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The Waiver of Immunity in the Equal Access to Justice Act: Clarifying Opaque Language

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THE WAIVER OF IMMUNITY IN THE EQUAL ACCESS TO JUSTICE ACT: CLARIFYING OPAQUE LANGUAGE

In enacting the Equal Access to Justice Act of 1980 (EAJA or Act),[1] Congress recognized that the disparity of resources between the United States and other parties often creates a formidable barrier that deters parties from vindicating their rights against the government.[2] The EAJA sought to minimize that deterrent by providing for the award of attorneys' fees to prevailing litigants.[3] Section 2412(b) of the Act provides that "[t]he 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."[4] This provision waives governmental immunity[5] that exists in common law and statutory exceptions[6] to the traditional "American rule" that each party pays its own litigation expenses.[7]

1. Pub. L. No. 96-481, tit. II, 94 Stat. 2321, 2325–30 (codified as amended at 5 U.S.C. § 504 (1982), 28 U.S.C. § 2412 (1982)).

2. *Id.* at tit. II, § 202.

3. *Id.* at §§ 202–204. 28 U.S.C. § 2412(b) awards fees to prevailing parties other than the United States in actions by or against the government.

4. Pub. L. No. 96-481, tit. II, § 204, 28 U.S.C. § 2412(b) (1982). This Comment is limited to interpreting the waiver of immunity with regard to other fee-shifting statutes and does not discuss the United States' liability under the common law. *See, e.g.*, Trustees for Alaska v. Watt, 556 F. Supp. 171 (D. Alaska 1983) (common benefit claim denied).

5. The doctrine of sovereign immunity means that the United States cannot be sued by name without its consent. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 392 (1970). Traditionally, courts have held that waivers of sovereign immunity are to be construed strictly. *See, e.g.*, Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983). When waivers measure the liability of the United States in terms of that of another party, however, courts have liberally interpreted the waivers. *See infra* notes 159–71 and accompanying text.

6. 28 U.S.C. § 2412(b) (1982).

7. The United States is the only common law country in which the losing party in litigation does not automatically pay the attorneys' fees of the winner. Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 LAW & CONTEMP. PROBS. 187, 188–89 (1984). The traditional American rule is that each party pays the costs of its counsel, absent a contractual obligation, statute, or common law exception. Note, *Award of Attorneys' Fees to Nonprevailing Parties Under the Clean Air Act—* Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983), 59 WASH. L. REV. 585, 586–87 (1984). The rule, stemming from Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796), was reaffirmed in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975). *Alyeska* held that the common law exceptions were limited to actions taken in bad faith and those which create a "common benefit." *Id.* at 245. *Alyeska* also held that the courts could not create a new common law exception by shifting fees when litigation produced broad societal advantages. *Id.* at 269.

In the last two decades, however, congressional policy has promoted "fee shifting"—passing the costs of litigation to the losing party by carving out statutory exceptions to the "American rule." At present, there are approximately 140 such federal provisions. *See Federal Statutes Authorizing the Award of Attorneys' Fees*, ATT'Y FEE AWARDS REP., Apr. 1985, 2, 2–3. Most of these provisions were

Recently, courts have interpreted the government's liability for fee awards when section 2412(b) is used in conjunction with the Civil Rights Attorney's Fees Awards Act of 1976 (section 1988).[8] Section 1988 authorizes attorneys' fees when, inter alia, federal constitutional or statutory rights are violated by officials acting under color of state law.[9] In relating the two statutes, the majority of courts has read section 2412(b) narrowly. These courts hold that the United States is liable for attorneys' fees under sections 2412(b) and 1988 only when federal officials act under color of state law.[10] The minority has found the United States liable when federal officials engage in the same activity for which state officials would be liable under section 1988.[11]

This Comment first summarizes the relevant statutes and key judicial opinions in the section 2412(b) controversy. It then analyzes the disputed text, the impact of alternative textual interpretations on the EAJA as a whole, congressional intent as revealed by the Act's legislative history, and the potential limitations created by the doctrine of sovereign immunity. This Comment argues that the text of the Act creates a presumption that section 2412(b) imposes liability for attorneys' fees on the United States when the government commits an act which would impose such liability on another party. None of the other factors analyzed rebut the presumption; rather, they tend to support it. This Comment concludes that the minority solution to the section 2412(b) puzzle is correct but lacks a rationale applicable across the circuits and the broad range of federal fee-shifting

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enacted in response to *Alyeska*. Note, *Will the Sun Rise Again for the Equal Access to Justice Act?*, 48 BROOKLYN L. REV. 265, 272 (1982). *See generally Alyeska*, 421 U.S. 240 at 247–62 (history of the American rule and its exceptions); *Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 1 (1984) (entire issue); Robertson & Fowler, *Recovering Attorneys' Fees from the Government Under the Equal Access to Justice Act*, 56 Tul. L. Rev. 903, 909–12 (1982); Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 651.

8. Pub. L. No. 94-559, § 2, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1982)).

9. *See infra* note 32 and accompanying text.

10. *E.g.*, Premachandra v. Mitts (*Premachandra II*), 753 F.2d 635, 637, 641 n.7 (8th Cir. 1985) (en banc); Unification Church v. Immigration & Naturalization Serv., 762 F.2d 1077, 1080 (D.C. Cir. 1985); Holbrook v. Pitt, 748 F.2d 1168, 1177 (7th Cir. 1984); Lauritzen v. Lehman, 736 F.2d 550, 559 (9th Cir. 1984); Northwest Indian Cemetery Protective Ass'n v. Peterson, 589 F. Supp. 921, 924–26 (N.D. Cal. 1983), *aff'd and vacated in part on other grounds*, 764 F.2d 581 (9th Cir. 1985); Venus v. Goodman, 556 F. Supp. 514, 521–22 (W.D. Wis. 1983).

11. *E.g.*, Premachandra v. Mitts (*Premachandra I*), 727 F.2d 717, 723–30 (8th Cir. 1984), *rev'd*, 753 F.2d 635 (8th Cir. 1985) (en banc); Boudin v. Thomas, 732 F.2d 1107, 1114 (2d Cir. 1984) (dicta); Trujillo v. Heckler (*Trujillo I*), 587 F. Supp. 928, 931–32 (D. Colo. 1984), *appeal docketed*, No. 84-2104 (10th Cir. Aug. 7, 1984); Local 3-98, Int'l Woodworkers of America, AFL-CIO v. Donovan, 580 F. Supp. 714, 716 (N.D. Cal. 1984) (dicta); Clemente v. United States, 568 F. Supp. 1150, 1171 (C.D. Cal. 1983), *vacated in part, rev'd in part on other grounds*, 766 F.2d 1358 (9th Cir. 1985); Krodel v. Young, 576 F. Supp. 390, 395 n.6 (D.D.C. 1983) (dicta), *aff'd*, 748 F.2d 701 (D.C. Cir. 1984), *cert. denied*, 106 S. Ct. 62 (1985).

provisions. It therefore offers guidelines for insuring that future interpretations of the waiver provision in relation to other federal fee-shifting statutes neither constrict nor expand the intended scope of section 2412(b).

I. LEGISLATIVE BACKGROUND

A. Equal Access to Justice Act

Although the sponsors of the EAJA were concerned primarily with the problems of small businesses in contesting unwarranted government interference,[12] the EAJA's broadly worded preamble applies to any individual, partnership, corporation, or other organization seeking review of or defending against unreasonable governmental action in a civil suit or administrative proceeding.[13] Congress found that the expenses of litigation might deter such parties from vindicating their rights against the government and that the greater resources and expertise of the United States justified a departure from the American rule against fee shifting.[14] Accordingly, the Act was designed to ease the litigation burden by providing for attorneys' fees awards in specified circumstances to parties who prevail against the government.

Congress accomplished this goal by amending section 2412, which had permitted courts to award costs to a private party that prevailed against the United States, but prohibited awards for attorneys' fees.[15] As amended, section 2412(a) continues to allow awards for costs, while section 2412(b) authorizes awards of attorneys' fees.[16] Both subsections are permanent

12. The EAJA comprises Title II of the Small Business Export Expansion Act of 1980. *See supra* note 1. The EAJA was added by a floor amendment to H.R. 5612, which was enacted as the Small Business Export Expansion Act of 1980. The provisions of the amendment were almost the same as S. 265, 96th Cong., 1st Sess. (1979), which had been passed overwhelmingly by the Senate and was reported favorably by the House Judiciary Committee. *See generally* Robertson & Fowler, *supra* note 7, at 905 n.11. This Comment will cite committee reports on S. 265 as part of the legislative history of the EAJA. *Accord, e.g., Premachandra II*, 753 F.2d at 639; H.R. REP. No. 1418, 96th Cong., 2d Sess. 1 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984 [hereinafter cited as H.R. REP.].

13. Pub. L. No. 96-481, tit. II, 94 Stat. 2325, 2325.

14. *Id.*

15. 28 U.S.C. § 2412 (1976), *amended by* 28 U.S.C. § 2412 (1982).

16. 28 U.S.C. § 2412(b)(1982) provides as follows:

> 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 to the same extent as any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

parts of the Act, and both provide for discretionary awards. Neither provision contains restrictions as to parties or size of awards.[17]

For a three-year experimental period, section 2412(d) of the Act authorized mandatory fee awards to prevailing parties, other than the United States.[18] A parallel provision, section 504, permitted fee shifting in adversarial administrative adjudications.[19] Unlike section 2412(b), both of these sections provided for fee awards only when the position of the United States or its agency was not found to be "substantially justified" and when there were no "special circumstances" which would make an award unjust.[20] Although sections 2412(d) and 504 were repealed, they have been reinstated retroactively.[21]

Congress enacted Senate Bill 265 as the EAJA after extensive consideration of various fee-shifting bills.[22] The testimony before House and Senate committees, as well as floor debate, heavily emphasized the need to relieve small businesses from overbearing governmental regulation through provisions subsequently enacted as sections 504 and 2412(d).[23] There was

17. *See* 28 U.S.C. § 2412(a), (b) (1982).

18. 28 U.S.C. § 2412(d) (1982). Section 2412(d) excluded from eligibility individuals whose net worth exceeded $1,000,000 and businesses or organizations whose net worth exceeded $5,000,000. It also limited the net worth of eligible parties and the hourly rates for fee awards. *Id.* In addition, it restricted fee awards to civil judicial proceedings for actions "other than cases sounding in tort." *Id.* Congress, however, explicitly indicated its intent to remove constitutional torts from the exception. H.R. REP., *supra* note 12, at 18. *Accord,* Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd., 679 F.2d 64, 68 (5th Cir. 1982).

19. 5 U.S.C. § 504 (1982). Section 504 restricted fee awards to adversarial adjudications—those in which the position of the United States is represented by counsel. It excluded licensing and ratesetting adjudications. *Id.* at § 504(b)(1)(C). The legislative history also explicitly excluded social security administration proceedings. *E.g.,* H.R. REP., *supra* note 12, at 12; *see* H. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5003, 5012 [hereinafter cited as Conf. Rep.]. Further, § 504 excluded individuals whose net worth exceeded $1,000,000 and businesses or organizations whose net worth exceeded $5,000,000. It also limited the hourly rate for fee awards. 5 U.S.C § 504(b) (1982).

20. The "substantial justification" qualification presented a formidable barrier to fee awards. During the year ending June 30, 1984, federal courts denied 120 fee petitions. Almost three-quarters of these were denied because the courts found the position of the United States to be substantially justified. 1984 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 93 (1984).

21. Since Congress viewed §§ 504 and 2412(d) as major departures from traditional American practice in which each litigant pays its own fees, it provided for their automatic repeal on October 1, 1984. In 1984, the President vetoed a bill that would have reinstated §§ 2412(d) and 504 as permanent legislation. Memorandum of Disapproval, 20 WEEKLY COMP. PRES. DOC. 1814 (Nov. 8, 1984). On August 5, 1985, §§ 504 and 2412(d) were permanently enacted. Pub. L. No. 99-80, 99 Stat. 183.

22. Congress had been considering fee-shifting legislation for seven years. H.R. REP., *supra* note 12, at 6–8.

23. *See generally Award of Attorneys' Fees Against the Federal Government: Hearings on S. 265 Before the Subcomm. on Courts, Civil Liberties, and the Adminstration of Justice of the House Comm. on the Judiciary,* 96th Cong., 2d Sess. 1 (1980) [hereinafter cited as *H.R. Hearings*]; *Equal Access to Justice Act of 1979, S. 265: Hearings on S. 265 Before the Subcomm. on Improvements in Judicial*

virtually no mention of section 2412(b), with the exception of the testimony of Armand Derfner, the representative of the Lawyers Committee for Civil Rights Under Law and the American Civil Liberties Union.[24] Derfner noted that proposed fee-shifting legislation was intended to put the United States on a par with other parties.[25] He pointed out that the Civil Rights Attorney's Fees Awards Act of 1976 provides for fee awards against state and local governments for section 1983 violations. The pending bills, however, only authorized fee awards against the United States when private parties would be liable.[26] Referring to one of the pending bills, Derfner suggested changing "private parties" to "other litigants" to effectuate the committee's intent.[27]

B. Sections 1988 and 1983

Section 2412(b) of the EAJA is a referential statute that potentially provides for a fee award based on any federal fee-shifting provision. With a single exception,[28] however, all reported section 2412(b) litigation refers to the Civil Rights Attorney's Fees Awards Act of 1976 (section 1988). This statute authorizes discretionary awards of reasonable attorneys' fees to prevailing parties, other than the United States.[29] Courts may make such awards in "any action or proceeding" to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986, as well as two other enactments.[30]

Machinery of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 1 (1979) [hereinafter cited as *Sen. Hearings*].

24. Armand Derfner testified before a House subcommittee hearing on S. 265 and other pending fee-shifting bills. In the course of that testimony, Derfner suggested changing "private parties" to "other litigants." He pointed out that § 1988 provides for fee awards against state and local governments for § 1983 violations, but the pending bills only authorized fee awards against the United States when private parties would be liable. His proposed modification would help to put the United States "on a par with other governmental bodies." *H.R. Hearings, supra* note 23, at 100. Although the subcommittee proffered no explanation, the next draft of S. 265 contained the language which was enacted: "The United States shall be liable . . . to the same extent that any other party would be liable . . . ." 28 U.S.C. § 2412(b) (1982).

25. *H.R. Hearings, supra* note 23, at 100.

26. *Id.*

27. *Id.*

28. *See infra* note 117.

29. Under 42 U.S.C. § 1988 (1982), courts have little discretion in awarding fees pursuant to § 1988. Fees generally are awarded to prevailing plaintiffs unless special circumstances make an award unjust. *See, e.g.*, Ellwest Stereo Theatre, Inc. v. Jackson, 653 F.2d 954, 955 (5th Cir. 1981) ("the discretion afforded district courts to deny attorneys' fees to prevailing plaintiffs under § 1988 is exceedingly narrow . . . ."). Fees are awarded to prevailing defendants, however, only when a suit was brought or conducted in bad faith. *E.g.*, Hughes v. Rowe, 449 U.S 5, 15 (1980) (per curiam).

30. 42 U.S.C. § 1988 (1982) also authorizes fee awards to enforce title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1686 (1982), and title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d through d-6 (1982).

Most of the litigation involving sections 2412(b) and 1988 implicates section 1983.[31] This statute imposes liability on persons acting under color of state law who deprive persons of "rights, privileges, or immunities secured by the Constitution and laws . . . ."[32] The sweeping language of section 1983, coupled with expansive judicial interpretations in the 1960's and 1970's,[33] has made section 1983 the principal statute for the protection of civil rights.[34] Section 1983 also provides a cause of action when rights other than civil rights have been violated.[35] The Supreme Court, however, has made it clear that not all statutory violations can support section 1983 claims.[36]

II. THE COURTS' DECISIONS

The interpretative debate over section 2412(b) centers on whether the provision defines the government's fee liability directly (the United States is liable when it violates a provision of section 1988) or indirectly (*i.e.*, United States' liability is equivalent to that of any party who, committing the same act, would be liable for fees pursuant to section 1988). The majority interpretation of section 2412(b) is represented by *Lauritzen v. Lehman*[37] and *Premachandra v. Mitts* (*Premachandra II*).[38] In *Premachandra II*, the Eighth Circuit en banc reversed the *Premachandra v. Mitts* panel decision (*Premachandra I*),[39] which held that the United States is liable for attorneys' fees when it engages in the same conduct which would incur liability, had it been committed by any other party. The

31. 42 U.S.C. § 1983 (1982).

32. *Id.* Section 1983 provides as follows:

> 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.

As used in § 1983, "color of law" is the equivalent of state action. Timson v. Weiner, 395 F. Supp. 1344, 1347 (D.C. Ohio 1975).

33. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961) (persons can sue government officials under § 1983 even when the alleged violations were not authorized by the state; state judicial remedies need not be exhausted prior to a § 1983 action; local governments are immune from § 1983 suits), *overruled as to local government immunity,* Monell v. Dept. of Social Serv., 436 U.S. 658, 690 (1978).

34. C. WRIGHT, THE LAW OF FEDERAL COURTS § 22A, at 121 (4th ed. 1983).

35. *See* Maine v. Thiboutot, 448 U.S. 1 (1980) (permitting § 1983 action for deprivation of social security benefits).

36. *See infra* notes 129–34 and accompanying text.

37. 736 F.2d 550 (9th Cir. 1984).

38. 753 F.2d 635 (8th Cir. 1985) (en banc).

39. 727 F.2d 717 (8th Cir. 1984), *rev'd,* 753 F.2d 635 (8th Cir. 1985) (en banc).

Premachandra and *Lauritzen* fees claims stem from constitutional violations by federal officials. The minority position, represented by *Premachandra I,* has been extended to a fee claim based upon statutory violations.[40]

A. The Majority View

In *Premachandra II* and *Lauritzen,* the courts denied attorneys' fees requested under section 2412(b) even though plaintiffs had prevailed on substantive claims that the federal government violated their constitutional rights.[41] The courts found no basis for holding the United States liable for attorneys' fees simply because it committed the same action for which a state official would be liable. They labeled this approach one of "analogy" and rejected it,[42] holding instead that the United States must actually act under color of state law before it can be liable under sections 2412(b), 1988, and 1983. The courts relied on the text of section 2412(b) and the relation between sections 2412(b) and 2412(d). They also drew support from the legislative history of section 2412(b) and from the rule that waivers of sovereign immunity are to be construed strictly.

Both courts based their interpretation of the United States' liability for attorneys' fees under section 2412(b) on the language, "under the terms of any statute which specifically provides for such an award."[43] The courts reasoned that since plaintiffs could not allege federal governmental action under color of state law,[44] their suits did not enforce an enumerated provision of section 1988. Since the specific terms of section 1988 were not met and since no other attorneys' fees award statute applied, plaintiffs could not claim a section 2412(b) attorneys' fees award.[45] The courts found the statutory language clear and unambiguous and failed to find any compelling reason to depart from its facial meaning.[46]

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40. Trujillo v. Heckler (*Trujillo I*), 587 F. Supp. 928 (1984) (attorneys' fees awarded in a class action for violations of federal statutes by the Social Security Administration).

41. *Premachandra I,* 727 F.2d at 719 (alleging the Veteran's Administration violated Premachandra's fifth amendment rights by refusing to grant him a pretermination hearing); *Lauritzen,* 736 F.2d at 552 (alleging the Navy violated Lauritzen's constitutional rights by threatening to discharge her and by reducing her pay and rank as a result of her statements of possible homosexuality to a Navy psychiatrist).

42. *Premachandra II,* 753 F.2d at 636–37; *Lauritzen,* 736 F.2d at 553–54, 557–59.

43. *Premachandra II,* 753 F.2d at 637; *Lauritzen,* 736 F.2d at 553.

44. Section 1983 is the only enumerated provision of § 1988 that provides a remedy for the federal constitutional violations that were the substance of both cases. 42 U.S.C. § 1983 (1982).

45. *Premachandra II,* 753 F.2d at 637; *Lauritzen,* 736 F.2d at 553–54.

46. *See Premachandra II,* 753 F.2d at 637–38; *Lauritzen,* 736 F.2d at 553–54.

The courts also examined section 2412(b) in relation to the structure of the EAJA as a whole. They reasoned that many of the actions for which fees might be sought under section 2412(d) could be characterized as section 1983 constitutional or statutory violations but for the section 1983 requirement of state action.[47] If the analogy interpretation were followed, many prevailing parties would claim fee awards pursuant to sections 2412(b) and 1988 to avoid denial of a section 2412(d) award when the government's position was substantially justified.[48] According to these courts, plaintiffs' analogy interpretation of section 2412(b) could render nugatory the restrictions on section 2412(d) fee awards, "swallow up" that subsection, and thwart congressional intent for the EAJA as a whole.[49] Moreover, the *Premachandra II* court dismissed as irrelevant recent Supreme Court decisions clarifying which statutory claims may be brought under section 1983.[50] Since the *Premachandra II* court found it "conceivable" that all federal statutes could support section 1983 claims, it was particularly concerned that the analogy approach would result in section 2412(b) "swallowing up" section 2412(d).[51]

Both courts also found that the section 2412(b) waiver of sovereign immunity must be strictly construed in favor of governmental immunity.[52] Since Congress failed to clearly create fee liability in section 2412(b) for constitutional violations by federal officials acting under color of federal law, the courts ruled that the doctrine of sovereign immunity mandated resolution of doubts in the government's favor.[53]

The *Premachandra II* and *Lauritzen* courts took the position that legislative history should play virtually no role in interpreting section 2412(b).[54] They argued that even if the legislative history were considered relevant, it would not support plaintiffs' interpretation of section 2412(b).[55] Plaintiffs had emphasized the legislative amendment implementing Armand Derfner's suggestion that public entities be included in section 2412(b).

47. *Premachandra II*, 753 F.2d at 638; *Lauritzen*, 736 F.2d at 557.

48. *Premachandra II*, 753 F.2d at 638; *Lauritzen*, 736 F.2d at 557.

49. *Premachandra II*, 753 F.2d at 638. Although *Premachandra II* was decided after section 2412(d) had been repealed, the provision continued to apply "through final disposition of any action commenced before the date of repeal." Pub. L. No. 96-481, tit. II, § 204(c), 94 Stat. 2329.

50. *Premachandra II*, 753 F.2d at 638.

51. *See id.* at 638–39.

52. *Id.* at 639; *Lauritzen*, 736 F.2d at 555–56.

53. *Premachandra II*, 753 F.2d at 641; *Lauritzen*, 736 F.2d at 555–56.

54. *Premachandra II*, 753 F.2d at 638–39 (preferring to use the statutory context of § 2412(b) to resolve ambiguities and finding "no need to resort to conjecture regarding the legislative history"); *Lauritzen*, 736 F.2d at 555.

55. *Premachandra II*, 753 F.2d at 639–41; *Lauritzen*, 736 F.2d at 554–55.

According to the plaintiffs, this sequence of events demonstrated congressional intent to expand the reach of section 2412(b).[56] Neither court considered this evidence dispositive. Each noted that the legislative history contained no statement of a causal link between the testimony and the amendment.[57] In addition, the *Lauritzen* court reasoned that the suggested modification merely assured that sovereign immunity would not bar a fee award against the United States when the government is actually liable under a substantive provision of section 1988.[58] The *Premachandra II* court noted the disparity between the language of Derfner's suggested modification and the language adopted as evidence that Congress did not intend plaintiff's construction of the statute.[59]

The *Lauritzen* court held that Congress intended that the ultimate purpose of the EAJA—to encourage private parties to contest government action—could be accomplished through section 2412(d), rather than through the statutory prong of section 2412(b).[60] It reasoned that the primary purpose of section 2412(b) was simply to apply common law exceptions to the American rule to the federal government.[61]

Finally, *Premachandra II* refused to consider postenactment legislative history in construing section 2412(b).[62] The plaintiff argued that Congress ratified the *Premachandra I* panel opinion in a 1984 committee report accompanying a bill to reenact sections 2412(d) and 504 as permanent provisions of the EAJA.[63] That bill passed both houses of Congress, but was not signed by the President.[64] The court reasoned that the issue before it was the intent of the Congress that enacted the EAJA. Postenactment history was irrelevant to that intent, and the President's refusal to sign the bill deprived the committee report of any weight.[65]

B. The Minority View

A few courts[66] have adopted the broader interpretation of section 2412(b): prevailing parties are entitled to attorneys' fees when the United

56. *Premachandra II*, 753 F.2d at 639; *see Lauritzen*, 736 F.2d at 554–55. *See supra* note 24.
57. *Premachandra II*, 753 F.2d at 640; *Lauritzen*, 736 F.2d at 555.
58. *Lauritzen*, 736 F.2d at 556.
59. *Premachandra II*, 753 F.2d at 640–41.
60. *Lauritzen*, 736 F.2d at 557.
61. *Id.* at 554; *cf. Premachandra II*, 753 F.2d at 641 (ruling that legislative "reluctance" to authorize expansive fees liability mitigated against plaintiff's interpretation of § 2412(b)).
62. *Premachandra II*, 753 F.2d at 638.
63. *Id.* at 641 n.9. *See infra* note 156.
64. *Premachandra II*, 753 F.2d at 641 n.9.
65. *Id.*
66. *See supra* note 11 for courts adopting the minority position.

States engages in conduct that "if carried on by any 'other party' . . . would result in assessment of attorneys' fees against that party under § 1988."[67] The minority position, most fully explained by *Premachandra I*, rejected the majority approach in which the United States would incur liability for fees only when the federal government acted under color of state law. The court found that limiting fee awards to a situation which would occur so infrequently was inconsistent with the purpose, legislative history, and text of section 2412(b).[68] In addition, the court held that its broader view maintained a proper balance between sections 2412(b) and 2412(d) and was consistent with the rule of strict construction of a waiver of sovereign immunity.[69]

The *Premachandra I* court identified the disputed statutory text as "The United States shall be liable for such fees and expenses to the same extent that any other party would be liable"[70] and found that the language was "relatively opaque."[71] Since the statute was textually ambiguous, the court construed it on the basis of the congressional purpose and intent revealed by legislative history.[72] First, *Premachandra I* emphasized the remedial purpose of the EAJA: to eliminate the deterrent effect of litigation expenses and to place the federal government and civil litigants "on a completely equal footing."[73] According to the *Premachandra I* court, this purpose is better served by making the United States liable for fees in suits analogous to section 1983 actions than by restricting the scope of section 2412(b).[74] Second, the court found that the amendment changing "private party" to "other party" demonstrated congressional intent to assure governmental liability for actions by federal officials acting under color of federal law.[75] The court noted that the "clear import" of Derfner's remarks was to create federal liability for actions vindicating federal constitutional rights, "just as states are liable under § 1988 for fees in analogous suits against state officials brought under § 1983."[76] Third, the court pointed to legislative history showing that Congress explicitly considered the applicability of section 2412(b) to section 1988.[77]

67. Premachandra v. Mitts (*Premachandra I*), 727 F.2d 717, 724 (8th Cir. 1984), *rev'd.*, 753 F.2d 635 (8th Cir. 1985) (en banc).

68. *Id.* at 725–29.

69. *Id.* at 729–30.

70. *Id.* at 725 (citing 28 U.S.C. § 2412(b) (1982)).

71. *Id.* at 727.

72. *Id.*

73. *Id.* at 727–28 (citing the "equal footing" language contained in H.R. REP., *supra* note 12, at 9).

74. *Id.* at 728.

75. *See id.* at 728–29 (The "sequence of events demonstrates Congress' intent to extend § 2412(b) to make the United States liable for fees in suits . . . like the instant one . . . .").

76. *Id.*

77. *Id.* at 729. "[Section 2412(b)] clarifies the liability of the United States under such statutes as

The *Premachandra I* court reasoned that its interpretation of section 2412(b) comported with the rule requiring strict interpretation of waivers of sovereign immunity, although it acknowledged that the waiver could have been drafted with "more precision and clarity."[78] It noted that the legislative history and purpose behind the "to the same extent that any other party would be liable" language supported a finding that the government waived immunity.[79]

In addition, the *Premachandra I* court denied that its interpretation would result in section 2412(b) "swallowing up" section 2412(d).[80] The court identified the purpose of section 2412(d) as encouraging small businesses to contest unreasonable federal agency action.[81] It viewed section 2412(d) as "a sort of catchall provision" for federal regulatory litigation not already covered in the Act.[82] It stated that section 2412(d) was intended to provide potential fee awards in numerous types of suits outside the rubric of fee claims pursuant to sections 2412(b), 1988, and 1983.[83] The court also noted that potential section 1983 actions do not encompass violations of all federal statutes, as the government had claimed.[84] It pointed out that in the Eighth Circuit, section 1983 provides a cause of action only for violations of constitutional rights and those statutory rights similar to rights protected under the fourteenth amendment. An analogy interpretation of section 2412(b), therefore, would not "swallow up" section 2412(d).[85]

III. THE SCOPE OF SECTION 2412(b)

A. *Textual Analysis of Section 2412(b)*

Statutory interpretation begins with the disputed text itself.[86] Although

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the Civil Rights Attorneys' [sic] Fees Awards Act of 1976 . . . ." (quoting H.R. REP., *supra* note 12, at 17). Since § 1983 is the only provision mentioned in § 1988 that differentiates between states and private parties, "it is apparent that the amendment replacing 'private party' with 'any other party' was aimed at section 1983." *Lauritzen*, 736 F.2d at 562 (Boochever, J., concurring in part and dissenting in part).

78. *Premachandra I*, 727 F.2d at 729.

79. *Id.*

80. *Id.* at 730.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 729–30. The government had argued that, under Maine v. Thiboutot, 448 U.S. 1 (1980), § 1983 actions encompass violations of any federal statute.

85. *Id.* (citing First Nat'l Bank v. Marquette Nat'l Bank, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981)). *Premachandra I* also determined that Congress intended § 2412(b) to supersede § 2412(d), to the extent that there is a conflict between the provisions. *Id.* at 730.

86. *E.g.*, Bread Political Action Comm. v. Federal Election Comm'n, 455 U.S. 577, 581 (1982);

the majority courts treat the controverted sentence of section 2412(b) as if it were clear,[87] it is facially ambiguous.[88] It consists of two major clauses:

(1) The United States shall be liable for such fees and expenses

(2) to the same extent that any other party would be liable.[89]

The second clause is modified by two prepositional phrases:

(1) under the common law (or)

(2) under the terms of any statute which specifically provides for such an award.[90]

The majority courts appear to have interpreted the disputed sentence as if the final phrase, "under the terms of any statute . . . ." modifies the first clause and determines the liability of the United States.[91] Failing to find that the United States violated an enumerated provision of section 1988, they reasoned that no statute specifically provided for attorneys' fees; thus, section 2412(b) did not apply.[92] They concluded that section 2412(b) authorizes a fee award against the United States only when the United States commits an act under color of state law, violating section 1983 and incurring liability for attorneys' fees under section 1988.[93]

The majority interpretation is linguistically valid, however, only if the second major clause is set off by two commas from the rest of the sentence.[94] In this case there are no commas. Without commas, the qualifying phrase "under the terms of any statute . . . ." refers solely to the immediately preceding antecedent, "any other party."[95] By virtue of the

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American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982); J. HURST, DEALING WITH STATUTES 41 (1982); R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 110 (1975); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV., 527, 535 (1947).

87. *Premachandra II*, 753 F.2d at 642 (Gibson, J., dissenting).

88. Interview with Prof. Carol Stoel-Gammon, Department of Speech and Hearing Sciences, University of Washington (July 11, 1985). Acording to Prof. Stoel-Gammon, the absence of syntactic markers creates ambiguity in the controverted sentence: "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).

89. The phrase "to the same extent" introduces the rest of the clause and links it with the preceding clause. Prof. Stoel-Gammon, *supra* note 88.

90. The second phrase contains a subordinate relative clause ("which specifically provides for such an award"). *Id.*

91. This conclusion is supported by the omission of any mention of the second major clause in the textual analyses of the *Premachandra II* and *Lauritzen* courts.

92. *Premachandra II*, 753 F.2d at 637.

93. *Id.; see Lauritzen*, 736 F.2d 550, 559 (9th Cir. 1984).

94. Prof. Stoel-Gammon, *supra* note 88; *see* United States v. Pritchett, 470 F.2d 455, 459 (D.C. Cir. 1972). In interpreting a statute, the *Pritchett* court noted that if Congress had intended a controverted phrase to modify the first part of the sentence, it could have inserted a comma before the phrase to separate it from the immediately preceding clause.

95. The last antecedent is the last word or phrase which can meaningfully be read as an antecedent. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.33 (Sands 4th ed. 1984).

Support for the rule that qualifying phrases refer solely to the last antecedent includes First Charter Financial Corp. v. United States, 669 F.2d 1342, 1350 (9th Cir. 1982); Azure v. Morton, 514 F.2d 897.

first two clauses and the modifying phrases, section 2412(b) defines the United States' liability in terms of its equivalence to the liability of any other party.[96] This interpretation means that, for example, when a federal official violates the Constitution or a federal statute, the United States is liable for attorneys' fees awards, just as a state actor would be liable under section 1988 for a violation committed under color of state law.

An interpretation of the qualifying phrase as modifying the liability of "any other party," rather than that of the United States, comports with legal authority that linguistic principles may aid statutory interpretation, even though other canons of construction may be suspect.[97] Such an interpretation is neither inflexible[98] nor conclusive.[99] However, it creates a rebuttable presumption in favor of the minority interpretation of section 2412(b).

The majority courts' interpretation of section 2412(b) results in the additional analytic problem of surplus language. Courts are obligated to interpret statutes so as to give meaning to all the language and to avoid

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900 (9th Cir. 1975); Quindlen v. Prudential Insurance Co. of America, 482 F.2d 876, 878 (5th Cir. 1973); United States v. Pritchett, 470 F.2d 455, 459 (D.C. Cir. 1972); J. SUTHERLAND, *supra,* at § 47.33; Prof. Stoel-Gammon, *supra* note 88; *but see* United States v. Bass, 404 U.S. 336, 339 (1971) (qualifying phrase refers to all three antecedents). In *Bass,* the rule of the last antecedent conflicted with Court's longstanding rule of resolving ambiguous criminal statutes in favor of lenience toward the defendant. *See id.* at 348. No such rule of construction prevents application of the last antecedent rule to the EAJA.

96. It does not appear that the majority courts could have addressed the "to the same extent that" language and still reach their restrictive interpretation of § 2412(b). Section 2412(b) creates an equivalence relationship between the United States and any other party when the conduct of these parties is the same. In an uncontroverted statement, the plaintiff-appellee in *Premachandra II* had argued that "the government becomes liable for fees when it engages in the *same (not 'analogous')* conduct [as another party]. [This] creates a true parity between the federal government and 'other parties.'" Supplementary Brief of Plaintiff-Appellee Dr. Bhartur N. Premachandra for Rehearing En Banc at 15 n.22, Premachandra v. Mitts (*Premachandra II*), 753 F.2d 635 (8th Cir. 1984) (en banc) (emphasis in original). If the equivalence relationship is grounded on conduct (i.e., behavioral, not legal, acts), then plaintiffs' ability to allege legal acts in violation of § 1983 is irrelevant to their § 2412(b) fee claim. Moreover, the language of the second clause, "that any other party would be liable," requires only hypothetical liability of some other party. If Congress had wanted the government's liability to depend on the actual liability of another party, it would have used "is liable" rather than "would be liable." Yet under the majority courts' interpretation of § 2412(b) fee claims based on §§ 1988 and 1983, "the only time the federal government would be liable for the unconstitutional acts of its officers is when those officers act in concert with a state official and thus meet the state action requirement of § 1983." *Premachandra II,* 753 F.2d at 643 (Gibson, J., dissenting).

97. R. DICKERSON, *supra* note 86, at 227; J. HURST, *supra* note 86, at 57.

98. United States v. Pritchett, 470 F.2d 455, 459 (D.C. Cir. 1972) (last antecedent rule not applied where the context indicates otherwise).

99. J. HURST, *supra* note 86, at 56, and R. DICKERSON, *supra* note 86, at 228, treat rules of language usage as presumptions rebuttable by other aspects of statutory analysis.

surplusage.[100] *Premachandra II* and *Lauritzen,* however, failed to analyze the second major clause.[101] The omission suggests that these courts treated the clause as redundant or otherwise devoid of independent meaning. In particular, the majority courts failed to give meaning to the "to the same extent" phrase introducing the second clause.[102] The phrase implies an equivalence relationship between the liability of the United States and that of any other party,[103] such that statutes applicable to "any other party" are equally applicable to the United States.[104] The majority courts, however, considered only whether statutes apply directly to the United States.[105] Having failed to address fee-shifting statutes that apply indirectly to the United States because of this equivalence relationship, these courts mistakenly found the United States not liable for attorneys' fees under section 2412(b).

B. Structure of the EAJA

Statutory construction depends not only on the meaning of the text in question, but also on its relation to the statute as a whole.[106] The stricture against surplusage demands an interpretation in which the provision in question and other provisions in the statute all retain viable functions.[107] To the extent that an interpretation tends to nullify section 2412(b) or any other section of the EAJA, that interpretation is unsupportable.

1. Emasculation of Section 2412(b)

None of the courts that interpreted section 2412(b) has considered the possibility that the majority approach so constricts section 2412(b) that it becomes a virtual nullity.[108] The majority held that its narrow interpretation of section 2412(b) was supported by cases in which the United States

100. *E.g.*, United States v. Menasche, 348 U.S. 528, 538–39 (1955); Co Petro Mktg. Group, Inc. v. Commodity Futures Trading Comm'n, 680 F.2d 566, 569–70 (9th Cir. 1982). *But see* Posner, *Statutory Interpretation—in the Classroom and in the Courtroom,* 50 U. CHI. L. REV. 800, 812 (1983).

101. *See Premachandra II,* 753 F.2d at 637 (determining whether the terms of any statute specifically provide for attorneys' fees); *Lauritzen,* 736 F.2d at 553–54 ("to the same extent" clause omitted from the description of the controverted language of § 2412(b)).

102. This language is identical to that previously enacted in statutes that waive sovereign immunity from suit. *See infra* note 160.

103. Prof. Stoel-Gammon, *supra* note 88.

104. *Id.*

105. *Premachandra II,* 753 F.2d at 637; *Lauritzen,* 736 F.2d at 553–54.

106. *See* Chemehuevi Tribe of Indians v. Federal Power Comm'n, 420 U.S. 395, 403 (1975); J. HURST, *supra* note 86, at 59; J. SUTHERLAND, *supra* note 95, at § 47.02; *see* R. DICKERSON, *supra* note 86, at 110.

107. *See supra* note 100.

108. *Cf. Premachandra II,* 753 F.2d at 643 (Gibson, J., dissenting) (expressing concern that the majority interpretation is unduly restrictive).

conspired with state officials to violate rights protected by section 1983.[109] However, the conspiracy situation is so rare as to be virtually nonexistent.[110]

Further, section 2412(b) does not appear to have a significant function with regard to any of the enumerated provisions of section 1988 other than section 1983. Although these other provisions may impose fee liability on the United States,[111] they constitute a small proportion of section 1988 fee claims.[112] It is unlikely that Congress intended section 2412(b) to address only these exceptional circumstances in section 1988 when it explicitly enacted section 2412(b) with reference to section 1988,[113] when it believed that the United States should be held to the same standard in litigation as other parties,[114] and when it referred to the strong congressional movement toward placing the government and civil litigants on an equal footing.[115]

The actual use of the section 2412(b) waiver in litigation and the text of representative fee-shifting provisions reveal virtually no evidence of governmental liability pursuant to section 2412(b) and fee-shifting provisions other than section 1988.[116] While not dispositive, these analyses suggest that the majority interpretation is suspect because it tends to nullify a congressional enactment. With one exception,[117] section 2412(b) has not exposed the United States to liability under any federal fee provision other than section 1988. Although actual litigation cannot be equated with potential liability, the failure to utilize section 2412(b) with these other provisions suggests that such liability may be limited.

Section 2412(b) has not been used in conjunction with fee provisions other than section 1988 for several reasons. First, the section 2412(b)

109. *Id.* at 641 n.7 (citing Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd., 735 F.2d 895, 899–900 (5th Cir. 1984) for § 2412(b) fee award resulting from a conspiracy between federal and state officials).

110. *Id.* at 643 (Gibson, J., dissenting); telephone interview with E. Richard Larson, staff counsel of the American Civil Liberties Union (Aug. 2, 1985).

111. *E.g.*, Mendoza v. Blum, 560 F. Supp. 284, 287–88 (S.D.N.Y. 1983) (actual violation of Title VI).

112. Larson, *supra* note 110.

113. H.R. REP., *supra* note 12, at 17.

114. *Id.* at 9.

115. *Id.*

116. An evaluation of the potential applicability of § 2412(b) to each fee-shifting provision is beyond the scope of this Comment. Discussion is limited to actual use of the § 2412(b) statutory waiver and analysis of illustrative fee-shifting provisions.

117. Northwest Indian Cemetery Protective Ass'n v. Peterson, 589 F. Supp. 921, 927 (N.D. Cal. 1983) (attorneys' fees awarded under § 2412(b) and the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1365(d) (1982)), *aff'd and vacated in part on other grounds*, 764 F.2d 581 (9th Cir. 1985). However, the use of § 2412(b) may have been unnecessary. Other courts have held that the FWCPA in its own right authorized fees awards against the government. *E.g.*, State Water Control Bd. v. Train, 559 F.2d 921, 923 n.12 (4th Cir. 1977).

waiver is irrelevant to those fee provisions for which there is no right of action against the United States.[118] Second, section 2412(b) is superfluous when fee-shifting provisions explicitly impose fee liability on the United States.[119] Third, section 2412(b) has no function in those provisions which courts have interpreted as imposing fee liability on the federal government, despite the absence of explicit statutory authorization.[120] Finally, section 2412(b) is inapplicable to those fee provisions which do not *shift* attorneys' fees from the prevailing litigant to the United States.[121]

2. *Swallow-Up: A Non-Problem of the Minority Interpretation*

The *Premachandra II* and *Lauritzen* courts feared that the plaintiffs' analogy approach, coupled with the sweeping language of section 1983,[122] would lead to many 2412(b) fee claims for federal violations of federal statutes and the Constitution.[123] According to the courts, plaintiffs would utilize section 2412(b) to avoid the restrictions of section 2412(d), with the result that section 2412(b) would swallow up section 2412(d).[124]

Since an attorneys' fees claim based on an analogy theory requires federal conduct that would have resulted in 1983 liability, were it committed under color of state law, the scope of section 1983 causes of action

118. For example, the Railway Labor Act, 45 U.S.C. § 153 First (p) (1982), provides a right of action when "a carrier does not comply with an order of the Adjustment Board" and authorizes attorneys' fees only pursuant to subsection (p). *Cf.* Long Island R.R. Co. v. United Transportation Union, 76 F.R.D. 16, 18–19 (E.D.N.Y. 1976) (fees not allowed for subsection (q) actions). The United States could not be a party to a subsection (p) action. *Cf.* Kimbrough v. National R.R. Passenger Corp., 549 F. Supp. 169, 173 (M.D. Ala. 1982) (Amtrak is not a federal agency, but is treated as a private, for-profit railroad in its employee relations). Thus, there is no underlying cause of action against the United States to which the Railway Labor Act fee-shifting provision and the § 2412(b) waiver might be applied. *See also* Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a), (g) (1982) (persons empowered to bring a civil action and attorneys' fees and costs, respectively).

119. *See, e.g.,* Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1982) ("The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.").

120. For example, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 626(b) (1982), appears to require the § 2412(b) waiver because the ADEA does not explicitly create federal liability for attorneys' fees. One court, however, found such liability implied in the language of the ADEA itself. Krodel v. Young, 576 F. Supp. 390, 394–95 (D.D.C. 1983), *aff'd,* 748 F.2d 701 (D.C. Cir. 1984), *cert. denied,* 106 S. Ct. 62 (1985).

121. *See, e.g.,* Social Security Act Amendments of 1965, 42 U.S.C. § 406 (1982); Watkins v. Harris, 566 F. Supp. 493, 495 (E.D. Pa. 1983) (finding that § 406 is not a fee-shifting provision, but one that merely limits the attorneys' fees to 25% of the recovery).

122. 42 U.S.C. § 1983 (1982) ("deprivation of any rights, privileges, or immunities secured by the Constitution and laws").

123. *See Premachandra II,* 753 F.2d at 638; *Lauritzen,* 736 F.2d at 557.

124. *Premachandra II,* 753 F.2d at 638; *Lauritzen,* 736 F.2d at 557. The allegation of swallow-up is limited to situations in which attorneys' fees may be claimed pursuant to §§ 2412(b) and 1988. There is no way of knowing whether the swallow-up issue exists apart from § 1988 and the FWCPA, *supra* note 117, since no other fee provision has been referenced in a § 2412(b) fee claim.

profoundly influences the validity of the swallow-up argument. In addressing this issue, the *Premachandra II* court focused on *Maine v. Thiboutot,*[125] in which the Supreme Court held that a section 1983 cause of action was not restricted to a violation of the Constitution or of civil rights or equal protection laws. The Court in *Thiboutot,* however, did not affirmatively define the range of federal laws which could support a section 1983 claim.[126]

The *Premachandra II* court reasoned that its task of discerning legislative intent was restricted to the law when section 2412(b) was enacted.[127] According to *Premachandra II,* when the EAJA was passed, the *Thiboutot* decision made it conceivable that all federal statutes could support section 1983 causes of action.[128] There is no evidence in the legislative history, however, that Congress interpreted *Thiboutot* as broadly as did the *Premachandra II* court. This court erroneously attributed its gloss of *Thiboutot* to the 96th Congress. It then concluded from its broad interpretation of *Thiboutot* that Congress would not have enacted a section 2412(b) waiver of immunity which would authorize fees for such a wide range of cases.

It appears that *Thiboutot* never created as expansive a right of action as the *Premachandra II* court now claims it did.[129] Just prior to the *Premachandra II* decision, the Supreme Court considered the scope of section 1983 in the context of a claim for attorneys' fees pursuant to section 1988. In *Smith v. Robinson,*[130] the Court held that where a statute, the Education of the Handicapped Act (EHA), provides a comprehensive enforcement scheme and where the section 1983 constitutional claim is "virtually identical" to the EHA claim, the EHA is the exclusive avenue for assertion of an equal protection claim.[131] The Court denied the section 1983 claim and a section 1988 attorneys' fees award.[132] Further, where plaintiffs prevailed only on a non-fee claim, they were not entitled to a fee award pursuant to their section 1983 claim.[133] Apparently, the Supreme Court found *Thiboutot* consistent with its holding in *Smith* because it did not

125. 448 U.S. 1 (1980).

126. *Id.* at 4. In the Court's view, the question to be decided was whether the phrase "and laws" should be limited to a subset of laws. "[T]he plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act . . . . [T]he § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law."

127. *Premachandra II,* 753 F.2d at 638.

128. *Id.*

129. *See* Wilson v. Garcia, 105 S. Ct. 1938, 1948 (1985) (decided after *Premachandra II*) (citing *Thiboutot* for the proposition that "[a]lthough a few § 1983 claims are based on statutory rights . . . most involve much more").

130. 104 S. Ct. 3457 (1984).

131. *Id.* at 3468.

132. *Id.* at 3470–71.

133. *Id.* at 3471.

overrule or restrict its holding in *Thiboutot*. *Premachandra II*, however, disregarded *Smith* and other Supreme Court clarifications of section 1983 rights of action[134] in its analysis of "swallow-up."[135]

Even assuming the validity of the *Premachandra II* reading of *Thiboutot*, not all actions against the government would give rise to section 1983 claims.[136] Contract claims, for example, generally do not implicate the deprivation of rights, privileges, or immunities necessary in a section 1983 action.[137] Similarly, the typical individual social security appeal also does not trigger section 1983 liability.[138] Moreover, judicial review of agency procedure in promulgating regulations usually does not support a section 1983 claim.[139] Even if these illustrative situations had involved a state actor, none could support a section 1983 cause of action. In these cases, the analogy approach could not result in a successful section 2412(b) fee claim, because no other party could be liable for fees under section 1988. Hence, prevailing litigants in such cases could claim fees only pursuant to section 2412(d), and would be subject to all its restrictions.

The structural integrity of the EAJA is better served by the minority interpretation of section 2412(b) than by the majority position. The minority approach avoids the virtual elimination of section 2412(b) from the statute, while answering many of the "swallow-up" concerns. Any remaining threat to the balance between sections 2412(b) and 2412(d) originally struck by Congress can be corrected by the judicial restriction on section 2412(b) awards proposed in Part IV of this Comment.

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134. *See, e.g.*, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (§ 1983 does not provide a cause of action when the federal statute violated provides its own enforcement mechanism); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981) (no § 1983 cause of action when the statute violated creates no substantive right for the benefit of the claimants). The *Premachandra II* court also ignored its own decision in First Nat'l Bank v. Marquette Nat'l Bank, 636 F.2d 195, 198–99 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981) (limiting § 1983 causes of action to violations of statutory rights similar to rights protected by the fourteenth amendment). This Comment does not consider the limits *First Nat'l Bank* places on § 1983 because other circuits have not adopted the Eighth Circuit's narrow reading of the statute. *See Lauritzen*, 736 F.2d at 557 n.8.

135. *Premachandra II*, 753 F.2d at 638.

136. *See id.* at 643 n.1 (Gibson, J., dissenting).

137. *See, e.g., Garcia*, 105 S. Ct. at 1948 (§ 1983 actions are "more analogous to tort claims for personal injury than . . . to claims for damages to property or breach of contract."); Estey Corp. v. Matzke, 431 F. Supp 468, 470 (N.D. Ill. 1976).

138. *Premachandra II*, 753 F.2d at 643 n.1 (Gibson, J., dissenting) ("[T]he overwhelming number of social security appeals . . . is evidence of the extent to which individuals' statutory rights may be violated without running afoul of the Constitution or § 1983."); *see generally* Heaney, *Why the High Rate of Reversals in Social Security Disability Cases*, 7 HAMLINE L. REV. 1, 8–11 (1984).

139. *See, e.g.*, Action on Smoking and Health v. Civil Aeronautics Bd. (*ASH I*), 699 F.2d 1209 (D.C. Cir. 1983). In *ASH I*, plaintiffs attacked the adequacy of the Board's statement of purpose and reasons for refusing to adopt certain regulations. No violations of the law were alleged. The court awarded attorneys' fees pursuant to § 2412(d). Action on Smoking and Health v. Civil Aeronautics Bd. (*ASH II*), 724 F.2d 211, 214–15 (D.C. Cir. 1984).

C. *Congressional Intent: The Mosaic of Legislative History*

The *Premachandra II* repudiation of legislative history in interpreting section 2412(b)[140] is at odds with the Supreme Court's recent use of such extrinsic aids.[141] Analysis of decisions of the 1981–82 Term of the Court shows that the "plain meaning" rule[142] is dead.[143] The Court examined legislative history on every occasion calling for statutory construction.[144] Accordingly, courts interpreting section 2412(b) should give serious consideration to the legislative history. In the case of this statute, however, the legislative history does not decisively support either of the competing interpretations of section 2412(b).

On the one hand, there is a strong argument that the totality of legislative history favors the majority's restrictive interpretation of section 2412(b). When analyzed as a whole, the legislative history demonstrates that Congress gave little thought to section 2412(b). Testimony at House and Senate hearings, floor debate, and even the sponsors' summaries of the bills overwhelmingly concerned fee-shifting provisions other than section 2412(b).[145] Aside from the Derfner episode, there is virtually no evidence that anyone considered the implications of section 2412(b). In such circumstances it may not be unreasonable for courts to take a conservative approach and narrowly define the application of section 2412(b).

On the other hand, the Derfner episode is clear affirmative evidence that Congress intended the broader, minority interpretation of section 2412(b). The chronology of Derfner's testimony and the House Judiciary Committee's amendment of S. 265 from "a private party" to "any other party" indicates congressional intent to expand the scope of the waiver regarding fee-shifting statutes. Derfner specifically referred to section 1988 fee

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140. *See supra* note 54.

141. *E.g.*, Bread Political Action Comm. v. Federal Election Comm'n, 455 U.S. 577, 581–84 (1982) (legislative history used to confirm a textual interpretation or to show that Congress clearly intended otherwise); *see generally* Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).

142. Under the "plain meaning" rule, the words of a statute alone determine its meaning; judges do not consult legislative history to ascertain the meaning of an enactment. Wald, *supra* note 141, at 196.

143. *Id.* at 195 ("When the plain meaning rhetoric is invoked, it becomes a device not for ignoring legislative history but for shifting onto legislative history the burden of proving that the words do not mean what they appear to say.").

144. *Id.* at 197 ("Not once last Term was the Supreme Court sufficiently confident of the clarity of statutory language *not* to double check its meaning with the legislative history.") (emphasis in original).

145. Two of the sponsors of S. 265, Senators Dennis DeConcini and Pete Domenici, ignored the waiver of immunity regarding other fee-shifting provisions in prepared statements at the House subcommittee hearings on S. 265. *See H.R. Hearings*, *supra* note 23, at 16, 24. Testimony at the House and Senate hearings heavily emphasized the unjust effects of overbearing governmental regulation on small businesses. *See generally id.* 1–129; *Sen. Hearings*,*supra* note 23, at 1–119. Similarly, floor debate overwhelmingly concerned §§ 504 and 2412(d). 126 CONG. REC. 28,637–48 (1980).

awards for section 1983 actions and recommended amending the pending language in order to "put the United States completely on a par as far as the enforcement of important constitutional and statutory rights."[146] The draft immediately following Derfner's testimony contained the proposed change. The *Premachandra I* court found that this "sequence of events" supported its position.[147] Inferences about congressional intent arising from amendments made in the course of passage of a bill are highly probative.[148] Moreover, Congress explicitly stated its intention that section 2412(b) apply to section 1988.[149]

The *Premachandra II* court argued that Congress' omission of some of Derfner's language contradicted the minority interpretation of section 2412(b).[150] The court, however, found a disparity only because it misread the legislative history of the EAJA.

At the hearing at which Derfner testified, five fee-shifting bills similar to S. 265 were under consideration in addition to S. 265. Derfner's use of the terms "circumstances" and "other litigants" related to the language of the bill his panel was discussing, H.R. 7208.[151] A "circumstances" phrase similar to the one quoted by Derfner had been part of S. 265 when it was introduced in the Senate on January 31, 1979.[152] However, the bill had been amended prior to its introduction in the House of Representatives on August 1, 1979 to read, "to the same extent that a private party would be liable under . . . the terms of any statute . . . ."[153] Since "circumstances" was not in the version of S. 265 under consideration by the House,

146. *H.R. Hearings, supra* note 23, at 100.

147. Premachandra v. Mitts (*Premachandra I*), 727 F.2d 717, 729 (8th Cir. 1984), *rev'd*, 753 F.2d 635 (8th Cir. 1985) (en banc).

148. J. HURST, *supra* note 86, at 42–43.

149. The United States would also be liable under the same standards which govern awards against other parties under Federal statutory exceptions, unless the statute expressly provides otherwise. This subsection clarifies the liability of the United States under such statutes as the Civil Rights Attorney's Fees Awards Act of 1976, as well.

H.R. REP., *supra* note 12, at 17.

150. Premachandra v. Mitts (*Premachandra II*), 753 F.2d 635, 640–41 (8th Cir. 1985).

151. *H.R. Hearings, supra* note 23, at 99. H.R. 7208 provided that "a court may award reasonable attorney fees to the prevailing party in a civil action brought by or against the United States, in those circumstances where the court may award such fees in suits involving *private parties*." H.R. 7208, 96th Cong. 2d Sess. (1980), *reprinted in H.R. Hearings, supra* note 23, at 186 (emphasis added). Derfner recommended amending that language to read, "in those circumstances where the court may award such fees in suits involving *other litigants*." *H.R. Hearings, supra* note 23 at 100 (emphasis added).

152. S. 265, *reprinted in H.R. Hearings, supra* note 23, at 230–31.

153. *Id.* The amendment replaced the vague "circumstances" phrase with more explicit language: "and the United States shall be liable to the same extent that a private party would be liable under the common law or under the terms of any statute which specifically provides for such an award." *Id.* at 231. There is no indication in the legislative history that this amendment reflected a substantive change in the bill.

there was no "omission" which would suggest a difference between Derfner's intent and that of Congress. There is no meaningful difference between Derfner's suggestion and that adopted by Congress. Congress simply made a small linguistic change in S. 265 to effectuate Derfner's suggestion.[154]

The amendment of "private party" to "any other party," coupled with the committee report reference to section 1988, makes it likely that Congress was concerned about litigation implicating section 1983. That statute is the only provision enumerated in section 1988 which requires differentiation between private parties and states.[155] It is implausible that Congress would have referred specifically to section 1988 and amended the text in a way that affects only section 1983 of the provisions enumerated in section 1988, if it had intended the restrictive interpretation of section 2412(b) advanced by the *Lauritzen* and *Premachandra II* courts.

Occasionally, postenactment legislative history may assist a court in "completing or clarifying" an ambiguous statute.[156] Here, however, postenactment developments are inconclusive. Although the 98th Congress appeared to approve the *Premachandra I* interpretation of section 2412(b), the 99th Congress failed to express such approval.[157]

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154. Compare S. 265 as referred to the Committee on the Judiciary (S. 265, *reprinted in H.R. Hearings, supra* note 23, at 312) ("a *private party* would be liable . . . .") (emphasis added) with S. 265 as reported out of committee. *Id.* at 325 ("*any other party* would be liable.") (emphasis added).

155. 42 U.S.C. §§ 1983, 1988 (1982); Lauritzen v. Lehman, 736 F.2d 550, 562 (9th Cir. 1984) (Boochever, J. dissenting) (of the statutes mentioned in § 1988, only § 1983 requires action under color of state law before liability attaches).

156. R. DICKERSON, *supra* note 86, at 179–80; J. SUTHERLAND, *supra* note 95, § 48.06; *cf.* Heckler v. Turner, 105 S. Ct. 1138, 1151 (1985) (subsequent congressional action clarifies Congress' intent). In Taylor v. United States, the Third Circuit referred to a 1984 bill to reenact § 2412(d) and accompanying committee report to clarify terminology in § 2412(d) as enacted in the EAJA. 749 F.2d 171, 173–74 (3d Cir. 1984) ("Although the President declined to sign the bill into law, we nonetheless find its language and legislative history to be instructive on the . . . meaning of . . . the original EAJA."). *Contra, Premachandra II*, 753 F.2d at 641 n.9; Posner, *supra* note 100, at 809; Wald, *supra* note 141, at 205.

157. In a report on a bill to replace the repealed sections of the EAJA, the House Committee on the Judiciary stated:

> [In § 2412(b)] a court is given discretion to award reasonable attorneys' fees . . . aganist [sic] 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 was [sic] designed to put the United States in the same position as other parties.

H.R. REP. No. 992, 98th Cong., 2d Sess. 4 n.3 (1984). The committee report on H.R. 2378, the bill enacted to reinstate §§ 2412(d) and 504, refers to § 2412(b) but not to *Premachandra I*:

> [A] court is given discretion to award reasonable attorneys' fees . . . against the United States to the same extent that any other party—i.e., private, public, or governmental party—may be liable . . . under terms of any statute which specifically provides for such an award. The provision was designed to put the United States in the same position as other parties.

H.R. REP. No. 120, 99th Cong. 1st Sess. 4 n.3 (1985).

The arguments based on legislative history marshalled by the majority and minority courts are not dispositive, and they tend to cancel one another. Moreover, the internal inconsistencies in the available legislative materials preclude reliable assessment of congressional intent.[158] In short, it appears that Congress did not provide a clear answer to the section 2412(b) interpretive puzzle. The courts, therefore, should rely on their analyses of the text of section 2412(b), the structure of the Act as a whole, and the requirements of the doctrine of sovereign immunity.

D. Implications of the Doctrine of Sovereign Immunity

A distinct line of case law takes a liberal approach to sovereign immunity. Courts consistently have given liberal interpretations to waivers of immunity in statutes which, like section 2412(b), measure the liability of the United States by that of other parties.[159] For example, the Federal Torts Claims Act (FTCA) creates governmental liability for certain tortious conduct "to the same extent as a private individual . . . ."[160] Courts repeatedly have favored a liberal construction of this waiver.[161] In

158. Three examples of the unreliability of the legislative history of the EAJA follow. First, in the House committee report, the "Section-by-Section Analysis" carefully described the waiver of governmental immunity with regard to existing fee-shifting statutes, *see* H.R. REP., *supra* note 12, but the "Statement" omitted the statutory branch of the § 2412(b) waiver. *Id.* at 9. Second, in its statement of the purpose of the EAJA, the conference report accorded equal status to the new exceptions to the American rule (§ 504 and § 2412(d)) and the waiver provision (§ 2412(b)). Conf. Rep., *supra* note 19, at 21 ("The purpose of the Act is to . . . [provide] in specified situations for an award of attorney fees . . . *and* to insure the applicability . . . of the common law and statutory exceptions to the 'American rule' . . . ."") (emphasis added). In the description of § 2412(b), however, the conference report discussed only the common law exceptions to the American rule against fee shifting. *Id.* at 25. *Lauritzen*, 736 F.2d at 554, mistakenly relied on the description of § 2412(b) in concluding that the "primary purpose" of § 2412(b) was to apply the common law exceptions to the American rule to the federal government. Third, although the House committee report states that constitutional torts are *not* excluded from § 2412(d), *see supra*, note 12, the conference report omits this crucial information and simply states that tort actions are excluded from § 2412(d). Conf. Rep., *supra* note 19, at 25.

159. *See generally* Shaw v. Library of Congress, 747 F.2d 1469, 1479–82 (D.C. Cir. 1984) (reviewing case law relaxing strict construction of the sovereign immunity doctrine), *cert. granted*, 106 S. Ct. 58 (1985). Prior statutes provide a context for interpreting an enactment; they demonstrate the values, policies, and tacit assumptions underlying the enactment in question. *Cf.* Kokoszka v. Belford, 417 U.S. 642, 650 (1974); R. DICKERSON, *supra* note 86, at 110; J. SUTHERLAND, *supra* note 95, at § 51.01.

160. 28 U.S.C. § 2674 (1982). Section 2412(b) and § 2674 contain the identical phrase, "to the same extent," to create a standard of liability for the United States which is equivalent to that of some other party.

161. *E.g.*, United States v. Muniz, 374 U.S. 150, 150 (1963) (permitting FTCA suit for negligence of federal prison staff); United States v. Yellow Cab Co., 340 U.S. 543, 550 n.8, 553 (1951) (noting an increasing trend in waiving sovereign immunity and holding that the United States may be impleaded as a third-party defendant); 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 3654, at 164 (1976). *Contra*, Feres v. United States, 340 U.S. 135, 146 (1950) (plaintiff's military status precluded malpractice suit).

particular, the Supreme Court upheld the right to sue under the FTCA even when there is no private activity identical to the allegedly tortious government action.[162] The Court rejected a literalist construction of the FTCA that would have precluded governmental liability for activities that private parties do not perform[163] because the "broad and just purpose" of the statute was to treat the government and private persons equally.[164] Both the purpose of the EAJA[165] and the language creating liability in section 2412(b)[166] mirror the FTCA.

In addition, federal courts have liberally interpreted the waivers of sovereign immunity in the Suits in Admiralty Act[167] to make the government's liability coextensive with that of private parties.[168] Similarly, the Supreme Court held that the Public Vessels Act[169] created liability for the United States equal to that of a private shipowner.[170] Finally, the District of Columbia Circuit has liberally interpreted the waiver of immunity contained in Title VII of the Civil Rights Act of 1964.[171]

The key interpretive issue in section 2412(b) is whether governmental liability is defined directly or is equivalent to the liability of another party. The extent of that other party's liability is not in question. Although section 2412(b) and the other statutes waiving sovereign immunity contain different qualifications of the liability of the other party, they all provide that the liability of the United States shall be equivalent to that of the other party. Judicial interpretation of the waiver of immunity in section 2412(b), therefore, should follow the liberal approach courts have previously used in interpreting these similar waiver provisions.[172]

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162. *E.g.*, Indian Towing Co. v. United States, 350 U.S. 61, 64–65 (1955) (suit for tortious conduct by the Coast Guard in operating a lighthouse).

163. *Id.* at 64.

164. *Id.* at 68–69 (The Court must not as a "self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.").

165. H.R. REP., *supra* note 12, at 9 (Act's purpose is to place the government and civil litigants on "a completely equal footing").

166. 28 U.S.C. § 2412(b) (1982) ("The United States shall be liable . . . to the same extent that any other party would be liable . . . .").

167. 46 U.S.C. app. §§ 741–52 (Supp. I 1984).

168. *E.g.*, Nahmeh v. United States, 267 U.S. 122, 125–26 (1925); De Bardeleben Marine Corp. v. United States, 451 F.2d 140, 145–47 (5th Cir. 1971).

169. 46 U.S.C. app. §§ 781–90 (Supp. I 1984).

170. Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 228 (1945).

171. Shaw v. Library of Congress, 747 F.2d 1469, 1475–83 (D.C. Cir. 1984) (construing 42 U.S.C. § 2000e-5(k) (1982)), *cert. granted*, 106 S. Ct. 58 (1985). The court concluded that when "Congress proclaims that the liability of the United States shall be the same as for a comparably-situated private individual . . . the strict-construction rule poses a grave threat to effectuation of congressional purpose . . . ." *Id.* at 1483.

172. Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983), does not compel a different result. *Ruckelshaus* is distinguishable because the language of the waiver of immunity in the Clean Air Act did not measure the liability of the United States by that of another party. *Id.* at 682–83. Moreover, a liberal

This liberal interpretation of waivers of sovereign immunity comports with modern legal scholarship. Scholars argue that sovereign immunity rests on the principle that litigation should not interfere with necessary governmental activities.[173] They conclude that the doctrine should be relaxed where a waiver of immunity fulfills the purpose of a statute and where the waiver would not interfere with vital governmental processes.[174] Applying this reasoning to section 2412(b), the waiver of immunity should be interpreted liberally. The expressed purpose of the EAJA, to encourage persons to litigate their claims against the United States,[175] is consistent with the broader authorization of section 2412(b) attorneys' fees awards advocated by the minority. Moreover, the EAJA merely permits payment of attorneys' fees to parties prevailing in litigation against the government. It neither creates underlying causes of action against the United States nor authorizes specific relief.[176] Thus, a liberal interpretation of section 2412(b) does not interfere with vital governmental processes.

The majority and minority analyses of section 2412(b), however, follow the traditional rule of strict construction of waivers of sovereign immunity.[177] Traditional doctrine requires an explicit statutory waiver of immunity before the United States can be subjected to monetary liability.[178]

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interpretation of that waiver would have awarded attorneys' fees against the United States to nonprevailing parties, a radical departure from "historic fee-shifting principles and intuitive notions of fairness." *Id.* at 686. "[I]f Congress intended such a novel result . . . it would have said so in far plainer language . . . ." *Id.* at 693–94. The minority interpretation of § 2412(b) creates no such qualitative change in the law of fee-shifting. Since the § 2412(b) waiver of immunity is consistent with prior law, the language used by Congress is sufficiently plain.

173. *E.g.*, Cramton, *supra* note 5, at 397; *cf.* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949) ("[I]t is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to . . . restrain the Government from acting, or to compel it to act . . . . The Government . . . cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.").

174. J. SUTHERLAND, *supra* note 95, at § 62.02; *cf.* Bank of Hemet v. United States, 643 F.2d 661, 665 (9th Cir. 1981) ("The time is long past when the bar of sovereign immunity should be preserved through strained and hyper-technical interpretations of . . . acts of Congress.").

175. Pub. L. No. 96-481, tit. II, 94 Stat. 2325.

176. For example, the *Premachandra* attorneys' fees action rested on a successful fifth amendment claim for injunctive relief from an order to dismantle plaintiff's laboratory prior to a hearing on his termination. Premachandra v. Mitts (*Premachandra I*), 727 F.2d 717, 719 (8th Cir. 1984), *rev'd*, 753 F.2d 635 (8th Cir. 1985) (en banc).

It is possible that the majority courts' interpretation of § 2412(b) stems from their concern about the quantity of litigation against the United States or the propriety of injunctive relief. These may be issues for congressional action outside the purview of the courts. If, however, it is proper for courts to address these matters, they should do so in deciding the underlying substantive claims. They should not invoke nonexistent bars of sovereign immunity when interpreting an attorneys' fees provision.

177. Premachandra v. Mitts (*Premachandra II*), 753 F.2d 635, 641 (8th Cir. 1985) (en banc); Lauritzen v. Lehman, 736 F.2d 550, 555–56 (9th Cir. 1984); *Premachandra I*, 727 F.2d at 729.

178. *See Ruckelshaus*, 463 U.S. at 685; United States v. Sherwood, 312 U.S. 584, 586–88 (1941).

Language similar to that of section 2412(b) has been construed as an explicit waiver.[179]

IV. GUIDELINES FOR INTERPRETING SECTION 2412(b)

The majority position mistakenly constricts the scope of section 2412(b) by permitting a section 2412(b) attorneys' fees award pursuant to section 1988 only in the few cases in which the United States actually violates a provision enumerated in section 1988. The minority holds that the United States incurs such fees liability when it commits an act for which any other person would be liable. This holding is consistent with the text of section 2412(b), the structure of the EAJA, and the legal context of the Act. However, the balance struck by *Premachandra I* between sections 2412(b) and 2412(d) lacked a compelling rationale.[180] It did not provide an analysis of section 2412(b) applicable to the vast array of federal attorneys' fees provisions. A new rationale for the minority interpretation of section 2412(b) is required, one that is valid across the circuits and the range of fee-shifting statutes. It must determine the boundary of section 2412(b) from the EAJA itself. This boundary should consistently permit fee awards within clearly defined limits of section 2412(b) and disallow awards beyond those limits.

The key to this limit should be the discretionary nature of section 2412(b) attorneys' fees awards. The fact that the terms of a referenced fee-shifting statute have been met does not mean that a section 2412(b) award

179. Shaw v. Library of Congress, 747 F.2d 1469, 1475–77 (D.C. Cir. 1984), *cert. granted*, 106 S. Ct. 58 (1985). *Shaw* involved Title VII of the Civil Rights Act of 1964, which provides, inter alia, that "the United States shall be liable for costs the same as a private person" and that reasonable attorneys' fees shall be part of costs. 42 U.S.C. § 2000e-5(K) (1982). Since a private person may be liable for interest as part of a fee award and since the provision subjects the United States to liability "the same as a private person," the court found an express waiver of immunity from payment of interest. The waiver was considered express even though neither the statute nor the legislative history explicitly mentioned payment of interest. *Contra*, Boudin v. Thomas, 732 F.2d 1107, 1112 (2d Cir. 1984) (holding the section 2412(b) authorization of attorneys' fees "in any civil action" insufficient to waive sovereign immunity in habeas corpus actions). The *Boudin* court decided that habeas corpus actions are not entirely civil proceedings. *Id.* at 1112. It found no indication of congressional intent to apply section 2412(b) to such "unique" actions and was persuaded that their inclusion would be inconsistent with the legislative history and policies underlying the EAJA. *Id.* at 1112–15. That legislative history is not inconsistent with analogy interpretation of section 2412(b) espoused by *Premachandra I*. *See supra* notes 145–58 and accompanying text.

180. *Premachandra I*, 727 F.2d at 730 (limiting the scope of § 2412(b) by the holding in First Nat'l Bank v. Marquette Nat'l Bank, 636 F.2d 195, 198–99 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981), that § 1983 provides a cause of action only for statutory violations which are akin to constitutional claims). Other circuits have not similarly restricted the scope of § 1983 actions; the Ninth Circuit explicitly rejected this limitation in Lauritzen v. Lehman, 736 F.2d 550, 557 n.8 (9th Cir. 1984).

automatically ensues. In construing section 2412(b), *Premachandra II* lost sight of the distinction between the terms of the referenced statute, section 1988, and those of section 2412(b). The court mistook the virtually mandatory fee award to a prevailing plaintiff under section 1988[181] for a virtually mandatory fee award pursuant to section 2412(b).[182] If Congress had intended section 2412(b) fee awards to be predicated totally on the terms of the referenced statute, it would have said so.[183] Congress chose "may" rather than "shall" in section 2412(b), and the courts should utilize the discretion Congress intended them to have. The courts should articulate standards of sufficient generality to apply to virtually all cases involving section 2412(b) and a particular fee-shifting statute.

The judicial rule for attorneys' fees claims under sections 2412(b) and 1988 should retain the balance between sections 2412(b) and 2412(d) originally struck by Congress by setting a fair limit on the scope of section 2412(b). Section 2412(b) statutory fee awards should encompass only those section 1988 claims resulting from the vindication of constitutional rights and fundamental personal rights similar to those protected by the thirteenth, fourteenth, and fifteenth amendments. Thus, if the United States commits an act involving constitutional or fundamental personal rights which would incur liability had the same act been committed by another party or which actually violates an enumerated provision of section 1988, the United States would be liable under section 2412(b). The major effect of this rule would be to limit any potential flood of section 2412(b) claims based on the statutory prong of section 1983. If the substantive claim is one for which section 1983 provides a right of action when "color of state law" is satisfied, but which does not involve fundamental rights, attorneys' fees would not be awarded pursuant to section 2412(b). Parties prevailing in a broad range of federal regulatory litigation generally would not be entitled to a section 2412(b) fee award.[184] They could claim section 2412(d) fee awards subject to its restrictions. Plaintiffs requesting fees for actions to enforce constitutional or fundamental personal statutory rights, however, would be eligible for section 2412(b) awards.[185]

181. *See supra* note 29.

182. *Premachandra II*, 753 F.2d at 639 n.3 ("If subsection (b) applies, the court must invoke section 1988, which means fees are awarded unless special circumstances would make the result unjust.").

183. When Congress intended a nondiscretionary fee award, it so indicated by using the word "shall." 5 U.S.C. § 504, 28 U.S.C. § 2412(b) (1982).

184. *See Premachandra II*, 753 F.2d at 643 (Gibson, J., dissenting); supplementary brief of plaintiff-appellee Dr. Bhartur N. Premachandra for rehearing en banc, at 3–5, Premachandra v. Mitts (*Premachandra II*), 753 F.2d 635 (8th Cir. 1984) (en banc).

185. *E.g.*, Trujillo v. Heckler (*Trujillo I*), 587 F. Supp. 928, 932 (D. Colo. 1984) (alleging statutory violations which were found to be akin to violations of fundamental rights), appeal docketed, No. 84-2104 (10th Cir. Aug. 7, 1984).

In addition, the specific language of section 2412(b) sets limits on potential fee awards, independent of the terms of any referenced fee-shifting statute. This limitation is required because there is no indication in the EAJA or its legislative history that referenced statutes are intended to enlarge or override the fee authorization in section 2412(b).[186] By its terms, section 2412(b) only authorizes fees against the United States in a civil action,[187] even though a hypothetical referenced fee-shifting statute could award fees to the prevailing party in any civil or criminal action.[188] Finally, the discretionary language of section 2412(b) permits a court to refuse to grant an award because the circumstances of the case render an award unjust.[189] This degree of discretion insures that the adoption of a general rule for interpreting section 2412(b) in relation to a referenced statute does not conflict with the demands of justice in unusual factual situations.

In short, interpretation and application of section 2412(b) require a fulfillment of the terms of both the referenced fee-shifting provision and section 2412(b). Section 2412(b) fee awards are proper only within the limits imposed by its language.

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186. When Congress wished to resolve potential conflicts between § 2412(d) and other fee-shifting statutes in favor of those other statutes, it clearly expressed its intent. *See* H.R. REP., *supra* note 12, at 18.

187. 28 U.S.C. § 2412(b) (1982).

188. As a second example, § 2412(b) provides for fees only in *judicial* actions, but a referenced fee-shifting statute might permit fee awards in administrative hearings. The Supreme Court recently resolved such a conflict between §§ 2412(b) and 1988. *See* Webb v. Board of Educ., 105 S. Ct. 1923, 1928 (1985) (holding that § 1988 fee awards do not cover administrative hearings held in connection with § 1983 actions because § 1983 does not require such proceedings). The analysis of this issue in Trujillo v. Heckler (*Trujillo II*), 596 F. Supp. 396, 400 (D. Colo. 1984) (dicta), nevertheless, is instructive of the difficulties courts can create if they fail to heed the restrictive terms of § 2412(b). *Trujillo II* suggested that an action for attorneys' fees based on §§ 2412(b) and 1988 may support fee awards for administrative as well as judicial proceedings. *Id.* Such an extension of *Premachandra I* conflicts with the language of § 2412(b) and threatens the structure of the EAJA.

Section 2412(b) authorizes fee awards only in a "civil action." 28 U.S.C. § 2412(b) (1982). It is not as expansive as § 1988, which authorizes fees in "any action or proceeding." 42 U.S.C. § 1988 (1982); *see, e.g.*, Ciechon v. City of Chicago, 686 F.2d 511, 525 (7th Cir. 1982) (holding that § 1988 authorized fee awards for administrative actions). Moreover, § 2412 is contained within the portion of the EAJA entitled "Award of Fees and Other Expenses in Certain Judicial Proceedings." *See supra* note 1. The EAJA authorizes fee awards in agency actions in a separate section and permits those awards only in adversary adjudications in which the position of the United States is not substantially justified. *See* 5 U.S.C. § 504 (1982). Fee awards for judicial review of such adjudications "may be made *only* pursuant to section 2412(d)(3) . . . ." (emphasis supplied). *Id.* Fees awarded for an administrative hearing pursuant to § 2412(b) and a referenced fee-shifting provision would not be subject to these requirements. The *Trujillo II* approach thus could create an impermissible "end run" of the language, structure, and legislative history of the Act. *See* H.R. REP., *supra* note 12, at 14.

189. 28 U.S.C. § 2412(b) (1982).

V. CONCLUSION

The interpretive puzzle of section 2412(b) stems from Congress' use of opaque language, coupled with its failure to express clearly the intended scope of section 2412(b). By a careful reading of the statute and an openminded inquiry into its legal context, however, courts can reach an interpretation of section 2412(b) that gives due weight to all parts of the text and is consistent with the stated remedial purpose of the EAJA.

A careful reading of section 2412(b) clarifies its opaque language. The textual analysis shows that the subsection imposes liability on the United States when it commits an act which would create liability in any other party. This interpretation comports with the liberal constructions that have been accorded similarly worded waivers of sovereign immunity. It gives effect to all the language of section 2412(b) and preserves a viable role for the subsection within the EAJA.

To maintain the intended balance between sections 2412(b) and 2412(d) of the EAJA, the courts should utilize the discretion granted them by Congress to limit section 2412(b) awards. In the case of section 2412(b) attorneys' fees claims based on section 1988, they should restrict awards to cases where the underlying action implicated constitutional or important personal rights. More generally, in resolving section 2412(b) claims based on any federal fee-shifting provisions, courts should require fulfillment of both the terms of the referenced statute and any restrictive terms in section 2412(b).

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