction was "prevailing party" under 42 U.S.C. 1988, even though action was subsequently dismissed as moot), *cert. denied*, 450 U.S. 1012 (1981); *Williams v. Miller*, 620 F.2d 199, 202 (8th Cir. 1980) (voluntary compliance mooted lawsuit); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429-30 (8th Cir. 1970) (where there is voluntary compliance, the lawsuit was "catalyst" which prompted defendant to comply and attorneys' fees will be awarded).

70. *United Handicapped Fed'n*, 622 F.2d at 348; *see also* *Besig v. Dolphin Boating & Swimming Club*, 683 F.2d 1271, 1278 (9th Cir. 1982).

achieves some benefit may be considered "prevailing."⁷¹

Courts have developed a two-part test to discern whether a litigant is "prevailing" and therefore entitled to attorneys' fees in the context of a settled or mooted dispute.⁷² The test, first enunciated in *Nadeau v. Helgemoe*,⁷³ has been adopted by the Eighth Circuit and cited with approval by the Supreme Court.⁷⁴ A litigant must meet both parts of the *Nadeau* test to qualify as a prevailing party for fee shifting purposes.⁷⁵

The first part of the test is a question of fact requiring a determination of whether the plaintiff's lawsuit served as a catalyst which prompted the opposing party to take remedial action.⁷⁶ The suit must be "a necessary and important factor in achieving the relief desired."⁷⁷

The second part of the *Nadeau* test is a legal determination of reasonableness.⁷⁸ A litigant may not be considered "prevailing" where the suit was so frivolous, unreasonable, or groundless that the defendant's voluntary compliance with the plaintiff's desired relief may be considered gratuitous.⁷⁹

2. The Triad of Sections 2412, 1988 & 1983

It is the combination of sections 2412, 1988, and 1983 that form the crucible of *Premachandra*. Section 2412(b) waives sovereign immunity and provides that the United States shall be liable for fees to the same extent that any other party would be liable under fee shifting statutes.⁸⁰ Section 1988, a fee shifting statute, awards fees to prevailing parties of section 1983 suits.⁸¹ Section 1983, in turn, imposes civil liability upon any party who, under color of state law, deprives a citizen of his constitutional rights.⁸² Thus, the United States can be charged with attorneys' fees in an action to vindicate

71. *Hensley*, 461 U.S. at 433 (quoting *Nadeau*, 581 F.2d at 278-79).

72. *Hensley*, 461 F.2d 424; *United Handicapped Fedn*, 622 F.2d 342; *Nadeau*, 581 F.2d 275.

73. 581 F.2d 275 (1st Cir. 1978).

74. *Hensley*, 461 U.S. at 433; *United Handicapped Fedn*, 622 F.2d at 345-46.

75. See *Premachandra*, 727 F.2d at 721-22.

76. *United Handicapped Fed'n*, 622 F.2d at 346. It is not necessary for the lawsuit to be the only cause or even the primary cause of the defendant's decision to settle. *Id.*

77. *Premachandra*, 727 F.2d at 721; *Begis*, 683 F.2d at 1278 (plaintiff must establish "clear, causal relationship" between lawsuit and voluntary action of defendant); see also *Lauritzen*, 546 F. Supp. at 1226 (lawsuit was a "material factor" in plaintiff maintaining her position with the Navy for purposes of § 2412).

78. *Nadeau*, 581 F.2d at 281.

79. *Premachandra*, 727 F.2d at 722.

80. 28 U.S.C. § 2412(b); see *supra* note 60 and accompanying text.

81. 42 U.S.C. § 1988; see *supra* note 49.

82. 42 U.S.C. § 1983; see *supra* note 51.

constitutional rights to the same extent that any other party would be liable.

Section 1983, however, only provides a cause of action for deprivation under color of state law.⁸³ The federal government, by definition, seldom acts under color of state law. The dilemma here is whether the United States can be charged with fees when it acts under color of federal law rather than state law. Section 2412(b) imposes liability to the same extent that any other party would be liable. The question is whether Congress intended that the United States should be substituted for the state itself without the need to prove state action. If not, is it necessary for the United States to act in concert with state officials in a way that would constitute a state action in order to be liable for attorneys' fees.⁸⁴

This triad of statutes was interpreted in the case of *Lauritzen v. Lehman*.⁸⁵ At issue in *Lauritzen* was whether section 2412(b) reaches violations of the Constitution where federal officials act under color of federal law rather than state law.⁸⁶ *Lauritzen*, threatened with discharge from the Navy on the basis of homosexuality, alleged violation of her constitutional rights.⁸⁷ The district court granted a preliminary injunction enjoining the discharge pending a hearing before the Board for the Correction of Naval Records (Board).⁸⁸

After the Board reversed the personnel action, the district court awarded attorneys' fees under section 2412(b).⁸⁹ The court found that the legislative history of section 2412(b) demonstrated congressional intent to make the United States liable for fees in actions analogous to section 1983 for vindication of constitutional rights.⁹⁰

83. 28 U.S.C. § 2412(b); see *supra* note 60.

84. Federal officials usually act under color of federal law and seldom deprive constitutional rights under color of state law. See *Premachandra*, 727 F.2d at 729; cf. *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979) (imposing liability on federal officials under § 1983 only where state officials played a significant role in the underlying constitutional violation), *rev'd in part on other grounds*, 446 U.S. 754 (1980) (per curiam).

85. 736 F.2d 550 (9th Cir. 1984) (Lehman was sued in his capacity as Secretary of the Navy).

86. *Id.* at 553.

87. *Lauritzen*, 546 F. Supp. at 1223. *Lauritzen* sought damages, injunctive and declaratory relief on the grounds that the Navy's past and threatened actions violated her rights under the first, fourth, fifth, sixth and ninth amendments to the Constitution. *Id.* The district court awarded fees because it found *Lauritzen's* claim to be virtually identical to an action under § 1983. *Id.* at 1227, 1229.

88. *Id.* A temporary restraining order was issued previously, pending a hearing on the injunction to prevent *Lauritzen's* discharge from the Navy. *Id.*

89. *Id.* at 1229. The district court held that the United States was liable to the same extent as any other party under § 1988. *Id.*

90. *Id.* at 1227-28. The court stated that "the EAJA was specifically amended to provide for precisely the type of liability involved in this case." *Id.* see *Clemente v. United States*, 568 F. Supp. 1150, 1170-71 (C.D. Cal. 1983) (adopting the reasoning

The court reasoned that since a state official would be liable under section 1988 for fees in a section 1983 action alleging constitutional violations, the United States should be held liable to the same extent.⁹¹

Lauritzen was reversed on appeal.⁹² The Ninth Circuit held that *Lauritzen* was not eligible for fees under section 2412(b) because the violations she alleged did not meet the specific provisions enumerated under the Act.⁹³ Neither the legislative history nor the policy of the EAJA persuaded the court to depart from a narrow reading of section 2412(b).⁹⁴ In examining section 2412(b) in its statutory framework, the Ninth Circuit found that Congress intended subsection (d) to be the general statutory exception to sovereign immunity.⁹⁵ Finally, the court considered analogous actions to be without boundaries or limitation, upsetting the balance of subsections (b) and (d).⁹⁶

II. THE *PREMACHANDRA* DECISION

A. *Factual Background*

Dr. Premachandra was a research endocrinologist employed by the Veterans Administration (VA).⁹⁷ Premachandra's underlying cause of action arose out of the VA's termination of his employment and its directive to dismantle his research laboratory.⁹⁸ As an eighteen-year

of *Lauritzen*, awarding fees and costs to the plaintiff under 2412(b) in action for violation of fifth amendment due process rights); accord *Muth v. Marsh*, 525 F. Supp. 604, 609 (D.D.C. 1981) (United States liable for fees under § 2412(b) for violation of Age Discrimination in Employment Act where Act provides that a litigant may recover legal fees and costs from a non-government defendant).

91. *Lauritzen*, 546 F. Supp. at 1227.

92. *Lauritzen*, 736 F.2d at 550. The Ninth Circuit's review was *de novo* since the appeal raised issues concerning the interpretation of the EAJA in awarding fees. *Id.* at 553.

93. *Id.* at 553. For other courts that have agreed with the Ninth Circuit, see *Saxner v. Benson*, 727 F.2d 669, 673 (7th Cir. 1984); *Unification Church v. Immigration and Naturalization Serv.*, 574 F. Supp. 93, 96 (D.D.C. 1983); *United States v. Miscellaneous Pornographic Magazines*, 541 F. Supp. 122, 127-29 (N.D. Ill. 1982).

94. See *Lauritzen*, 736 F.2d at 554-57.

95. *Id.* at 557-58. The Ninth Circuit remanded the case for reconsideration of whether the actions of the United States' were substantially justified. *Id.* at 559. If the United States was not substantially justified, *Lauritzen* would be permitted to recover under § 2412(d). *Id.* Thus, to escape liability, the government must demonstrate that its position was reasonable both in law and fact. The decision is to be based on the totality of the circumstances. *Id.*

96. *Id.* at 557. The court found that nearly every case alleging a constitutional or statutory violation by the federal government could be characterized as analogous to an imaginary § 1983 action. *Id.*

97. *Premachandra*, 753 F.2d at 636.

98. *Id.* Premachandra's complaint stated claims based on the fifth amendment,

career employee, he could only be dismissed for cause.⁹⁹ Moreover, disassembly of the lab would have resulted in destruction of rare blood samples and ongoing experiments representing years of work.¹⁰⁰ Premachandra alleged that the failure of the VA to provide him with a pretermination hearing violated his due process rights as guaranteed by the fifth amendment.¹⁰¹

Premachandra appealed his termination to the Merit Systems Protection Board (MSPB). He also sought an order enjoining the VA from requiring him to dismantle his laboratory.¹⁰²

The district court issued a temporary restraining order,¹⁰³ but subsequently denied Premachandra's motion for a preliminary injunction.¹⁰⁴ The district court, the Eighth Circuit, and the United States Supreme Court all denied Premachandra's application for an injunction pending appeal.¹⁰⁵

Premachandra submitted a second motion to the Eighth Circuit requesting an order prohibiting the dismantling of his laboratory, but allowing the VA to terminate his employment.¹⁰⁶ The Eighth Circuit granted a stay pending oral argument.¹⁰⁷ Subsequent to oral argument, but prior to the court's decision, the VA voluntarily agreed that the lab would remain intact until the MSPB hearing.¹⁰⁸

The injunction issue became moot when the MSPB ordered the VA

the Civil Service Reform Act of 1978, 5 U.S.C. § 4303 (1982), and VA regulations implementing the 1978 Act. *Id.* at 637 n.1.

99. *Premachandra*, 509 F. Supp. at 425. Federal civil service employees have a valid property interest in continued employment and can only be dismissed for cause. *Id.* at 428-29.

100. *Id.* at 427. Approximately three years work was required to render the ten room laboratory fully operational. *Id.* at 426. While it would be possible to freeze the blood samples, the integrity of the experiments would be violated. *Id.* at 427.

101. *Premachandra*, 753 F.2d at 636. Premachandra "claimed that his unique scientific role at the VA placed him in an exceptional category of cases in which due process demanded an evidentiary hearing prior to his termination." Brief for Appellee at i, *Premachandra v. Mitts*, 753 F.2d 635 (8th Cir. 1985).

102. *Premachandra*, 727 F.2d at 719.

103. *Premachandra*, 548 F. Supp. at 119.

104. *Id.* The injunction was denied because the court found Premachandra to have only a minimal chance of success on the merits of his claim for a permanent injunction. *Premachandra*, 509 F. Supp. at 430.

105. *Premachandra*, 727 F.2d at 719.

106. *Premachandra*, 548 F. Supp. at 119.

107. *Id.* The stay did not extend to the termination of the plaintiff's employment. *Id.*

108. *Id.* at 119-20. In a letter to the court the VA agreed "not to dismantle or interfere with appellant's use of the laboratory before the decision on the merits of appellant's discharge is filed by the Hearing Examiner." *Id.* at 120. As a result of the VA's voluntary restraint, the Eighth Circuit entered an order on May 21, 1981, in which it recognized the VA's agreement not to dismantle the laboratory and ordered a stay with regard to that issue pending appeal. *Id.* at 119. The VA subsequently permitted Dr. Premachandra to work in his lab without pay. *Id.* at 120.

to reverse Premachandra's termination.¹⁰⁹ In addition, the MSPB granted Premachandra's request for attorneys' fees in the administrative proceeding.¹¹⁰

B. District Court Posture

Upon dismissal of the case by the Eighth Circuit after the ruling of the MSPB, Premachandra petitioned the district court for the recovery of reasonable attorneys' fees incurred in the preliminary injunction litigation.¹¹¹ A threshold issue, whether Premachandra was a prevailing party, was in dispute.¹¹² Several courts had denied Premachandra's first motion to enjoin his termination and the disassembly of his laboratory.¹¹³ On the other hand, a second motion seeking only to prohibit the disassembly of the laboratory was before the Eighth Circuit when the VA voluntarily agreed to comply.¹¹⁴ Both parties claimed to be "prevailing."¹¹⁵ Several courts have deemed a party to be prevailing when remedial action is taken by the defendant after a suit has been initiated.¹¹⁶

The district court, applying the two-part *Nadeau* test, concluded that Premachandra was indeed a prevailing party.¹¹⁷ First, the lawsuit was found to be a catalyst to the VA's decision to allow Premachandra to remain in his laboratory pending disposition.¹¹⁸ The VA had maintained that its voluntary compliance was merely a "gratuitous litigating courtesy."¹¹⁹ Secondly, the court found that the reasonableness of the lawsuit was demonstrated by the MSPB's reversal

109. *Premachandra*, 548 F. Supp. at 120. The MSPB concluded that if the VA had made reasonable inquiry it would have known that the charges against Premachandra were without merit. *Premachandra*, 727 F.2d at 720 n.1.

110. The MSPB held that it did not have jurisdiction to award attorneys' fees incurred in connection with proceedings before the federal courts. *Premachandra*, 545 F. Supp. at 122.

111. *Premachandra*, 727 F.2d at 720. Premachandra requested fees pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 2412(b). *Id.*

112. *Premachandra*, 548 F. Supp. at 120. Premachandra must be a prevailing party as the term is used in 42 U.S.C. § 1988 and 28 U.S.C. § 2412. *Id.*

113. See *supra* text accompanying notes 104-05.

114. *Premachandra*, 548 F. Supp. at 119-20.

115. *Id.* at 120-21.

116. *Id.* at 121. See *supra* note 69.

117. *Premachandra*, 548 F. Supp. at 121.

118. *Id.*; cf. *Harrington*, 656 F.2d at 267 (where there is overlap between "voluntary compliance" and a legal duty, a court may nonetheless interpret lawsuit as catalyst to defendant's remedial action).

119. *Premachandra*, 727 F.2d at 723. The VA characterized its compliance as a litigating courtesy amounting to a minimal concession. Brief for Appellant at 11-12, *Premachandra v. Mitts*, 753 F.2d 635 (8th Cir. 1985). The court characterized this argument as bordering on "self-serving hindsight which could be urged in every case mooted by the government [sic] voluntary compliance." *Premachandra*, 727 F.2d at 723.

of the VA's dismissal.¹²⁰ Thus, since both parts of the test were positive, Premachandra was found to be a "prevailing party."¹²¹

The district court interpreted section 2412(b) in conjunction with section 1988, the fee shifting section of the Civil Rights Act.¹²² The court found federal violations of constitutional rights to be analogous to state violations embraced by section 1983.¹²³ Further, the court found that Congress intended to authorize fee awards in suits, like *Premachandra*, where federal officials have violated fundamental constitutional rights.¹²⁴ Accordingly, the district court held that Premachandra was entitled to attorneys' fees.¹²⁵

On appeal, the fee award was upheld by a divided panel of the Eighth Circuit Court of Appeals.¹²⁶ The Eighth Circuit, recognizing the importance of *Premachandra*, heard the case again *en banc*.¹²⁷

C. *The Premachandra Decision*

On rehearing, the Eighth Circuit reversed the district court's decision.¹²⁸ The court framed the prime issue as being whether the United States may be held liable for fee awards under section 2412(b) for constitutional violations.¹²⁹ Contrary to the panel's holding, the court, sitting *en banc*, found no authority to award attorneys' fees.¹³⁰

The *Premachandra* court looked first to the ordinary meaning of

120. *Premachandra*, 548 F. Supp. at 122.

121. *See id.*

122. *Id.* at 120-21. The Eighth Circuit panel explained the district court's reasoning. Section 2412 provides that the United States shall be liable for fees to the same extent as any other prevailing party. *Premachandra*, 727 F.2d at 723-24. Section 1988 authorizes fees against litigants other than the government where the plaintiff has sued to enforce a provision enumerated in § 1983. *Id.* at 724. Section 1983 provides a statutory right against any person who under color of state law, violates another's constitutional rights. *Id.* Thus, § 1988 authorizes fees against state officials that violate constitutional rights under color of state law. *Id.* The only difference in *Premachandra* is that the federal officials act under color of federal law. *Id.*

123. *Premachandra*, 548 F. Supp. at 120-21.

124. *See id.* District courts facing this issue have come to different conclusions. *See Unification Church*, 574 F. Supp. at 95-96 (D.D.C. 1983) (fees not awarded without state action); *Venus*, 556 F. Supp. at 520-21 (§ 1988 may only be invoked where state action is present); *Lauritzen*, 546 F. Supp. at 227 (legislative history supports award of fees where federal official violates Constitution); *Miscellaneous Pornographic Magazines*, 541 F. Supp. at 127-28 (§ 1988 available only when state action is involved).

125. *Premachandra*, 548 F. Supp. at 122.

126. *Premachandra*, 727 F.2d at 717.

127. *Premachandra*, 753 F.2d at 635.

128. *Id.*

129. *Id.* at 636.

130. *Id.* The Eighth Circuit found no basis in the language of the statutes or legislative history to support an award of attorneys' fees. *See id.* at 642.

section 2412(b) to determine its legislative purpose.¹³¹ Section 2412(b) provides attorneys' fees "to the same extent that any other party would be liable" under common law or fee shifting statutes.¹³² The court limited its review to section 1988, arguably the only applicable fee shifting statute.¹³³ Moreover, section 1983 is the only statute within the purview of section 1988 that provides protection for constitutional violations.¹³⁴ Since the United States did not act under color of state law as required by section 1983, the court found that the fee shifting statute did not apply.¹³⁵ Although the court swiftly disposed of the section 1983 liability, it proceeded to address the uncertainty presented by section 2412(b).¹³⁶

Second, acknowledging that section 2412(b) may be ambiguous, the Eighth Circuit examined its context under the EAJA for clarification.¹³⁷ Section 2412(d), a companion fee shifting subsection, essentially provides attorneys' fees unless the United States was substantially justified or unless other special circumstances make the award of fees unjust.¹³⁸ The Eighth Circuit in *Premachandra* reasoned that if section 2412(b) were read without a state action requirement, the federal government would be liable for fees under section 2412(b) without regard to the substantially justified standard of section 2412(d).¹³⁹ The court found that Congress could not have intended that section 2412(b) swallow section 2412(d) and accordingly

131. *Id.* at 637. The court believed that the ordinary meaning of the language of the statute expressed the legislative purpose. *Id.* at 639.

132. 28 U.S.C. § 2412(b). The Eighth Circuit examined only § 2412(b) because § 2412(d) was not properly raised in the district court. *Premachandra*, 753 F.2d at 641-42.

133. *See Premachandra*, 753 F.2d at 637. The common law principles codified in § 2412(b) were raised in district court, but they were not decided. *Id.* at 642. Thus, the Eighth Circuit remanded *Premachandra* for a determination of whether the government was liable under common law principles. *Id.*

134. *Id.* at 637.

135. *Id.*; *accord Blum*, 643 F.2d at 83 & n.17.

136. *See Premachandra*, 753 F.2d at 638.

137. *Id.* at 639; *accord Richards v. United States*, 369 U.S. 1, 11 (1962); C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 27.0, at 457 (N. Singer 4th ed. 1985 Revision); *cf. Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. 395, 403 (1975) (section 4(e) of Federal Power Act must be interpreted in context of other provisions of the Act).

138. For the complete text of § 2412(d)(1)(A), see *supra* note 61.

139. *Premachandra*, 753 F.2d at 638. "Premachandra's interpretation of § 2412(b) would render nugatory the 'substantially justified' and 'special circumstances' limits in § 2412(d)." *Id.* Notably, § 1983 extends not only to violation of constitutional rights but also to those created by a broad range of federal statutes. *Maine v. Thiboutot*, 448 U.S. 1 (1980). As one court stated, "[i]f the state action component of § 1983 were eliminated for purposes of § 2412(b) fee awards, that subsection would effectively swallow up Section 2412(d). In light of the far more liberal standard for allowance of fees under § 1988, that would be an extraordinary result not lightly to be imputed to Congress." *Miscellaneous Pornographic Magazines*, 541 F. Supp. at 125.

held that such a result should be avoided.¹⁴⁰

Third, the court turned to Premachandra's prime argument, that legislative history evidences Congressional intent to charge the United States with fees in actions analogous those brought against state parties under section 1983.¹⁴¹ As proposed, section 2412(b) would have imposed fees on the United States only to the extent that a private party would be liable.¹⁴² A witness, Armond Derfner, testifying before the House committee expressly noted the discrepancy between a state's liability for fees in section 1983 actions and the federal government's liability in virtually identical fact patterns.¹⁴³ Derfner suggested a change in the wording of section 2412(b) which would put the United States completely on par with state governments.¹⁴⁴ In the immediately succeeding draft, the language was amended to impose fees on the United States to the same extent as "any other party."¹⁴⁵

140. See *Premachandra*, 753 F.2d at 638. The VA argued that if § 2412(b) were stretched to permit federal officials acting under color of federal law, "fee requests in many statutory actions in the areas of food stamps, housing, Medicaid, and other public benefit programs will also be channeled through § 2412(b)." Supplemental Reply Brief of Appellant at 2, *Premachandra v. Mitts*, 753 F.2d 635 (8th Cir. 1985).

Premachandra's response is that the existing limitations on § 1983 actions will prevent most parties from invoking the analogous link to § 1988. *Premachandra*, 753 F.2d at 638. Section 1983 does not apply to every violation of a federal statute. See, e.g., *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20-21 (1981); *First Nat'l Bank v. Marquette Nat'l Bank*, 636 F.2d 195, 198 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981).

141. *Premachandra*, 753 F.2d at 639.

142. *Award of Attorney's Fees Against the Federal Government: Hearings on s. 265 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm.*, 96th Cong., 2d Sess. at 1, 3, 9 (1980) (cited in *Premachandra*, 753 F.2d at 639).

143. Armond Derfner testified before the House subcommittee:

There is an area in which a slight drafting modification could carry out what I believe might be the intention of the committee; and that is to put the United States completely on a par as far as the enforcement of important constitutional and statutory rights.

In the Civil Rights Act of 1976 you provided that when someone, whether it be an individual or business, or whatever sues a State or local government under 42 United States Code, section 1983, to vindicate a constitutional or Federal statutory rights [sic], that fees would be available under the *Newman v. Peggy [Piggie] [sic] Park* standard. These bills say that the United States should pay fees—in the amendment to 28 United States Code 2412—in those circumstances where the court may award such fees in suits involving private parties.

That doesn't say State or local government, but if the language were amended to read, "in those circumstances where the court may award such fees in suits involving other litigants"; it would achieve that purpose. And I think it would go even further toward putting the United States on a par with other governmental bodies.

Id.

144. *Id.*

145. SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE HOUSE JUDICIARY COMM., H.R. REP. NO. 1418, 96th Cong., 2d Sess. at 1, 4, 7,

Premachandra argued that the only plausible explanation for the amendment was an intent to implement Derfner's suggestion that the federal government should be on equal footing with state governments.¹⁴⁶ The Eighth Circuit, however, found the plain meaning of section 2412(b) to obviate the need to resort to "conjecture" regarding legislative history.¹⁴⁷ The court was reluctant to give dispositive weight to Derfner's testimony, particularly since there were no statements linking the testimony to the amendment.¹⁴⁸ In addition, the court noted that while Derfner suggested the language be changed to "other litigants" the actual change was to "any other party."¹⁴⁹

Finally, while denying a mission to protect the treasury, the Eighth Circuit noted that uncertainty must be resolved in the government's favor.¹⁵⁰ The EAJA is a waiver of sovereign immunity and must be strictly construed to the advantage of the United States.¹⁵¹ The court held that Congress had not made the United States clearly liable for fees in actions for constitutional deprivation.¹⁵²

19-20 (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4985-86; *Lauritzen*, 546 F. Supp. at 1228.

146. This interpretation was found persuasive by the district court. *Premachandra*, 727 F.2d at 728-29; see also, *Lauritzen*, 736 F.2d 550; *Lauritzen*, 546 F. Supp. at 1228 (such an interpretation comports with the policies underlying the enactment of EAJA); *Miscellaneous Pornographic Magazines*, 541 F. Supp. at 129 n.6 (there is no other explanation than that proposed by plaintiff).

On the other hand, the VA maintained that the issue is not what Derfner intended, but what Congress intended. Supplemental Reply Brief for the Federal Appellants on Rehearing *En Banc* at 12, *Premachandra v. Mitts*, 753 F.2d 635 (8th Cir. 1985).

147. *Premachandra*, 753 F.2d at 639. The court finds the origin of the amendment ambiguous and insufficient to contradict the express language of the statute. *Id.* at 641.

148. *Id.* at 640. The court notes that there is convincing authority that the absence of discussion between Derfner's testimony and the implementation of the amendment should not be taken as agreement. See R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES*, 181-82 (1975) ("There could hardly be less reputable legislative material than legislative silence."); see also *American Smelting & Refining Co. v. OSHA*, 501 F.2d 504, 510 (8th Cir. 1974) (Congressional failure to respond to comments in a committee hearing does not necessarily reflect agreement).

149. *Premachandra*, 753 F.2d at 640.

150. *Id.* at 641. The court does not sit as the self-constituted guardian of the Treasury. *Id.*; see *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).

151. *Premachandra*, 753 F.2d at 641. The Eighth Circuit has held that with respect to the EAJA, the conditions upon which the government consents to be sued must be strictly construed and that exceptions may not be implied. *Monark Boat Co.*, 708 F.2d at 1329.

152. *Premachandra*, 753 F.2d at 641. A concise amendment could have accomplished the purpose and failure to do so casts doubt on whether it was intended. *Id.*

The Eighth Circuit remanded the case for decision on whether *Premachandra* was entitled to attorneys' fees under a common law exception to the American Rule.

III. DISCUSSION

In *Premachandra*, the Eighth Circuit resorted to an unduly literal translation of section 2412(b) that serves to eviscerate the clear intent of Congress.¹⁵³ Legislative history indicates that the Derfner amendment was intended to award fees to litigants in *Premachandra's* position. The primary objective of statutory construction is to determine the underlying legislative intent.¹⁵⁴ When federal statutes are facially ambiguous, it is clearly proper to examine legislative history to discern congressional intent.¹⁵⁵ Testimony before a legislative committee is evidence of congressional intent when it is acted upon.¹⁵⁶

The Eighth Circuit, however, placed minimal significance on legislative history by making reference to the "ashcans of the legislative process."¹⁵⁷ Consequently, the Eighth Circuit thus devalued Derfner's testimony.¹⁵⁸ Section 2412(b) was amended in substantial

Id. at 642. The case was subsequently settled. Telephone interview with Marilyn S. Teitelbaum, attorney for appellee (Sept. 18, 1985).

153. *Cf.* *Barnes v. Donovan*, 720 F.2d 1111, 1114 (9th Cir. 1983) (parties may not resort to an unduly literal translation that ignores Congressional intent).

154. *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 293 (1907). Such intent is to be found in the language of the statute itself. When the language is ambiguous or the meaning is doubtful, the court should consider the purpose, the subject matter and the condition of affairs which led to its enactment, and so construe it to effectuate and not destroy the spirit and force of the law and not to render it absurd. *Id.*; *see, Lambur*, 148 F.2d at 139; *see also United States v. Cooper Corp.*, 312 U.S. 600, 609 (1941).

155. *Lambur*, 148 F.2d at 139. That other circuits are at odds with the interpretation of section 2412(b) is ample evidence that the statute is ambiguous. *See Boudin v. Thomas*, 732 F.2d 1107, 1114 (2d Cir. 1984); *Clemente v. United States*, 568 F. Supp. 1150, 1170 (C.D. Cal. 1983); *Hollbrook v. Pitt*, 748 F.2d 1168, 1174-75 (7th Cir. 1984); *Lauritzen*, 736 F.2d at 553-59; *Saxner v. Benson*, 727 F.2d 669, 673 (7th Cir. 1984); *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 589 F. Supp. 921 (N.D. Cal. 1983); *Trujillo v. Heckler*, 587 F. Supp. 928, 931-32 (D. Colo. 1984); *Unification Church*, 574 F. Supp. at 95-96; *Venus*, 556 F. Supp. 514; *Miscellaneous Pornographic Magazines*, 521 F. Supp. at 126-27.

156. Testimony before a congressional committee is sometimes dispositive in interpreting congressional intent where the witness is closely associated with the legislation. *United States v. Henning*, 344 U.S. 66, 72 n.14 (1952) (citing congressional testimony of the Assistant Administrator for Insurance, Veterans Administration, to interpret statute); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 547-48 (1940) (testimony of Chairman of Legislative Committee of the Interstate Commerce Commission); 2A C. SANDS, *supra* note 137, § 49.11 (statements of individual witnesses considered where they sponsored legislation or led it through Congress). *Bul see Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (statement by sponsor not dispositive); *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493 (1931); *March v. United States*, 506 F.2d 1306, 1314 (D.C. Cir. 1974); *United States v. Kung Chen Fur Corp.*, 188 F.2d 577, 584 (C.C.P.A. 1951).

157. *See Premachandra*, 727 F.2d at 638. Rather, the court looks to the context of the EAJA as a more formal expression of Congressional intent. *Id.*

158. *See id.* at 638-39.

accordance with Derfner's testimony.¹⁵⁹ It is mischaracterization to say that Congress was silent on the connection between Derfner's testimony and the amendment.¹⁶⁰ It is the sequence of events that provides the nexus between the testimony and the intent of Congress to implement the proposed change.¹⁶¹ Derfner proposed an amendment to make the United States liable for fee awards in actions analogous to section 1983.¹⁶² Following Derfner's suggestions, Congress amended section 2412(b).¹⁶³ Derfner's testimony is the only possible impetus for the amendment.¹⁶⁴

The court's fear that an expansive reading of section 2412(b) will swallow section 2412(d) is unwarranted. The two subsections have different and distinct goals.¹⁶⁵ Section 2412(b)/1983 actions are only available for a limited number of enumerated statutory violations.¹⁶⁶ Section 1983 provides a cause of action only for violations of rights akin to fundamental rights protected by the Fourteenth Amendment.¹⁶⁷

In contrast, section 2412(d) was a catchall provision, encompassing situations not covered by section 2412(b).¹⁶⁸ Although there is some overlap, section 2412(d) embraces suits where similarly situated private individuals or state governments would not be liable.¹⁶⁹ Some amount of overlap is not surprising because section 2412(d) was enacted for a limited period of time as an experimental provi-

159. *Premachandra* 753 F.2d at 643 (F. Gibson, J., dissenting); *Lauritzen*, 736 F.2d at 561 (Boochever, J., dissenting).

160. *Premachandra*, 753 F.2d at 643-44 (F. Gibson, J., dissenting). If Derfner's proposal had not been the intent of the Committee, then in that circumstance one would expect additional comments and debate. *See id.* at 643. No debate occurred because the Committee was in agreement with Derfner as shown by the amendment. *See id.*

161. *See Lauritzen*, 736 F.2d at 561 (Boochever, J., dissenting). The court in *Miscellaneous Magazines* acknowledges that this may be the case but suggests that Derfner "was a better policy advocate than a draftsman." *Misc. Magazines*, 541 F. Supp. at 129.

162. *See supra* note 152 and accompanying text.

163. *Lauritzen*, 546 F. supp. at 1228.

164. *Lauritzen*, 736 F.2d at 562 (Boochever, J., dissenting).

165. *Id.* at 563.

166. *Premachandra*, 727 F.2d at 730 (§ 2412/1983 cause of action does not encompass violations of all federal statutes).

167. *First Nat'l Bank of Omaha*, 636 F.2d at 199 (holding that violation of plaintiff's bank's rights under the National Banking Act did not give rise to a § 1983 action).

168. H.R. REP. NO. 1418, 96th Cong., 2d Sess. at 18; reprinted in 1980 U.S. CODE CONG. & AD NEWS 4984, 4997 [hereinafter cited as H.R. REP. NO. 1418]. Section 2412(d) is intended to apply only where fee awards against the government are not already authorized. Additionally, section 2412(d) was designed primarily to encourage small businesses to contest the unreasonable exercise of federal agency action. *See id.* at 9-10; 1980 U.S. CODE CONG. & AD. NEWS at 4988.

169. *Premachandra*, 727 F.2d at 730.

sion.¹⁷⁰ Finally, the House Report indicates that Congress intended the more specific fee shifting provision, section 2412(b), to supersede section 2412(d) where the two provisions conflict.¹⁷¹

The Eighth Circuit avoided an interpretation of section 2412(b) that would expand federal liability for fee awards without restrictions and limitations.¹⁷² Both sections 2412(b) and 2412(d), however, have sufficient discretionary safeguards which allow a court to reduce or deny awards to prevent anticipated abuse.¹⁷³ Although courts may have limited discretion to award fees under section 2412(b), it remains a discretionary provision.¹⁷⁴ On the other hand, though section 2412(d) is a *mandatory* provision, the court may determine that the government is substantially justified or that special circumstances make the award unjust.¹⁷⁵

In enacting the EAJA, Congress intended to put the United States on equal footing with other litigants.¹⁷⁶ Section 2412(b) provides that the United States has the same liability as any other party. If a state official had violated Premachandra's constitutional rights, the state would be liable for attorneys' fees under section 1988.¹⁷⁷ It follows that the United States should be charged with attorneys' fees for a violation of similar rights.¹⁷⁸ This is entirely consistent with the legislative history and the policy it was designed to implement.

In legislation passed to re-enact section 2412(d), Congress noted that section 2412(b) grants discretion to award fees against the United States to the same extent that state governments would be

170. H.R. REP. NO. 1418, 96th Cong. 2d Sess. at 13, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 4992. A sunset provision repealed 2412(d) on October 1, 1984. *Id.* Although section 2412(d) was reenacted by Congress (H.R. 5479), President Reagan has declined to sign it into law. *See supra* note 63.

171. *See* H.R. REP. NO. 1418, 96th Cong., 2d Sess. at 18, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 4997 (section 2412(d) is intended to apply only to cases where fee awards against the government are not already authorized).

172. *See Premachandra*, 753 F.2d at 638.

173. Note, *supra* note 1, at 726.

174. Courts may have limited discretion to deny analogous awards under § 1988. *See, e.g.,* *Sethy v. Alameda County Water Dist.*, 602 F.2d 894, 897 (9th Cir. 1979) (awards are unavailable where special circumstances render the award unjust), *cert. denied*, 444 U.S. 1046 (1980). Attorneys' fees, however, are not always awarded under § 1988. *See, e.g.,* *Greenside v. Ariyoshi*, 526 F. Supp. 1194, 1197 (D. Hawaii 1981) (award of attorneys' fees in civil rights action must not encourage the overpressing of marginal claims).

175. 28 U.S.C. § 2412(d). In addition, section 2412(d) permits the court, in its discretion, to reduce or deny an award to a party "engaged in conduct which unduly and unreasonably protracted the final resolution. . . ." *Id.* § 2412(d)(1)(C).

176. H.R. REP. NO. 1418, 96th Cong., 2d Sess. at 9, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 4987.

177. *Accord Lauritzen*, 736 F.2d at 561 (Boochever, J., dissenting).

178. *Id.*

liable.¹⁷⁹ The House Report specifically indicates approval of the district court's fee award to Premachandra. The Report cites the district court's interpretation as an example of how section 2412(b) is intended to work.¹⁸⁰ While not dispositive, the House Report is yet another indication of legislative intent.

Although the Eighth Circuit expressly denies a mission to protect the public fisc, the court betrays its parental anxiety.¹⁸¹ In the margin, the court notes that many of the currently "disappointed litigants" would be awarded fees absent a standard to limit the United States' liability. It should not be forgotten that these litigants are disappointed because they have been violated by federal officials. Many of these victims do not have the resources to vindicate their rights. The court should not protect the economics of government at the expense of important societal rights.

Public confidence in our governmental process fosters voluntary compliance with the laws. Respect for the law is contingent upon fair and uniform application of the law to the government and the populace alike. Denying a prevailing party his attorneys' fees insulates the government from responsibility for its actions. Moreover, private enforcement of rights is a necessary element of our legal system.¹⁸² Indigent parties who need protection most lack the economic strength to oppose unreasonable government action. The expense

179. H.R. REP. NO. 992, 98th Cong., 2d Sess. (1984) which accompanied H.R. 5479 supports the panel's decision on *Premachandra*.

In a permanent provision of the Act which is unaffected by H.R. 5479 - 28 U.S.C. § 2412(b) - a court is given discretion to award reasonable attorneys' fees and other costs in addition to those costs enumerated in section 2412(a) against the United States to the same extent that any other party—i.e., private, public, or governmental—may be liable under the common law or under terms of any statute which specifically provides for such an award. See, *Premachandra v. Mitts*, 727 F.2d 717 (8th Cir. 1984). The provisions [sic] was designed to put the United States in the same position as other parties.
Id. at 4, n.3.

180. *But cf.* Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one") (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1977) ("[such] observations . . . are in no sense part of the legislative history") (quoting *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1979)).

180. H.R. REP. NO. 992, 98th Cong., 2d Sess. at ____.

181. See *Premachandra*, 753 F.2d at 638 n.2 (1985). The footnote reads:

Experience has demonstrated the limiting influence of the "substantially justified" language [of § 2412(d)]. During the 1983 fiscal year, 133 fee requests were filed under subsection (d). Over half of these petitions were denied on the ground that the government's position was substantially justified. 1983 Annual Report Administrative Office United States Courts 82. *If allowed to proceed under subsection (b), many of these disappointed litigants may have been awarded fees.* (emphasis added).

Id.

182. See *supra* note 4 and accompanying text.

of litigation should not be a barrier to the enjoyment of fundamental rights.

CONCLUSION

The Eighth Circuit construed section 2412(b) restrictively because its scope is facially uncertain. The issue, however, is not whether section 2412(b) was drafted with precision. At issue is congressional intent. The record clearly demonstrates congressional intent to charge the United States with attorneys' fees in actions analogous to those brought against state officials for constitutional deprivation.¹⁸³ *Premachandra* undercuts the intent of Congress and thus impinges challenges of unreasonable government actions.¹⁸⁴

The EAJA created the perception that the average citizen could challenge unfair government action. The EAJA was intended to encourage individuals to vigorously vindicate their rights by minimizing the disparity of economic resources between private litigants and the federal government. The court should not import immunities back into a statute designed to limit them.¹⁸⁵ If the *Premachandra* court's interpretation of section 2412(b) prevails, victims remain vulnerable and defenseless in the government's shadow. Governmental deprivation of constitutional rights will continue unchecked. It is hoped that Congress will take appropriate steps to give the courts a clearer directive.

Mark J. Frenz

183. *Lauritzen*, 546 F. Supp. at 1228.

184. Cardozo, J., in *Anderson v. John L. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926) wrote: "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced."

185. *Indian Towing Co.*, 350 U.S. at 69.