CURRENT PROPOSALS IN CONGRESS TO LIMIT AND TO BAR COURT-AWARDED ATTORNEYS' FEES IN PUBLIC INTEREST LITIGATION

E. RICHARD LARSON*

INTRODUCTION

One of the long-standing exceptions to the American rule against fee shifting is the authorization of court-awarded fees pursuant to statute.[1] Today, this statutory exception is overwhelmingly the major exception,[2] particu-

* National Staff Counsel with the American Civil Liberties Union, and author of FEDERAL COURT AWARDS OF ATTORNEY'S FEES (1981).

1. *See* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796); *see also* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 249-50 (1975. *See generally* Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984).

2. For a brief discussion of the two generally recognized nonstatutory exceptions to the American rule, see *infra* notes 51-67 and accompanying text.

larly in the federal arena where nearly 200 federal statutes now authorize courts to award attorneys' fees.[3]

Although Congress has enacted fee-shifting statutes which apply to various traditional areas of commercial litigation,[4] many of these statutes are either relatively archaic[5] or rarely invoked.[6] More frequently invoked are the fee-shifting statutes applicable to public interest litigation in fields such as environmental law,[7] consumer law,[8] and traditional civil rights law.[9] The decade-old Civil Rights Attorney's Fees Awards Act of 1976[10] (the "Fees Act") is unquestionably the most frequently invoked.

Congress enacted the Fees Act to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights," and thereby "to promote the enforcement of the Federal civil rights acts."[11] In so doing, it inadvertently spawned a deluge of ancillary litigation over fees.[12] Whether this increased litigation over fees has been caused either by the breadth of the Fees Act,[13] or by Congress' provision of standards

3. Most of the relevant federal fee-shifting statutes are listed in 3 M. F. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES, Table of Statutes (1983); *see also* E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 323-27 (1981).

4. *See, e.g.*, Clayton Act, 15 U.S.C. § 15 (1982); Securities Act of 1933, 15 U.S.C. § 77k(e) (1982); Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a) (1982).

5. *See, e.g.*, Packers and Stockyards Act of 1921, 7 U.S.C. § 210(f) (1982); Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499g(b) (1982).

6. *Id.*; *see also, e.g.*, Plant Variety Act, 7 U.S.C. § 2565 (1982); Hobby Protection Act, 15 U.S.C. § 2102.(1982).

7. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7607(f) (1982); *see also* the sixteen similar statutes listed in Ruckelshaus v. Sierra Club, 463 U.S. 680, 682 n.1 (1983); *see infra* note 147.

8. *See, e.g.*, Truth in Lending Act, 15 U.S.C. § 1640(a) (1982); Fair Credit Reporting Act, 15 U.S.C. §§ 1681n(3), 1681o(2) (1982); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d) (1982); Consumer Product Safety Act, 15 U.S.C. §§ 2060(c), 2072(a), 2073 (1982).

9. *See, e.g.*, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b)(1982); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1982); and the Voting Rights Act as amended by the Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973 1(e) (1982).

10. Pub. L. 94-559 (Oct. 19, 1976), 90 Stat. 2641, amending 42 U.S.C.§ 1988 [hereinafter cited as the Fees Act or § 1988]. The Fees Act provides in relevant part:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [Sections 1981, 1982, 1983, 1985, and 1986 of U.S.C. Title 42], Title IX of Public Law 920318 [Title IX of the Education Amendments of 1972, Sections 1681-1686 of U.S.C. Title 20], or . . . Title VI of the Civil Rights Act of 1964 [Sections 2000d, *et seq.*, of U.S.C. Title 42], the court, in its discretion, may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the costs.

Id.

11. H.R. REP. NO. 1558, 94th Cong., 2d Sess. 9 (1976).

12. One commentator, writing in 1984, counted "approximately 1,730 federal court decisions" rendered under the Fees Act since its enactment in 1976. Calhoun, *Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fee Awards Under 42 U.S.C. § 1988*, 55 U. COLO. L. REV. 341, 344 (1984). *See generally* the case annotations spanning more than 200 pages in 42 U.S.C.A. § 1988 (West 1981 & Supp. 1986).

13. Although the Fees Act itself consists of only one sentence, *see supra* note 10, its authorization of fees in cases brought under 42 U.S.C. § 1983 alone accounts for its considerable breadth.

favorable to prevailing plaintiffs[14] coupled with losing defendants' unwillingness to pay fees to counsel for prevailing plaintiffs,[15] fee litigation has become burdensome for both plaintiffs' counsel and the courts.[16]

Moreover, the regularity with which reasonable market-based fees have been awarded to counsel for prevailing plaintiffs has produced a political backlash against fee awards. The backlash has come not only from losing state and local government defendants[17] but also from within the Reagan Administration.[18] This has been increasingly exhibited in the past five years among cer-

14. These standards are set forth, for the most part, in the accompanying Senate and House Reports: S. REP. NO. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. CODE, CONG. & AD. NEWS 5908-14 [hereinafter cited as the Senate Report]; and H.R. REP. NO. 1558, 94th Cong., 2d Sess. (1976), *reprinted in* E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES, 288-312 (1981) [hereinafter cited as the House Report]. Illustrative of the federal courts' deference to Congress' standards is the Supreme Court's frequent reliance on the Senate and House Reports to effectuate congressional intent. *See, e.g.*, Pulliam v. Allen, 466 U.S. 522, 527 & n.4, 543 & n.23 (1984); Blum v. Stenson, 465 U.S. 886, 893-97 (1984); Hensley v. Eckerhart, 461 U.S. 424, 429-34 & nn.2, 4, 7 (1983); Maher v. Gagne, 448 U.S. 122, 129, 132 n.15 (1980); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 737-39 & n.17 (1980); Hutto v. Finney, 437 U.S. 678, 694 n.23 (1978).

15. The preference of losing defendants to litigate rather than to pay fees is illustrated by the fact that the petitioners in all of the Supreme Court cases cited *supra* in note 14 were losing defendants. At the Supreme Court level, these defendant-petitioners lost again in all of the foregoing cases. *Id.* Losing defendants' preference to litigate is also illustrated *infra*, note 118.

16. The burden on plaintiffs' counsel is the obvious one of delay in payment. Although defense counsel are ordinarily paid on 30-day schedule during the course of litigation, plaintiffs' counsel ordinarily must wait until the end of the litigation on the merits and over fees to collect on their fee judgments. This delay often forces plaintiffs' counsel who have cash-flow problems to accept low fees through settlement rather than to obtain reasonable fees by engaging in fee litigation. *See generally* Justice Brennan's separate opinion in Hensley v. Eckerhart, 461 U.S. 424, 441-57 (Brennan, J., concurring and dissenting), which is set forth in relevant part *infra* at note 108.

The burden experienced by the courts is evident from the Supreme Court's admonition that a "request for attorney's fees should not result in a second major litigation," Hensley v. Eckerhart, 461 U.S. 424, 437 (1983), *quoted with approval in* Blum v. Stenson, 465 U.S. 886, 902 n.19 (1984), and is also evident from Justice Brennan's stronger admonition that there should be no encouragement for "losing defendants to engage in what must be one of the least socially productive types of litigation imaginable: appeals from awards of attorney's fees," Hensley v. Eckerhart, 461 U.S. at 442 (Brennan, J., concurring and dissenting).

17. The National Association of Attorneys General (NAAG) is among the most vigorous proponents of severely curbing—if not altogether eliminating—fee awards for plaintiffs' counsel under the Fees Act. *See generally* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, REPORT TO CONGRESS: CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (1984). *See also Legal Fees Equity Act: Hearing on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 234-36, 347-56 (1984) (testimony and submissions of Utah Attorney General David L. Wilkinson); *id.* at 344-56 (testimony and prepared statement of Arkansas Attorney General Steven Clark); *see also, e.g., infra* note 98.

18. Much broader than the legislative proposals drafted by the NAAG are the two versions of the Justice Department's proposed legislation, misleadingly titled the Legal Fees Equity Act. *See generally Legal Fees Equity Act: Hearings on S. 1580 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (forthcoming) (testimony of Deputy Attorney General D. Lowell Jensen); *see also Legal Fees Equity Act: Hearing on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 31-137 (1984) (testimony and prepared statement of Deputy Attorney

tain members of Congress, particularly in the Republican controlled Senate.[19]

This backlash has not resulted in Congress' evisceration of the Fees Act or similar fee-shifting statutes. Nevertheless, bills which would have this effect have been pursued in Congress.[20] At the same time, at least one proposal to enact a new fee-shifting statute has been both delayed and potentially encumbered with a disabling amendment.[21] There, thus, is at least the appearance

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General Carol Dinkins). This legislation is discussed *infra* at notes 120-260 and accompanying text.

19. *See infra* notes 20-21, 94-130, 261-64, 295 and accompanying text.

20. See the discussion of the proposed Legal Fees Equity Act, *infra* notes 120-260 and accompanying text, and the discussion of S. 1794 and S. 1795, bills which would bar fees for plaintiffs' counsel in § 1983 lawsuits won against judicial officials, *infra* notes 261-95 and accompanying text.

21. The new fee-shifting authorization is contained in the Handicapped Children's Protection Act, S. 415, 99th Cong., 1st Sess. (1985); H.R. 1523, 99th Cong., 1st Sess. (1985). The delay in enactment has been caused by the House's unwillingness to accede to an amendment obtained by Senator Orrin Hatch in S. 415 limiting publicly-funded organizations to cost-based fees.

This dispute stems from Congress' attempt to nullify the Supreme Court's decision in Smith v. Robinson, 104 S. Ct. 3457 (1984), which held that plaintiffs who prevailed under § 615 of the Education of the Handicapped Act, 20 U.S.C. § 1415 (1982), were not entitled to attorneys' fees. Legislation to overturn *Smith* and authorize fees was introduced in the Senate and in the House. Differing versions passed the Senate and House, but the legislation has not yet become law.

The Senate bill was initially a clean one, S. 415, 99th Cong., 1st Sess. (1985); *see Handicapped Children's Protection Act: Hearing on S. 415 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 99th Cong., 1st Sess. (1985). Before the full Committee, however, Chairman Orrin Hatch was able to win a substitute bill with an amendment limiting publicly-funded organizations to cost-based fees:

> Section 615(e)(4) of the Education of the Handicapped Act is amended by inserting "(A)" after the paragraph designation and by adding at the end thereof the following new subparagraphs:
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> "(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award a reasonable attorney's fee in addition to the costs to a parent or legal representative of a handicapped child or youth who is the prevailing party.
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> "(C) Whenever the parent or legal representative of a handicapped child or youth—
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> "(i) is awarded fees under subparagraph (B), and
>
> "(ii) is represented by a publicly funded organization which provides legal services, the reasonable attorney's fee which is awarded pursuant to this subsection shall be computed based upon the actual cost related to the bringing of the civil action under this subsection to the publicly funded organization, including the proportion of the compensation of the attorney so related, other reasonable expenses which can be documented, and the proportion of the annual overhead costs of the publicly funded organization attributable to the number of hours reasonably spent on such civil action.
>
> "(D) For the purpose of this paragraph, the term 'publicly funded organization' means any organization which receives funds, other than attorney fee awards, from Federal, State, or local governmental sources which are available for use during any fiscal year in which the action or proceeding is pending to enable the organization to provide legal counsel or representation."

See S. REP. NO. 112, 99th Cong., 1st Sess. 15-16 (1985). The cost-based amendment was adopted by the full Committee on a 9-7 party line vote. *Id.* at 4; *see also id.* at 17-18 (additional views of Senators Kerry, Kennedy, Pell, Dodd, Simon, Metzenbaum, and Matsunaga). The

that Congress may be less committed than it previously was to providing the incentive of court-awarded fees necessary to attract competent counsel to enforce constitutional, civil, and other federal rights.

The focus of this article is essentially threefold. The article first briefly summarizes the congressional and judicial standards currently governing court-awarded fees.[22] It then briefly describes the rationales which Congress has invoked to support enactment of fee-shifting statutes.[23] Finally, against this backdrop, the article critiques the two anti-fee legislative proposals currently pending before the Ninety-Ninth Congress: (1) the Legal Fees Equity Act, an omnibus effort to reduce, and in some cases bar, fee awards against government defendants;[24] and (2) legislation that would bar fee awards to counsel for plaintiffs who prevail in civil rights cases against judicial officials.[25]

I
CURRENT STANDARDS GOVERNING STATUTORY COURT-AWARDED ATTORNEYS' FEES

When the Ninety-Fourth Congress enacted the Fees Act in 1976, it did so with extraordinary awareness of the standards used by the federal courts in awarding fees under fee-shifting statutes previously enacted by Congress to encourage enforcement of our civil rights laws.[26] Accordingly, although the Fees Act itself is but a one-sentence authorization of fees, it is accompanied by an extensive legislative history that is set forth primarily in the accompanying House and Senate Reports. This history provides detailed standards intended

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substitute bill thereafter was passed by the Senate. 131 CONG. REC. S10396-401 (daily ed. July 30, 1985).

The House bill, H.R. 1523, 99th Cong., 1st Sess. (1985), does not contain any such cost-based limitation. *See Handicapped Children's Protection Act: Hearing on H.R. 1523 Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. (1985); *see also* H.R. REP. 296, 99th Cong., 1st Sess. (1985). This clean bill was passed by the House. 131 CONG. REC. H9964-73 (daily ed. Nov. 12, 1985).

Although the conferees have been appointed, the House-Senate Conference Committee has not yet agreed on the final form of the legislation. The conferees are fully aware that the concept of cost-based fees has been squarely rejected by the Supreme Court and by all courts of appeals based in part on Congress' intent in enacting the Fees Act. *See* S. REP. No. 112, 99th Cong., 1st Sess. 17-18 (1985) (additional views of Senators Kerry, et al.). *See generally infra* notes 117 & 215-227 and accompanying text.

22. *See infra* notes 26-50 and accompanying text.

23. *See infra* notes 51-91 and accompanying text.

24. *See infra* notes 120-260 and accompanying text.

25. *See infra* notes 261-95 and accompanying text.

26. In addition to the express standards and dozens of illustrative cases set forth in the Senate and House Reports accompanying the Fees Act, Congress also expressly stated: "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." Senate Report, *supra* note 14, at 4. "The Committee intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing [the Fees Act]." House Report, *supra* note 14, at 8.

Congressional awareness of existing judicial standards has not been lost on the Supreme Court, which recently pointed out that "Congress was legislating in light of experience when it enacted the 1976 fee statute." Blum v. Stenson, 465 U.S. 886, 894 n.10 (1984).

to govern determinations of both fee entitlement and the amount of fee awards.[27]

Although the Fees Act standards do not technically govern the allowance of fee awards under all fee-shifting statutes,[28] its standards do encompass the standards applied under many of the earlier statutes.[29] In addition, the Fees Act standards have been fully incorporated into subsequently enacted statutes.[30] Accordingly, the courts have generally deferred to these standards in awarding fees, not only under similar fee authorizations in civil rights and other public interest statutes,[31] but also under fee authorizations in statutes such as the Clayton Act[32] and the Copyright Act.[33]

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27. *See supra* notes 14 & 26, and *infra* notes 35-49 & 184-189 and accompanying text.

28. A few fee-shifting statutes differ from the Fees Act in statutory standards and congressional intent. For example, the fee entitlement standards under the Freedom of Information Act's fee authorization, 5 U.S.C. § 552(a)(4)(E) (1982), are considerably more complex. First, in order to be "eligible" for fees, an FOIA plaintiff must substantially prevail by obtaining documents that had been previously denied, by showing that the lawsuit was reasonably necessary to obtain the documents, and by showing that the lawsuit had a causative effect on the release of the documents. Second, in order for the plaintiff to be "entitled" to fees, the court must weigh four additional factors: the benefit to the public, the commercial benefit to the plaintiff, the nature of the plaintiff's interest, and whether the government had a reasonable basis in law for withholding the documents ultimately obtained. *See generally* Miller v. Department of State, 779 F.2d 1378, 1388-90 (8th Cir. 1985), and cases cited therein.

29. *See supra* note 26.

30. It has not been at all uncommon for Congress, when enacting a new fee-shifting statute, simply to incorporate its previous legislative guidance into the new statute. For example, when Congress in 1978 enacted the fee-shifting provision in § 505(b) of the Rehabilitation Act, 29 U.S.C. § 794(a)(b), Congress left no doubt that "[t]he legislative history and expressions of legislative intent with respect to [the Civil Rights Attorney's Fees Awards Act of 1976], Public Law 94-559 are applicable to the new section 505(b)." 124 CONG. REC. 30346, 30347 (1978) (remarks of Senator Cranston, the author of § 505(b)); *see also, e.g., id.* at 37508 (remarks of Senator Stafford).

31. For example, in addressing a fee issue under the fee-shifting provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1982), the Supreme Court in New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), quickly disposed of the issue in a footnote by relying on the guidance provided in the House Report accompanying the Fees Act, which the Court noted "is legislation similar in purpose and design to Title VII's fee provision." *Id.* at 70 n.9. Such reliance is commonplace among the lower courts. *See, e.g.*, Seals v. Quarterly County Ct. of Madison County, Tenn., 562 F.2d 390, 393-94 (6th Cir. 1977) (fee-shifting provision of the Voting Rights Act, 42 U.S.C. § 1973 *l*(e) (1982), construed based upon the legislative history of the Fees Act).

Conversely, it is not unusual for the Court to make a ruling under the 1976 Fees Act applicable to similar fee-shifting statutes. *See, e.g.*, Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983) ("The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party' ").

32. *See, e.g.*, Southwest Marine, Inc. v. Campbell Indus., 732 F.2d 744, 746-47 (9th Cir. 1984) (standards for determining prevailing plaintiff status under the Fees Act applied to determine prevailing plaintiff status under the Clayton Act). The courts have also uniformly applied the lodestar method of fee computation, *see, e.g.*, Ohio-Sealy Mattress Mfg. v. Sealy, Inc., 776 F.2d 646 (7th Cir. 1985); Moore v. Jas. H. Matthews & Co., 682 F.2d 830 (9th Cir. 1982); Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291 (9th Cir.), *cert. denied*, 459 U.S. 1002 (1982).

33. *See, e.g.*, Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001 (9th Cir. 1985); Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colorado, 768 F.2d 145 (7th

The Fees Act standards are relatively explicit and easy to apply. Counsel for plaintiffs become entitled to reasonable fees if plaintiffs "prevail."[34] In order to be deemed to have prevailed, plaintiffs need only to have vindicated their rights,[35] or, in cases litigated to judgment, to have succeeded "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[36] Prevailing party status may be obtained not only through judgment on the federal claim from which fee entitlement flows, but also in a variety of other ways such as through judgment on a pendent claim,[37]

Cir. 1985); Southern Bell Tele. and Telegraph Co. v. Associated Tele. Directory Publishers, 756 F.2d 801 (11th Cir. 1985).

34. Although the Fees Act and other civil rights fee-shifting provisions authorize fees to the "prevailing party" and not just to prevailing plaintiffs, *see supra* notes 9 & 10, different standards govern the availability of fees to prevailing plaintiffs and prevailing defendants. Under the plaintiffs' standard, a plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1968), *quoted with approval* in the Senate Report, *supra* note 14, at 4, and in the House Report, *supra* note 14, at 6. Prevailing defendants, on the other hand, are entitled to fees only where a court finds that the plaintiff's lawsuit "was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 422 (1978); *see generally* Senate Report, *supra* note 14, at 5, and House Report, *supra* note 14, at 6-7.

Not all fee-shifting statutes, it should be noted, are two-way statutes authorizing fees liberally to plaintiffs and sometimes to defendants. Some statutes authorize fees only for prevailing plaintiffs and not at all for prevailing defendants. *See, e.g.*, the Clayton Act, 15 U.S.C. § 15 (1982); the Fair Labor Standards Act, 29 U.S.C. § 216 (b) (1982); the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1982); and the Railway Labor Act, 45 U.S.C.§ 153(p) (1982).

35. As stated in the Senate Report, "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." *Supra* note 14, at 5. Cited immediately after these standards and in support thereof, *id.*, were the following illustrative cases: Kopet v. Esquire Realty, 523 F.2d 1005 (2d Cir. 1975) (plaintiff won nothing formally but was deemed to have prevailed by virtue of his having exposed embarrassing information through discovery); Parham v. Southwestern Bell Tele., 433 F.2d 421, 429-30 (8th Cir. 1970) (plaintiff lost his individual Title VII claim and won no class relief, but was deemed to have prevailed because his "lawsuit acted as a catalyst which prompted [defendant] to take action implementing its own fair employment policies"); Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3d Cir. 1970) (plaintiffs-intervenors who lacked standing nevertheless prevailed and were entitled to fees because of their successful efforts in causing plaintiffs to sue), *cert. denied*, 401 U.S. 911 (1971); ASPIRA of New York, Inc. v. Board of Educ., 65 F.R.D. 541 (S.D.N.Y. 1975) (although plaintiffs and defendants both contributed to the consent decree, plaintiffs prevailed because they obtained benefits from the consent decree); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Or. 1969) (plaintiff who won no relief but who proved a violation of Title VII was the prevailing party).

See also infra notes 38 & 39 which discuss the House Report and the cases relied on therein.

36. Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978) *quoted with approval in* Hensley v. Eckerhart, 461 U.S. 424 (1983), where the Court referred to this standard as a "typical formulation." *Id.* at 433. This standard, ordinarily applied in cases litigated to judgment, appears somewhat more stringent than the vindication-of-rights standard. Accordingly, some courts look only to the second part of this standard requiring plaintiffs to have achieved "some of the benefit" the parties sought in bringing suit. *See, e.g.*, Institutionalized Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897, 910-11 (3d Cir. 1985), and cases cited therein.

37. The standards governing fee entitlement in this context are fully set forth in the House Report:

To the extent a plaintiff joins a claim under one of the statutes enumerated in [the Fees

through settlement,[38] or through causing the relief to be obtained informally.[39] Additionally, in litigated cases, plaintiffs' counsel may obtain fees prior to the conclusion of litigation where, for example, plaintiffs prevail on an

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Act] with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the "substantiality" test, *see Hagans v. Lavine, id.*; *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." *United Mine Workers v. Gibbs, supra* at 725.

House Report, *supra* note 14, at 4 n.7.

38. As the Supreme Court expressly held in Maher v. Gagne, 448 U.S. 122 (1980), the fact that plaintiff "prevailed through a settlement rather than through litigation does not weaken her claim to fees." *Id.* at 129. The Court continued:

> Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."

Id.(quoting from the Senate Report, *supra* note 14, at 5; *see supra* note 35). The Court could also have relied on the House Report, which states in relevant part:

> If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. *Incarcerated Men of Allen County Jail v. Fair*, 507 F.2d 281 (6th Cir. 1974); *Parker v. Matthews*, 411 F. Supp. 1059 (D.D.C. 1976) [*aff'd sub nom., Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977)]; *ASPIRA of New York, Inc. v. Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975). A "prevailing" party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion.

House Report, supra note 14, at 7. In each of the cases cited in the foregoing, the merits were resolved through settlements or consent decrees, and fees were awarded to the plaintiffs as the prevailing parties.

Consistent with this congressional intent, the lower federal courts have routinely awarded fees to counsel for plaintiffs who prevail through settlements or consent decrees. *See infra* note 161.

39. The language and illustrative cases in the accompanying Senate and House Reports again are conclusive. The Senate Report points out that plaintiffs "may be considered to have prevailed when they vindicate rights" not only through a consent decree but also "without formally obtaining relief. . . . *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970)." Senate Report, *supra* note 14, at 5; *see supra* note 35.

The House Report sets forth the same standard somewhat more elaborately:

> The phrase "prevailing party" is not intended to be limited to the victor after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. . . . [I]t thus would be proper to award fees after entry of a consent decree. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed. *E.g., Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.) *cert. denied*, 409 U.S. 982 (1972); *see also Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971).

House Report, *supra* note 14, at 7; *see supra* note 38. The House Report also notes approvingly that "the courts have also awarded counsel fees to a plaintiff who successfully concludes a class

interim matter or succeed in establishing liability.[40]

The amount of "reasonable fees" is determined using the lodestar method: the hours reasonably expended are multiplied by market rates, and the resulting lodestar sum then may be adjusted upward or sometimes downward to reflect a reasonable fee.[41] All hours reasonably expended are ordina-

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action suit even though that individual was not granted any relief. *Parham*, 433 F.2d 421; Reed v. Arlington Hotel Co., Inc., 476 F.2d 721 (8th Cir. 1973)." House Report, *supra* note 14, at 8.

The cases relied on by Congress fully illustrate these standards. Most prominent is *Parham*, 433 F.2d at 429-30, the seminal case establishing the catalyst theory. In *Parham*, a Title VII plaintiff lost his individual claim, and was entitled to no class relief in view of the defendant's post-lawsuit progress in achieving equal employment opportunity, but nonetheless was viewed as having prevailed because the lawsuit acted as a catalyst which prompted the defendant to implement its own fair employment policies. Similar cases are Reed v. Arlington Hotel, 476 F.2d 721 (8th Cir.) *cert. denied*, 414 U.S. 854 (1973), in which a plaintiff who lost his individual claim was found to have prevailed because he established class violations; Brown v. Gaston County Dyeing Mach., 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972), in which the plaintiff failed to prove his individual claim and won no class relief but was found to have prevailed because he did prove part of the class claim; and Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971), where plaintiffs were found to have prevailed even though they won no relief.

Consistent with this congressional intent, the federal courts have routinely awarded fees to plaintiffs' counsel in cases mooted by defendants' post-lawsuit actions benefiting plaintiffs. *See infra* note 161.

40. These standards, not surprisingly, emanate directly from the Senate and House Reports. As set forth succinctly in the Senate Report:

> In appropriate circumstances, counsel fees under [the Fees Act] may be awarded *pendente lite*. *See Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974). Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. *See Bradley supra*; *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

Senate Report, *supra* note 14, at 5.

> The same standards are set forth somewhat more elaborately in the House Report: Furthermore, the word "prevailing" is not intended to require the entry of a *final* order before fees may be recovered. "A district court must have discretion to award fees and costs incident to the final disposition of interim matters." *Bradley v. Richmond School Board*, 416 U.S. 696, 723 (1974); *see also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Such awards *pendente lite* are particularly important in protracted litigation, where it is difficult to predicate with any certainty the date upon which a final order will be entered. While the courts have not yet formulated precise standards as to the appropriate circumstances under which such interim awards should be made, the Supreme Court has suggested some guidelines. "(T)he entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees. . . ." *Bradley v. Richmond School Board*, *supra*, at 722 n.28.

House Report, *supra* note 14, at 8.

Illustrative of the application of these standards are the Supreme Court's decisions in *Bradley* and *Mills*. The plaintiffs in Bradley v. School Bd., 416 U.S. 696 (1974), which involved ongoing remedial proceedings in a school desegregation case, were held entitled to fees for services rendered on their motion for a more extensive school desegregation plan even though the trial court had specifically rejected plaintiffs' proferred remedy. In Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), a stockholders derivative suit, plaintiffs were held entitled to fees under the common fund rationale although they had succeeded only in part by establishing a violation of the securities laws and were not necessarily entitled to any legal or equitable remedies.

41. The lodestar method of fee computation, initially formulated by the Third Circuit in

rily compensable,[42] subject to billing judgment[43] and reduction for time spent on factually and legally separate losing claims.[44] Hourly rates are the prevailing market rates,[45] often reflected by counsel's actual rates.[46] The resulting lodestar sum may be adjusted upward to account for contingency risks,[47] de-

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Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), was obliquely but effectively approved by Congress in the Senate Report, *supra* note 14, at 6. *See infra* notes 184-88 and accompanying text. *See generally* E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 116-19 (1981). This method has also been approved twice by the Supreme Court: "The initial estimate of a reasonable attorney's fees is properly caculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. Adjustments to that fee then may be made as necessary in the particular case." Blum v. Stenson, 465 U.S. 886, 888 (1984); *see also* Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983). Prior to the Supreme Court's endorsement, the lodestar method had been adopted by virtually every court of appeals. *See, e.g.*, Ramos v. Lamm, 713 F.2d 546, 552-58 (10th Cir. 1983): Graves v. Barnes, 700 F.2d 220, 222 (5th Cir. 1983); Fitzpatrick v. Internal Revenue Serv., 665 F.2d 327, 332 (11th Cir. 1983); Anderson v. Morris, 658 F.2d 246, 249 (4th Cir. 1981); Copeland v. Marshall, 641 F.2d 880, 891-94 (D.C. Cir. 1980) (en banc); Furtado v. Bishop, 635 F.2d 915, 919-20 (1st Cir. 1980).

42. "In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' " Senate Report, *supra* note 14, at 6. *See infra* notes 184-189 & 195 and accompanying text. *See generally* Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

43. As the Supreme Court directed in Hensley v. Eckerhart, 461 U.S. 424 (1983):

> Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private section, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 (1980) (en banc).

Id. at 434.

44. *Id.* at 434-35.

45. *See infra* notes 184-189 and accompanying text. Blum v. Stenson, 465 U.S. 886, 892-96 (1984). The Supreme Court in *Blum* sought to clarify the meaning of "prevailing market rate":

> In seeking some basis for a standard, courts properly have required prevailing attorneys to justify the reasonabless of the requested rate or rates. To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate.

Id. at 895 n.11.

46. *Id.* Where a lawyer's actual or proferred rates are in line with those prevailing in the marketplace, the courts ordinarily defer to those actual rates as consistent with prevailing rates. *See generally* the cases cited *infra* note 205. However, where the lawyer's actual rates are lower than those prevailing in the marketplace, several courts have restricted counsel to no more than their low, actual rates. *See, e.g.*, Shakopee Mdewakanton Sioux Community v. Prior Lake, Minnesota, 771 F.2d 1153, 1159-1161 (8th Cir. 1985); Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 13-25 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 3488 (1985).

47. *See infra* notes 184-189 and accompanying text. Although the Supreme Court has not expressly approved upward adjustments to account for contingency risks, *see* Blum v. Stenson, 465 U.S. 886, 901 n.17 (1984), the use of such upward adjustments certainly appears to be authorized by the congressional intent accompanying the Fees Act, *id.* at 902-04 (Brennan, J., concurring). Their use has been uniformly approved by the courts of appeals subsequent to the

lay in payment,[48] or for the results obtained.[49]

Although the standards provided by the Ninety-Fourth Congress are more extensive than those noted above, and have been considerably refined by the courts,[50] there is no doubt that Congress intended fees to be awarded pursuant to its standards.

II
THE RATIONALES INVOKED BY CONGRESS IN THE PAST TO SUPPORT THE ENACTMENT OF FEE-SHIFTING STATUTES

The connection between the carrot-like incentive of court-awarded fees and the attendant level of private enforcement of our nation's laws may be so obvious as to make its statement superfluous if not entirely unnecessary. Nevertheless, it is a connection which the Ninety-Fourth Congress repeatedly stated, and even elaborated on, when it enacted the Fees Act. The obviousness of this connection was initially recognized by the courts in a series of cases that eventually led Congress to enact the Fees Act. This recent history is particularly pertinent here.

Although fee shifting pursuant to statute is unquestionably the most common and frequent form of fee shifting today,[51] this was not always the case. Until barely more than a decade ago, fee shifting was predominantly nonstatutory and usually occurred under the two judge-made exceptions to the American rule against fee shifting: the common benefit doctrine, and the bad faith theory. The former exception initially only allowed an award of fees to a party who produced a monetary fund which benefited absent class members or similarly situated nonlitigants,[52] but it was eventually expanded to allow a fee

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Supreme Court's decision in Blum, *see infra* note 238, just as they were prior to *Blum*, *id.* Additionally, use of upward adjustments has been widely approved in complex litigation in fields such as antitrust and securities cases, *see infra* note 232.

48. *Id.*; *see also* Hensley v. Eckerhart, 461 U.S. 424, 449 (1983) (Brennan, J., concurring and dissenting). Instead of using an upward adjustment of the hours-times-rates lodestar, several courts have suggested that the use of current hourly rates, rather than historical rates based on when the services were rendered, is an easier and more appropriate method of compensating counsel for the delay in payment. *See, e.g.*, Murray v. Weinberger, 741 F.2d 1423, 1433 (D.C. Cir. 1984).

49. "[I]n some cases of exceptional success an enhanced award may be justified." Hensley v. Eckerhart, 461 U.S. 424, 435 (1983), *quoted with approval in* Blum v. Stenson, 465 U.S. 886, 901 (1984). The courts of appeals have widely sanctioned the use of upward adjustments to account for the results obtained. *See infra* note 238.

50. The detailed standards provided by Congress have been implemented and refined by the courts in several thousand reported decisions. *See supra* note 12. This fast-growing body of law in turn has spawned two major books on attorneys fees law. *See supra* note 3. The foregoing legal outline accordingly reflects only the most basic standards of this increasingly refined body of law.

51. *See supra* note 12 and accompanying text. *See also* the cases collected in E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES, 329-520 (1981).

52. In this situation, fees are theoretically paid not by the party's adversary but instead out of the common monetary fund preserved or recovered in the litigation. Alyeska Pipeline Serv. v.

award to a party who through litigation guaranteed a right which benefited similarly situated nonlitigants.[53] The case of *Hall v. Cole*[54] is illustrative. In *Hall*, a union member won equitable relief vindicating his right to free speech under the Labor-Management Reporting and Disclosure Act.[55] Although the statute did not authorize fee shifting,[56] the Supreme Court nevertheless held that the union member was entitled to fees under the common benefit doctrine because he "necessarily rendered a substantial service to his union as an institution and to all of its members."[57] Not unimportant to the Supreme Court, or to the Second Circuit which had reached the same result, was the consequence of not allowing fees:

> As the Court of Appeals recognized: "[N]ot to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. . . . An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of

Wilderness Soc'y, 421 U.S. 240, 257-59 (1975); *see also* Trustees v. Greenough, 105 U.S. 527 (1882).

53. *See, e.g.*, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Hall v. Cole, 412 U.S. 1 (1973); Sprague v. Ticonic National Bank, 307 U.S. 161 (1939):

The development of statutory fee shifting is less closely allied to the policy rationales supporting the bad faith theory. Under this exception to the American rule against fee shifting, fees are assessed against bad faith actors in favor of their adversaries for conduct " 'not only in the actions that led to the lawsuit, but also in the conduct of the litigation.' " Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980) (citation omitted). This exception also authorizes fees against counsel personally. *Id.* ("If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes"). *Id.*

As with the common benefit doctrine, the bad faith theory has been vastly expanded in recent years. Much of this expansion has occurred under the 1983 amendments to FED. R. CIV. P. 11, which encourages federal district courts to award fees against parties or their counsel based on an objective standard of reasonableness rather than on a bad faith standard. *See, e.g.*, Zaldivar v. Los Angeles, 780 F.2d 823 (9th Cir. 1986), and cases cited therein. *See generally* Kassin, *An Empirical Study of Sanctions Under Rule 11*, — STAN. L. REV. — (1986) (forthcoming); Schwartzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181 (1985). Fee shifting based on bad faith is also being increasingly invoked by the courts of appeals under FED. R. APP. P. 38, and even by the Supreme Court under Sup. Ct. R. 49.2 (—). *See, e.g.*, Tatum v. Regents of the Univ. Nebraska-Lincoln, 462 U.S. 1117 (1983) (assessment of $500 for filing a frivolous petition for certiorari).

Despite the recent expansion of both the common benefit doctrine and the bad faith theory, fees are awarded far less frequently in these contexts than they are under the nearly 200 federal statutes authorizing fee awards.

54. 412 U.S. 1 (1973), *aff'g* 462 F.2d 777 (2d Cir. 1972).

55. 29 U.S.C. § 411(a)(2) (1982).

56. Section 102 of the LMRA, 29 U.S.C. § 412 (1982), authorized an express cause of action; but there was no authorization for fee-shifting in the Act.

57. *Hall*, 412 U.S. at 8.

it.[58]

Similar sentiments were expressed five years earlier by a unanimous Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*,[59] which held that a plaintiff who prevails under Title II of the Civil Rights Act of 1964[60] is entitled to fees under the statute's fee authorization[61] regardless of a defendant's good faith. In reaching this result, the Court pointed out the importance of fee shifting to "private attorney general" enforcement of our federal laws:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.[62]

The convergence of the common benefit doctrine with the private attorney general rationale gave rise in the early 1970s to a third (but short-lived) judicial exception to the American rule against fee shifting: allowance of fees to counsel who vindicate congressional policies in cases where fees were not statutorily authorized.[63] The Supreme Court put an end to this practice in *Alyeska Pipeline Service Co. v. Wilderness Society*,[64] an environmental case in which plaintiffs had been awarded fees by the lower courts under the non-statutory private attorney general theory. Although the Court remained mindful of the important enforcement role of fee shifting,[65] it was more deferential to the role of Congress in authorizing shifting of fees. In view of the

58. *Id.* at 13 (brackets and ellipsis by the Court), *quoting from* 462 F.2d 777, 780-81 (2d Cir. 1972) (per retired Supreme Court Justice Tom C. Clark, sitting by designation).

59. 390 U.S. 400 (1968), *modifying* 377 F.2d 433 (4th Cir. 1967) (en banc).

60. 42 U.S.C. § 2000a (1982).

61. 42 U.S.C. § 2000a-3(b) (1982).

62. *Newman*, 390 U.S. at 401-02 (footnotes omitted).

63. *See, e.g.*, the cases cited with disapproval in Alyeska Pipeline Serv. v. Wilderness Soc'y, 421 U.S. 240, 270 n.46 (1975).

64. 421 U.S. 240 (1975), *rev'g* 495 F.2d 1026 (D.C. Cir. 1974).

65. In commenting on the important enforcement role of fee shifting, the Court this time referred to it as a matter of congressional judgment: "It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation." *Id.* at 263.

many fee-shifting statutes enacted by Congress,[66] the Court thought it "apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine."[67]

Congress responded quickly to the Supreme Court's deference; not only did it add fee authorizations to most environmental laws,[68] but it enacted the Fees Act which authorized fees in a broad range of traditional civil rights suits.[69] With its major focus on the Fees Act, Congress relied on its knowledge of then-current law to provide express standards to govern fee entitlement and fee computation.[70] More fundamentally, Congress repeatedly articulated its policy rationales supporting the necessity of fee shifting.

First, Congress recognized at the outset that in "many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer."[71] This lack of financial resources, coupled with the Supreme Court's rejection of the private attorney general theory in *Alyeska*,[72] effectively precluded access to the courts. In Congress' view, "civil rights litigants were suffering very severe hardships because of the *Alyeska* decision."[73] This was occurring because "private lawyers were refusing to take certain types of civil rights cases," and civil rights organizations, "already short of resources, could not afford to do so."[74] For victims of civil rights violations, the situation was bleak: "Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to courts."[75] Congress thus responded by authorizing court-awarded fees as a financial incentive to attract counsel to represent persons whose rights had been violated. "In authorizing an award of reasonable attorney's fees, [the Fees Act] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law."[76] "This bill . . . provides the fee awards which are necessary if citizens

66. *Id.* at 260-61 nn.33-35 (citing numerous fee-shifting statutes).

67. *Id.* at 262 (footnote omitted).

68. *See supra* note 7 and *infra* note 147.

69. *See supra* notes 10, 12-13. Although *Alyeska* involved environmental litigation, it was apparent that the impact of the decision would fall most heavily on traditional civil rights litigation where the private attorney general theory had been most often invoked. *See supra* note 63. Through a rhetorical question, the Supreme Court in *Alyeska* posed a direct challenge to Congress: "[I]f *any* statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a court deny attorneys' fees to private litigants in actions under 42 U.S.C § 1983 seeking to vindicate *constitutional* rights?" *Alyeska*, 421 U.S. at 264 (emphasis by the Court).

70. *See generally supra* notes 26, 34-49 and accompanying text.

71. Senate Report, *supra* note 14, at 2.

72. Alyeska Pipeline Serv. v. Wilderness Soc'y, 421 U.S. 240 (1975); *see supra* notes 64-67 and accompanying text.

73. House Report, *supra* note 14, at 2.

74. *Id.* at 3. *See generally* COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE—FINANCING PUBLIC INTEREST LAW IN AMERICA 312-20 (1976).

75. House Report, *supra* note 14, at 1.

76. *Id.*

are to be able to effectively secure compliance with these existing [civil rights] statutes."[77]

Second, Congress thoroughly understood that most of our "civil rights laws depend heavily upon private enforcement,"[78] for the obvious reason that "there are very few provisions in our Federal laws which are self-executing."[79] It recognized that: "The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens."[80] In creating the incentive of fee awards to facilitate the functioning of the enforcement mechanism, Congress made "fees . . . an integral part of the remedy necessary to achieve compliance with our statutory [civil rights] policies."[81] Congress did so consciously and purposefully. It was aware of *Hall v. Cole*,[82] in which the Supreme Court allowed a fee award in a union member's suit to enforce the Labor-Management Reporting and Disclosure Act because "not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose."[83] Similarly, Congress quoted from the Supreme Court's decision in *Newman v. Piggie Park Enterprises, Inc.*:[84] "If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts."[85] Finally, Congress appreciated the proven contribution of fee-shifting provisions to enforcement of other civil rights statutes: "These fee-shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation."[86]

Congress believed fee awards to be essential both to secure future legal representation for aggrieved individuals and to create an ongoing mechanism for civil rights enforcement: "[C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an *essential* remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain."[87] This conclusion was of sufficient importance to bear repeating: "[F]ee awards are *essential* if the Federal statutes to which [the Fees Act] applies are to be fully enforced";[88] fee awards "are *necessary* if citizens are to be able to effectively secure compliance with these existing statutes";[89] "[i]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we *must*

77. Senate Report, *supra* note 14, at 6.
78. *Id.* at 2.
79. *Id.* at 6.
80. House Report, *supra* note 14, at 1.
81. Senate Report, *supra* note 14, at 3.
82. 412 U.S. 1 (1973); *see supra* notes 54-58 and accompanying text.
83. 412 U.S. at 13, *quoted with approval in* Senate Report, *supra* note 14, at 3.
84. 390 U.S. 400 (1968); *see supra* notes 59-62 and accompanying text.
85. 390 U.S. at 402, *quoted with approval in* Senate Report, *supra* note 14, at 3, and House Report, *supra* note 14, at 6.
86. Senate Report, *supra* note 14, at 4.
87. *Id.* at 2 (emphasis added).
88. *Id.* at 5 (emphasis added) (footnote omitted).
89. *Id.* at 6 (emphasis added).

maintain the traditionally effective remedy of fee shifting in these cases."[90]

In sum, Congress enacted the Fees Act, as it has similar fee-shifting statutes, to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights," and thereby "to promote the enforcement of the Federal civil rights acts."[91]

III
ANTI-FEE LEGISLATION BEING CONSIDERED BY THE NINETY-NINTH CONGRESS

The lessons learned by the Ninety-Fourth Congress, and then taught by Congress through the Fees Act with its elaborate legislative history, are now being forgotten. Many of the voices being heard from today (and in recent years) are those of vigorous opponents of fee shifting, usually losing government defendants and their defenders. These include the National Association of Attorneys General,[92] the United States Department of Justice,[93] and several members of Congress, most prominently Senators Strom Thurmond and Orrin Hatch.[94] According to these opponents, there is an overwhelming need for Congress to provide fee-shifting standards where allegedly none now exist.[95] Support for this proposition is provided not by reference to the definitive standards set forth in the legislative history of the Fees Act, but instead by misstatements and untruths about litigation over fees.[96] The "reform" these opponents propose is not simply the provision of standards, but the provision

90. *Id.* (emphasis added); *see also* House Report, *supra* note 14, at 9 ("awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected").

91. House Report, *supra* note 14, at 9.

92. According to one of its recent reports: "The National Association of Attorneys General was founded in 1907 for the purpose of fostering communication of legal developments and cooperative legal actions among the state's chief legal officers and their staff attorneys." NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, REPORT TO CONGRESS: CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 51 (1984) [hereinafter cited as NAAG, REPORT TO CONGRESS]. Often referred to by its acronym, NAAG has become a vigorous opponent of fee awards against government defendants. *See infra* notes 99-116 and accompanying text.

93. The Reagan Administration's Department of Justice drafted, and testified in support of, the omnibus Legal Fees Equity Act. *See supra* note 18. This legislation is designed to eliminate most fee awards against government defendants. *See infra* notes 120-260 and accompanying text.

94. At the outset of the Ninety-Seventh Congress, Senator Strom Thurmond (R-South Carolina) became Chairman of the Senate Committee on the Judiciary and Senator Orrin Hatch (R-Utah) became Chairman of its Subcommittee on the Constitution, of which Senator Thurmond is a member. The Subcommittee on the Constitution is responsible for most civil rights legislation. Senators Thurmond and Hatch jointly introduced the two successive versions of the Legal Fees Equity Act, which in turn were referred to Senator Hatch's subcommittee. *See infra* notes 124-130 and accompanying text.

Senator Hatch is also Chairman of the Senate Committee on Labor and Human Resources, a position which gave him power over the form of the fee-shifting provision in the Handicapped Children's Protection Act of 1986. *See supra* note 21 and accompanying text.

95. *See infra* notes 100, 102-03, 135-36 and accompanying text.

96. *See infra* notes 104-12 and accompanying text.

of new standards which would both limit fee entitlement and severely reduce the amount of fees awarded in cases against government defendants.[97]

Although some of those opposed to fee awards against government defendants began to promote their cause as early as 1981 during the First Session of the Ninety-Seventh Congress,[98] formal support for their cause seemed to arrive in 1984 when the National Association of Attorneys General published its Report To Congress.[99] This report focuses on the alleged lack of standards under the Fees Act; it also appears to be the source of the many misstatements subsequently made by both the Department of Justice and Senator Hatch.

The Report of the Attorneys General summarily concludes: "[T]he major problem with the Act, as presently implemented by the courts, is the lack of uniform and easily applied standards of determining eligibility for fees and for computing the amount of a reasonable fee in particular cases."[100] This allegation, made without any underlying references to the detailed standards already provided by Congress,[101] has been repeated in slightly different language by the Department of Justice[102] and Senator Hatch.[103]

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97. *See infra* notes 114-260 and accompanying text.

98. *See generally Municipal Liability Under 42 U.S.C. § 1983: Hearings on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 521-58 (1981) (testimony and prepared statement of Washington Attorney General Kenneth O. Eikenberry); *id.* at 559-82 (testimony and prepared statement of Utah Attorney General David L. Wilkinson); *id.* at 583-89 (testimony of North Carolina Deputy Attorney General James Wallace and prepared statement of North Carolina Attorney General Rufus Edmisten).

99. NAAG, REPORT TO CONGRESS, *reprinted in Legal Fees Equity Act: Hearing on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 237-305 (1984), *supra* note 92; *also reprinted in* 131 CONG. REC. S10886-96 (daily ed. Aug. 1, 1985) (submitted by Sen. Hatch).

100. NAAG, REPORT TO CONGRESS, *supra* note 92, at 50; *see also id.* at 9-10.

101. *See supra* notes 14, 26, 31, 34-51 and accompanying text.

102. At hearings on the initial version of the Justice Department's Legal Fees Equity Act, S. 2802, 98th Cong., 2d Sess. (1984), Deputy Attorney General Carol Dinkins testifed that: "[T]he civil fee-shifting statutes provide courts with only rudimentary standards and principles for the award of attorney fees, so courts frequently have either interpreted these statutes inconsistently or they have reached inappropriate results." *Legal Fees Equity Act: Hearing on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 32 (1984); *see also* the Justice Department's Section-by-Section Anslysis, *id.* at 107 ("These statutes have put a great burden on the courts because, for the most part, Congress has provided little or no guidance as to when an award of attorneys' fees is appropriate or as to what constitutes a reasonable award").

These same arguments are being made in support of the Justice Department's new version of the Legal Fees Equity Act, S. 1580, 99th Cong., 1st Sess. (1985). For example, in the Justice Department's transmittal letter accompanying the Legal Fees Equity Act, Acting Assistant Attorney General Phillip D. Brady wrote to President of the Senate George Bush:

> Numerous federal statutes provide that parties to civil suits and administrative proceedings against the United States, states or local governments may, in appropriate circumstances, recover "reasonable attorneys' fees" from government defendants. These fee-shifting statutes, for the most part, provide little or no guidance as to when an award of attorneys' fees is appropriate, or as to what constitutes a reasonable award. As a consequence, courts have reached conflicting interpretations of these statutes.

131 CONG. REC. S10878 (daily ed. Aug. 1, 1985). The same statement, in identical language, is

The Attorneys General then imply that the alleged absence of standards has caused allegedly greedy plaintiffs' attorneys to engage in extensive litigation over fees,[104] a form of litigation allegedly condemned by the courts. In support of this accusation, the Attorneys General quote Justice William J. Brennan out of context to give the impression that he opposes fee litigation by plaintiffs' counsel: "[O]ne of the least socially productive types of litigation imaginable [is] appeals from awards of attorney's fees . . . ." [105] This out-of-context quotation has been repeated by Senator Hatch,[106] despite the fact that Justice Brennan actually was bemoaning what he believed was the Supreme Court's "invitation to *losing defendants* to engage in one of the least socially productive types of litigation imaginable: [defendants'] appeals from awards of attorney's fees,"[107] appeals which in reality harm plaintiffs' counsel.[108]

The Attorneys General, seeking further judicial support for their posi-

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set forth in the Justice Department's Section-by-Section Analysis. *Id.* at S10879. *See also infra* notes 135-36 and accompanying text.

103. In Senator Hatch's view: "One of the main problems is that these fee-shifting statutes contain only sketchy standards for setting 'reasonable' fees." *Legal Fees Equity Act: Hearings on S. 1580 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (forthcoming) (statement of Senator Hatch).

104. As the Attorneys General argued in NAAG, REPORT TO CONGRESS:

> Absent such standards, state and local governments are faced not only with high and occasionally exorbitant fee awards, but also with the burden and expense of opposing excessive and unjustified claims for fees. Without clear standards, such opposition inevitably takes the form of complex and protracted litigation over fees, which further saps the resources of state and local governments, to the detriment of all parties, the courts, and ultimately, the public, the Act's intended beneficiaries.

NAAG, REPORT TO CONGRESS, *supra* note 92, at 50.

105. NAAG, REPORT TO CONGRESS, *supra* note 92, at xi (quoting Hensley v. Eckerhart, 461 U.S. 424, 442 (1983) (Brennan, J., concurring and dissenting)). This out-of-context quotation is later repeated so as to characterize "fees litigation as 'one of the least socially productive types of litigation imaginable." NAAG, REPORT TO CONGRESS, *supra* note 92, at 3 n.13 (quoting from *Hensley*, 461 U.S. at 442 (Brennan, J., concurring and dissenting)).

106. According to Senator Hatch: "The Court commented in 1983 that fees litigation is 'one of the least socially productive types of litigation imaginable.' " *Legal Fees Equity Act: Hearing on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 1-2 (1984) (opening statement of Sen. Hatch); *see also Legal Fees Equity Act: Hearings on S. 1580 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (forthcoming) (identical remarks in the opening statement of Sen. Hatch) [hereinafter cited as Legal Fees Equity Act].

107. Hensley v. Eckerhart, 461 U.S. at 442 (1983) (Brennan, J., concurring and dissenting) (emphasis added).

108. In his separate opinion in *Hensley*, 461 U.S. at 441-56 (Brennan, J., with Marshall, Blackmun, and Stevens, JJ.), Justice Brennan essentially agreed with the Court's holding as to the hours compensable under the Fees Act, but strongly disagreed with the Court's vacating and remanding the case because of the negative effect on plaintiffs' counsel. As to the latter, Justice Brennan stated:

> Vacating a fee award such as this and remanding for further explanation can serve only as an invitation to losing defendants to engage in what must be one of the least socially productive types of litigation imaginable: appeals from awards of attorney's fees, after the merits of a case have been concluded, when the appeals are not likely to affect the amount of the final fee. Such appeals, which greatly increase the costs to plaintiffs of vindicating their rights, frustrate the purposes of § 1988. Where, as here, a district court has awarded a fee that comes within the range of possible fees that the

tion, assert that the "vast amount of litigation on attorney's fees has led the courts to complain"; they then quote the court in *Mills v. Eltra Corp.*[109] as saying " 'the [attorney's fees] tail is wagging the [civil rights] dog.' "[110] The problem with this accusatory quotation, which was later used by Senator Hatch,[111] is that it does not appear in *Mills*, which in any event was not a civil rights case.[112]

Finally, and again without reference to Congress' detailed standards or the predilection of losing government defendants to litigate over rather than pay fees,[113] the Attorneys General propose that "Congress should amend the [Fees] Act . . . to provide clear and precise standards governing eligibility for and computation of attorney's fees awards under the Act."[114] More to the

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facts, history, and results of the case permit, the appellate court has a duty to affirm the award promptly.

Id. at 442. Justice Brennan thereafter elaborated on the negative effect which extended fee litigation has on plaintiffs' counsel:

> Within the confines of individual cases, from prevailing plaintiffs' point of view, appellate litigation of attorney's fee issues increases the delay, uncertainty, and expense of bringing a civil rights case, even after the plaintiffs have won all the relief they deserve. Defendants—who generally have deeper pockets than plaintiffs or their lawyers, and whose own lawyers may well be salaried and thus have lower opportunity costs than plaintiffs' counsel—have much to gain simply by dragging out litigation. The longer litigation proceeds, with no prospect of improved results, the more pressure plaintiffs and their attorneys may feel to compromise their claims or simply to give up.
>
> This case itself provides a perfect example. Petitioners [government defendants], who have little prospect of substantially reducing the amount of fees they will ultimately have to pay, have managed to delay paying respondents what they owe for over two years, after all other litigation between them has ended, with further delay to come. Respondents' [plaintiffs'] attorneys can hardly be certain that they will even be compensated for their efforts here in defending a judgment that five Justices find deficient only in minor respects. Apart from the result in this case, the prospect of protracted appellate litigation regarding attorney's fee awards to prevailing parties is likely to discourage litigation by victims of other civil rights violations in Missouri and elsewhere. The more obstacles that are placed in the path of parties who have won signficant relief and then seek reasonable attorney's fees, the less likely lawyers will be to undertake the risk of representing civil rights plaintiffs seeking equivalent relief in other cases. It may well become difficult for civil rights plaintiffs with less-than-certain prospects for success to obtain attorneys. That would be an anomalous result for judicial construction of a statute enacted "to attract competent counsel in cases involving civil and constitutional rights."

Id. at 455-56 (quoting from the House Report, *supra* note 14, at 9).

109. 663 F.2d 760 (7th Cir. 1981).

110. NAAG, REPORT TO CONGRESS, *supra* note 92, at 9 (allegedly quoting Mills v. Eltra Corp., 663 F.2d 760, 761 (7th Cir. 1981)).

111. *See, e.g., Legal Fees Equity Act: Hearing on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 2 (1984) (opening statement of Sen. Hatch): "In a recent case where 186 hours were devoted to resolution of the merits and over 350 hours to the fees issues, the seventh circuit lamented that the [attorney fees] tail is wagging the [civil rights] dog. (Mills v. Eltra Corp., 633 F. 2d 760, 761 (1981))."

112. Mills v. Eltra Corp., 663 F.2d 760 (7th Cir. 1981), involved the proper amount of a fee award under the common fund doctrine for an attorney's services provided more than a decade earlier in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), a securities lawsuit.

113. *See supra* notes 14-15, and *infra* note 118

114. NAAG, REPORT TO CONGRESS, *supra* note 92, at 6, 10 (ellipsis added). Similar ar-

point, the Attorneys General urge that Congress should provide new standards severely limiting fee entitlement[115] and also the amount of fees which plaintiffs' counsel could recover.[116]

Although the package of legislative proposals urged by the Attorneys General has never been introduced in Congress as a legislative bill, at least one of their proposals has surfaced in a legislative bill,[117] and virtually all of the proposals are encompassed within the Department of Justice's omnibus Legal Fees Equity Act.[118]

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guments are repeatedly made by the Department of Justice to support its fee-denying and fee-cutting legislation, the Legal Fees Equity Act. *See infra* note 137 and accompanying text.

115. The Attorneys General propose, for example, a new standard under which the courts would be invited to deny fees to counsel for prevailing plaintiffs in cases where the defendant's position was "advanced in good faith." NAAG, REPORT TO CONGRESS, *supra* note 92, at 6, 26. This proposed standard is diametrically opposite to the standard adopted by Congress and routinely applied by the courts. *See infra* note 118; *see also supra* notes 59-62, 84-85 and accompanying text.

The Attorneys General also propose a new threshold entitlement standard requiring that, in order to be "eligible" for a fee award, the plaintiff "must clearly and substantially prevail on the merits of each issue or claim as to which fees are being sought." NAAG, REPORT TO CONGRESS, *supra* note 92, at 6, 18. This heightened standard is extraordinarily more stringent than the threshold standards already established by Congress and routinely applied by the courts. *See supra* notes 34-40 and accompanying text, and *infra* notes 152-53, 161-62 and accompanying text.

116. Among the proposals for cutting the amount of fee awards for plaintiffs' counsel are recommended standards requiring courts to "apportion the amount of fee awards to the degree of success actually attained," NAAG, REPORT TO CONGRESS, *supra* note 92, at 6, 21; eliminating marketplace hourly rates in favor of a rate ceiling "of $75 per hour," *id.* at 6, 30; requiring publicly funded legal services organizations to be compensated not at marketplace rates but instead subject to the $75 hourly rate ceiling or lower "based on the actual costs of the litigation to the organization," *id.* at 6-7, 46; and barring the use of upward adjustments of the hour-times-rates lodestar to provide a reasonable fee, *id.* at 6, 40. These proposals, again, are contrary to the standards adopted by Congress and regularly applied by the courts. *See supra notes* 41-113 and accompanying text, and *infra* notes 120-260 and accompanying text.

117. The proposal, limiting publicly funded legal services organizations to cost-based fees, *see supra* note 116, was added by Senator Hatch to S. 415, 99th Cong., 1st Sess. (1985), the Senate version of the Handicapped Children's Protection Act of 1986. *See supra* note 21.

118. *See infra* notes 120-260 and accompanying text. The most notable standard proposed by the Attorneys General and conspicuously omitted from the Justice Department's savage attack on fees in its Legal Fees Equity Act is the standard proposed by the Attorneys General to authorize fee denial where the defendant's position was "advanced in good faith." NAAG, REPORT TO CONGRESS, *supra* note 92, at 6, 26. This proposal apparently was viewed as too far-fetched, if not too outrageous, to be made even by the current Justice Department.

The good faith defense, after all, has been thoroughly rejected by Congress and the courts. The initial rejection of the defense occurred in Newman v. Piggie Park Enter., Inc., 390 U.S. 400 (1968). *See supra* notes 59-62 and accompanying text. The *Newman* standards, in turn, were quoted and incorporated by Congress into the Fees Act through the Senate Report, *supra* note 14, at 3, and the House Report, *supra* note 14, at 6. *See supra* notes 84-85 and accompanying text. Based on Congress' intent, the Supreme Court again rejected the good faith defense in Hutto v. Finney, 437 U.S. 678, 693-700 (1978). *Cf.* Hall v. Cole, 412 U.S. 1, 15 (1973) (defendants' good faith is irrelevant to an award of fees to counsel for a prevailing plaintiff under the common benefit doctrine).

Despite this rather formidable authority, its controlling effect has not deterred losing defendants—ordinarily represented by state and local government attorneys—from arguing that defendants' alleged good faith should bar plaintiffs' entitlement to fees, arguments repeatedly

In view of the lobbying power of these governmental opponents of fees, and in view of the friendly reception accorded these and other opponents by Senator Hatch's Subcommittee on the Constitution,[119] it should come as no surprise that the Ninety-Ninth Congress is considered by the opponents of fees to be at least mildly receptive to limiting fee awards, and not especially open to the enactment of new fee-shifting statutes. Nevertheless, despite this chilly climate, the opponents of fee awards against government defendants have not yet achieved any significant success.

A. The Legal Fees Equity Act: Legislation to Limit and to Bar Fee Awards Against Government Defendants

The most ambitious and far-reaching attack on court-awarded attorneys fees that has ever surfaced in Congress is the Justice Department's proposed Legal Fees Equity Act. This legislation is not directed merely at cutting back on the Fees Act;[120] it would supercede virtually all fee-shifting statutes appli-

raised before and rejected by the courts of appeals. *See* Graves v. Barnes, 700 F.2d 220, 221 (5th Cir. 1983) (defendants' good faith in merely following the mandate of the state legislature); Consumers Union v. Virginia State Bar, 688 F.2d 218, 221-22 (4th Cir. 1982) (defendants' good faith belief that the challenged policy was unconstitutional coupled with their effort to change the challenged policy), *cert. denied*, 462 U.S. 1137 (1983); Crosby v. Bowling, 683 F.2d 1068, 1072-73 (7th Cir. 1982) (defendants' relative good faith given that the federal defendant through its controlling regulations was primarily responsible for the violation); Elwest Stereo Theatre, Inc. v. Jackson, 653 F.2d 954 (5th Cir. 1981) (defendants' good faith in enacting the challenged ordinance and defendants' good faith in not appealing the court's injunction against the ordinance); *see also, e.g.*, International Oceanic Enter. v. Menton, 614 F.2d 502 (5th Cir. 1980); Love v. Mayor of Cheyenne, 620 F.2d 235 (10th Cir. 1980); Johnson v. Mississippi, 606 F.2d 635, 637 (5th Cir. 1979); Pickett v. Milam, 579 F.2d 1118 (8th Cir. 1978); Mid-Hudson Legal Serv., Inc. v. G & U, Inc., 578 F.2d 34 (2d Cir. 1978); Brown v. Culpepper, 559 F.2d 274, 277-78 (5th Cir. 1977); Miller v. Amusement Enter., Inc., 426 F.2d 534, 538 (5th Cir. 1970).

The repeated assertion of these good faith arguments has led some courts of appeals to reject them, along with other meritless defense arguments, in a single sentence. *See, e.g.*, McLean v. Arkansas Bd. of Educ., 723 F.2d 45, 47 (8th Cir. 1983); *cf.* Moore v. Des Moines, 766 F.2d 343, 345 (8th Cir. 1985) (court dismissed seven defense arguments about the amount of the fee award and lectured defendants' counsel on attorney's responsibility to limit fee litigation), *cert. denied*, 106 S. Ct. 805 (1986).

119. *See supra* note 94.

120. Earlier anti-fee legislative efforts —like the legislative proposals formulated by the National Association of Attorneys General, *see supra* notes 114-16 and accompanying text— were directed solely at cutting back on fee awards under the Fees Act. The first such effort, initiated by Senator Hatch, was proposed as an amendment to S. 585, 97th Cong., 1st Sess. (1981). *See Attorney's Fees Awards: Hearing on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 12-13 (1982). The proposed amendment was designed to eliminate fee entitlement under the Fees Act in some cases where plaintiffs prevailed on a pendent claim or where the cases became moot due to a favorable change in government policy. It was also designed to limit the amount of fees recoverable by eliminating the use of contingency factors and multipliers. *Id.* Although a hearing was held on this proposed amendment, *id.*, and although earlier hearings also focused on possible amendments to the Fees Act, *see Municipal Liability Under 42 U.S.C.§ 1983: Hearing on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 1981, no further action was taken.

Early in the next Congress, Senator Hatch introduced S. 141, 98th Cong., 1st Sess. (1983). That bill, also directed at amending only the Fees Act, contained language virtually identical to

cable to federal, state, and local government defendants,[121] drastically curtail fee entitlement,[122] and severely limit the amount of fees which counsel could recover.[123]

The first version of this legislation was introduced in the summer of 1984 by Senators Strom Thurmond and Orrin Hatch.[124] A hearing was held that fall before Senator Hatch's Subcommittee on the Constitution.[125] Shortly thereafter, given the late date of the hearing, the legislation died in his Subcommittee with the end of the Ninety-Eighth Congress.[126]

The current version of the Legal Fees Equity Act was introduced in the summer of 1985, again by Senators Thurmond and Hatch.[127] This bill is virtually identical to its predecessor.[128] Hearings were held before Senator Hatch's

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the language proposed earlier. Although hearings on S. 141 were repeatedly scheduled and postponed, no hearing was ever held. The legislation thus was never voted out of subcommittee.

121. The scope of the proposed Legal Fees Equity Act is set forth in § 4 of the Act, S. 1580, 99th Cong., 1st Sess. (1985):

> (a) The provisions of this Act—
>
> (1) apply to any judicial or administrative proceeding in which an award of attorneys' fees and related expenses is authorized, pursuant to any Federal fee-shifting statute, to be made against the United States, or a State or local government. . . .
>
> * * *
>
> (b) Notwithstanding any other provision of law, no award of attorneys' fees or related expenses shall be made against the United States, or against State or local governments, in any judicial or administrative proceeding, except as expressly authorized by law (other than this Act), and in accordance with the provisions of this Act. No such award shall exceed the amount determined under the provisions of this Act.

122. *See infra* notes 140-81 and accompanying text.

123. *See infra* notes 182-240 and accompanying text.

124. S. 2802, 98th Cong., 2d Sess. (1984); *see generally* 130 CONG. REC. S8842-55 (daily ed. June 29, 1984) (statement of Sen. Hatch).

An identical bill was introduced in the House by Representative Hamilton Fish, H.R. 5757, 98th Cong., 2d Sess. (1984), but no action was ever taken on it.

125. *Legal Fees Equity Act: Hearing on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984).

126. The Ninety-Eighth Congress did enact the one positive proposal in the Legal Fees Equity Act. Section 6(d) of the Act, S. 2802, 98th Cong., 2d Sess. (1984), a provision which doubles the compensation rates and limits for defense attorneys in criminal proceedings under the Criminal Justice Act, 18 U.S.C. § 3000A(d) (1982), was enacted by the Ninety-Eighth Congress as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1901, 98 Stat. 1976, 2185-86 (1984).

127. S. 1580, 99th Cong., 1st Sess. (1985); *see* 131 CONG. REC. S10876-78 (daily ed. Aug. 1, 1985).

An identical bill was introduced in the House by Representative Thomas Kindness, H.R. 3181, 99th Cong., 1st Sess. (1985); *see generally* 131 CONG. REC. E3733 (daily ed. Aug. 1, 1985). Since no action has been taken on this bill, and since no action is expected to be taken, this article refers primarily to the Senate bill, S. 1580.

128. The current version of the bill does, however, contain two substantive changes. First, it necessarily omits from S. 1580, 99th Cong., § 6(d) of S. 2802, 98th Cong., a provision enacted by the Ninety-Eighth Congress in other legislation. *See supra* note 126. Second, it adds § 10 of S. 1580, 99th Cong., which would place limits on the amount of fees which agencies of the United States may pay to outside counsel. This additional proposal is most notable for its exemption of more than seventy-five percent of all federal government use of outside counsel. *Bill Would Place Cap on U.S. Legal Fees*, Nat'l L.J., Sept. 2, 1985, at 3, col. 1.

Subcommittee on the Constitution this past fall,[129] and the full Senate is expected to consider the legislation by the fall of 1986.[130]

Nowhere in the legislation itself, nor in the Justice Department's accompanying Section-by-Section Analysis of the bill,[131] is there any reference to the fact that the bill, if enacted, would both eviscerate the standards already provided by Congress[132] and nullify hundreds of court decisions (including a dozen from the Supreme Court)[133] applying those standards.[134] This dramatic context mandates a close examination of this legislation with regard to (1) its findings and purpose, (2) its effect upon fee entitlement, (3) its effect upon fee computation, (4) its effect upon government fee liability, and (5) its ultimate effect upon private enforcement of the law.

1. Findings and Purpose

Section 2(a)(2) of the bill strikes a familiar cord by alleging that Congress' "failure to provide standards to guide courts and administrative bodies in awarding . . . fees has led to inconsistent interpretations of these federal fee-shifting statutes."[135] Section 2(a)(3) repeats this accusation by finding that it is "inappropriate" for Congress to impose potential fee liability "without providing standards by which to make such awards."[136] The cure for these perceived ills, as stated in section 2(b)(3), is enactment of the Legal Fees Equity Act so as "[t]o prescribe standards for the awarding of attorneys' fees and related expenses or costs against the United States, or against State or local governments, in judicial or administrative proceedings to which any Federal fee-shifting statute applies."[137]

Contrary to the bill's stated findings, Congress in fact has already pro-

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129. *Legal Fees Equity Act: Hearings on S. 1580 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (forthcoming).

130. *See infra* note 260.

131. 131 CONG. REC. S10879-84 (daily ed. Aug. 1, 1985).

132. *See supra* notes 34-49 and accompanying text, and *infra* notes 184-89 and accompanying text.

133. Among the Supreme Court decisions which would be nullified are Blum v. Stenson, 465 U.S. 886 (1984) (fee computation); Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) (fee entitlement); Hensley v. Eckerhart, 461 U.S. 424 (1983) (fee entitlement and computation); Maher v. Gagne, 448 U.S. 122 (1980) (fee entitlement in settled cases).

134. Although these relevant concerns have not been mentioned by the Justice Department or by other fee opponents, they were fully brought to the attention of Senator Hatch's Subcommittee on the Constitution. *Legal Fees Equity Act: Hearings on S. 1580 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (forthcoming) (testimony of E. Richard Larson and prepared statement of the ACLU); *id.* at —— (statement of the Alliance for Justice).

135. S. 1580, § 2(a)(2) (ellipsis added). The Justice Department compounds this accusation in its Section-by-Section Analysis of section 2 by stating that federal fee-shifting "statutes have put a great burden on the courts because, for the most part, Congress provided no guidance as to when an award of attorney's fees is appropriate or as to what constitutes a reasonable award." 131 CONG. REC. S10879 (daily ed. Aug. 1, 1985); *see also supra* notes 102-03.

136. S. 1580, 99th Cong., 1st Sess. § 2(a)(3) (1985).

137. S. 1580, 99th Cong., 1st Sess. § 2(b)(3) (1985). This simple purpose is repeated by the Justice Department in its Section-by-Section Analysis: "The purpose of the bill is to have Con-

vided extensive and explicit standards for determining both fee entitlement and fee computation,[138] and the courts have adhered to and implemented those standards.[139] Thus, the underlying purpose of the legislation is not to provide standards where none now exist. Examination of the bill reveals that its true purpose is to replace current standards with new ones that would severely limit both fee entitlement and the amount of fees recoverable.

2. Fee Entitlement

Various sections of the bill would fundamentally and pervasively alter the basic standards of fee entitlement previously established by Congress. Four major changes are contemplated: (a) the threshold standards for fee entitlement would be significantly raised so as to make it far more difficult, and often impossible, for counsel who represent successful plaintiffs to be eligible for fees; (b) the threshold standards would make it virtually impossible for counsel who represent successful plaintiffs to recover fees in settled cases and in mooted cases; (c) interim fee awards, even in protracted litigation, would generally be barred; and (d) fee awards against intervenors, whose intervention multiplies the proceedings and expenses for plaintiffs' counsel, would be barred.

a. Threshold Entitlement Standards

Section 5(1) of the bill conditions eligibility for fees upon counsel's establishing that the plaintiff has "prevailed on the merits,"[140] and section 3(9) of the bill defines "prevailing on the merits" as "having obtained a final decision in which the party has succeeded on a significant issue or issues in the controversy and obtained significant relief in connection with that issue or issues."[141] Thus, to invoke fee entitlement under section 5(1), a plaintiff would have to satisfy a three-part test: The plaintiff would have to (1) obtain a "final decision," (2) succeed on a "significant issue" in controversy, and (3) obtain "significant relief."[142]

The Justice Department in its Section-by-Section Analysis concedes that this new language—particularly the requirement of obtaining "significant relief"—would change two of the basic entitlement standards under current law.[143] First, the Justice Department wants to nullify *Hensley v. Eckerhart*[144] in which the Supreme Court approved, as a "typical formulation" in litigated

gress provide greater guidance to the courts and federal agencies for the award of attorneys' fees pursuant to federal statute." 131 CONG. REC. S10879 (daily ed. Aug. 1, 1985).

138. *See supra* notes 34-49 and accompanying text, and *infra* notes 184-89 and accompanying text.

139. *See, e.g., supra* notes 14, 23-33, and *infra* notes 152-53, 161-62, 177, 181, 205 & 224.

140. S. 1580, 99th Cong., 1st Sess. § 5(1) (1985).

141. S. 1580, 99th Cong., 1st Sess. § 3(9) (1985).

142. *Id.*

143. 131 CONG. REC. S10881 (daily ed. Aug. 1, 1985).

144. 461 U.S. 424 (1983).

civil rights cases, a threshold entitlement standard under which " 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves *some of the benefit* the parties sought in bringing suit.' "[145] Second, the Justice Department seeks to nullify *Ruckelshaus v. Sierra Club*[146] in which the Supreme Court explicitly held that counsel for plaintiffs in cases brought under the Clean Air Act, as well as under sixteen other environmental statutes,[147] are entitled to fees so long as the plaintiffs obtain "some degree of success."[148]

But the Justice Department's Section-by-Section Analysis neither mentions nor explains that section 3(9) would bury entirely the basic vindication of rights standard that had been a premise for Congress' enactment of the 1976 Fees Act and of similar fee-shifting statutes.[149] Through this threshold entitlement standard, as amply illustrated in the Senate and House Reports accompanying the 1976 Fees Act,[150] the scope of the monetary or injunctive relief obtained by plaintiffs is irrelevant to the matter of fee entitlement so long as plaintiffs vindicate their rights.[151]

Under the Justice Department's new standards, there simply would be no fee entitlement in many cases in which plaintiffs' counsel now are entitled to fees: cases in which government defendants are found to have violated the law but little or no injunctive relief is available,[152] and cases in which government

145. 461 U.S. at 433 (emphasis added), *quoting from* Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978). Through the new language in section 3(9) of the bill, the Justice Department wants Congress to enact the first part of this standard (success on a significant issue) even though it is wholly inappropriate in settled and mooted cases; and at the same time the Justice Department seeks to replace the second part of this standard (achievement of some of the benefit sought) by requiring plaintiffs to obtain "significant relief" as a threshold condition of fee entitlement. *See* 131 CONG. REC. S10881 (daily ed. Aug. 1, 1985).

146. 463 U.S. 680 (1983).

147. In addition to the fee-shifting provision in the Clean Air Act, 42 U.S.C. § 7607(f) (1982), the Court in *Ruckelshaus*, 463 U.S. at 682 n.1, cited the similar fee-shifting provisions in sixteen other environmental statutes, *see, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2618(d) (1982); Endangered Species Act, 16 U.S.C. § 1540(g)(4) (1982); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d) (1982); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c) (1982); Clean Water Act, 33 U.S.C. § 1365(d) (1982); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g)(4) (1982); Deepwater Port Act, 33 U.S.C. § 1515(d) (1982); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d) (1982); Noise Control Act, 42 U.S.C. § 4911(d) (1982); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d) (1982); Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435(d) (1982); Ocean Thermal Energy Conversion Act, 42 U.S.C. § 9124(d) (1982); and Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5) (1982).

148. 463 U.S. at 694.

149. *See supra* notes 87-91 and accompanying text.

150. *See supra* notes 35 & 39-40.

151. *Id.*

152. *See, e.g.*, Evans v. Harnett County Board of Educ., 684 F.2d 304, 307 (4th Cir. 1982) (plaintiff who had won no individual relief is a prevailing plaintiff because his "successful pursuit of an injunction against unlawful discrimination vindicated the policies underlying Title VII"); United States v. Board of Educ. of Waterbury, 605 F.2d 573, 576 (2d Cir. 1979) (intervening plaintiffs who vindicated their rights by obtaining some modifications in a proposed school desegregation plan are prevailing plaintiffs).

defendants are found to have violated plaintiffs' constitutional rights but only nominal damages can be recovered.[153] In fact, even in litigated cases where plaintiffs win phenomenal relief, the relief might not be "significant" enough to meet the Justice Department's standards for fee entitlement. For example, in its Section-by-Section Analysis,[154] the Justice Department illustrates its impossibly high entitlement threshold by finding that the across-the-board injunctive relief barring sex discrimination and the double back pay award totalling nearly $50 million obtained by the plaintiffs in *Laffey v. Northwest Airlines, Inc.*[155] would not be sufficiently significant. Since few plaintiffs obtain relief as extensive as that won in *Laffey*, few if any plaintiffs could obtain "significant relief" under the Justice Department's formulation, and few if any lawyers for successful plaintiffs would thus be entitled to fees.

b. Entitlement in Settled or Mooted Cases

As previously noted, section 5(1) and section 3(9) of the bill combine to create a three-part test for fee entitlement: plaintiff's counsel must obtain a final decision, succeed on a significant issue, and obtain significant relief.[156] That this test would apply in all contexts, including in settled and mooted cases, is made clear by section 4(b) which states that "no award of attorneys' fees" shall be made against the United States or against state or local governments "except as authorized by law . . . and in accordance with the provisions of this Act."[157]

In its Section-by-Section Analysis, the Justice Department does not mention that its new test would effectively bar fee entitlement for plaintiffs' counsel in cases which are settled or mooted favorably to plaintiffs,[158] and thus

153. *See, e.g.*, Lamar v. Steele, 693 F.2d 559, 563 (5th Cir. 1982); Basiardanes v. Galveston, 682 F.2d 1203, 1220 (5th Cir. 1982); Milwe v. Cavuoto, 653 F.2d 80, 84 (2d Cir. 1981); Families Unidas v. Briscoe, 619 F.2d 391, 405-06 (5th Cir. 1980); McNamara v. Moody, 606 F.2d 621, 626 (5th Cir. 1979); Perez v. University of Puerto Rico, 600 F.2d 1, 2 (1st Cir. 1979); Burt v. Abel, 585 F.2d 613, 617 (4th Cir. 1978).

154. 131 CONG. REC. S10881 (daily ed. Aug. 1, 1985).

155. Among the many reported decisions in *Laffey*—a hard fought case spanning more than a decade—are the following decisions, beginning with the initial decision on liability, Laffey v. Northwest Airlines, 366 F. Supp. 763 (D.D.C. 1973), *remedial order*, 374 F. Supp. 1382 (D.D.C. 1974), *aff'd in relevant part*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *supplemental remedial order*, 481 F. Supp. 199 (D.D.C. 1980), *aff'd*, 642 F.2d 578 (D.C. Cir. 1980); *supplemental orders and final judgment aff'd*, 740 F.2d 1071 (D.C. Cir. 1984).

156. *See supra* notes 140-42, and accompanying text.

157. S. 1580, § 4(b).

158. *See* 131 CONG. REC. S10879-81 (daily ed. Aug. 1, 1985). The Justice Department discusses settlements and mooted cases only with regard to new section 8, a provision which would provide additional defenses to government defendants far beyond those recognized by Congress or allowed under settled law. *Id.* at S10883.

Despite the Justice Department's relative silence, its new standards would effectively bar fee awards in settled and mooted cases. First, fees would be barred in out-of-court settlements, even those which provide significant or even phenomenal benefits beyond those sought by a plaintiff, because they share several defeating elements: they always contain disclaimers by defendants of any liability or wrongdoing; they often are reached without any court involvement whatsoever; and they generally end the litigation with the plaintiffs dismissing the case. Given

completely eviscerate Congress' explicit standards authorizing fees in such cases.[159] Nor does the Justice Department mention that its new test would nullify dozens and possibly hundreds of court decisions which, applying Congress' standards, have allowed fees in cases settled favorably to plaintiffs,[160] and in cases mooted by defendants who changed their challenged policies or actions due in part to plaintiffs' lawsuits.[161] Among these decisions is *Maher v.*

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these realities, section 3(9)'s three-part entitlement test could not be satisfied. Initially, it could not be said that the plaintiff "obtained a final decision" because the plaintiff obtained no decision but in fact dismissed the case. Nor could it be said that the plaintiff had "succeeded on a significant issue" because the court may never have ruled on any matter in controversy, and also because the defendant ultimately disclaimed not only liability but also wrongdoing. Finally, the successful plaintiff could not be said to have obtained "significant relief" because the plaintiff in fact received no formal relief at all.

Second, the same fee-denial result would follow in mooted cases, even where it was defendants' response to the lawsuit that provided plaintiffs with all of the benefits sought. When live controversies in cases are eliminated by mooting, plaintiffs' cases are dismissed and final judgments are entered against them. Given this state of affairs, counsel for a successful plaintiff in a mooted case could not satisfy section 3(9)'s three-part entitlement test. The most obvious failure would be that plaintiff never "obtained a final decision" but instead suffered entry of an adverse judgment. Although this barrier would be decisive, neither of the other two parts of the test would be satisfied: the plaintiff could not necessarily be said to have "succeeded on a significant issue" in controversy, nor could the plaintiff be said to have obtained "significant relief in connection with that issue" because the plaintiff does not receive formal relief.

159. *See supra* notes 38-39 and accompanying text.

160. *See, e.g.*, Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984) (defendants agreed to remedy unconstitutional conditions of confinement in their prison system); Smith v. Thomas, 725 F.2d 354 (5th Cir. 1984) (defendant agreed to reinstate plaintiff on the ground that the firing of plaintiff was not constitutionally defensible); White v. City of Richmond, 713 F.2d 458 (9th Cir. 1983) (defendants agreed that their police officers would cease harassing black residents); Charles v. Coleman, 689 F.2d 774 (8th Cir. 1982) (defendants agreed not to dicontinue a federally funded training program); Disabled in Action v. Mayor of Baltimore, 685 F.2d 881 (4th Cir. 1982) (defendants agreed to make Baltimore's Memorial Stadium physically accessible to disabled persons); Pratt v. Board of Educ., 674 F.2d 259 (4th Cir. 1982) (defendants agreed to provide equivalent services to an emotionally handicapped child); Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980) (defendants agreed to expunge plaintiff's record of alleged misconduct); Dawson v. Pastrick, 600 F.2d 70 (7th Cir. 1979) (defendants agreed to institute various fair employment practices); Criterion Club of Albany v. Board of Comm'rs, 594 F.2d 118 (5th Cir. 1979) (defendants agreed to eliminate discriminatory at-large elections).

161. *See, e.g.*, Ortiz de Arroyo v. Barcelo, 765 F.2d 275 (1st Cir. 1985) (defendants removed the challenged land use restrictions only after the lawsuit was filed); Hennigan v. Ouachita Parish School Board, 749 F.2d 1148 (5th Cir. 1985) (defendants adopted a constitutionally sound reapportionment plan only after the lawsuit was filed); Garcia v. Guerra, 744 F.2d 1159 (5th Cir. 1984) (defendants submitted voting law changes for preclearance by the Attorney General under the Voting Rights Act only after the lawsuit was filed); Seegull Mfg. v. NLRB, 741 F.2d 882 (6th Cir. 1984) (defendants released documents requested under the FOIA only after and because the lawsuit was filed); Fields v. Tarpon Springs, Florida, 721 F.2d 318 (11th Cir. 1983) (defendant provided equal capital improvements to the black community only after the lawsuit was filed); Williams v. Fairburn, Georgia, 640 F.2d 635 (5th Cir. 1981) (defendants agreed to continue a federal housing program for low income residents only after the lawsuit was filed); Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980) (only after suit was filed did defendants cease their unconstitutional practice of convicting indigents of petty offenses without affording them a right to counsel), *cert. denied*, 449 U.S. 1102 (1981); Fisher v. Adams, 572 F.2d 406 (1st Cir. 1978) (defendant agreed to provide back pay to the plaintiff, a victim of sex discrimination, only after the lawsuit was filed); International Soc'y for Krishna Consciousness,

Gagne,[162] in which the Supreme Court adhered to the legislative history of the Fees Act by holding that counsel are entitled to fees where plaintiffs essentially prevail through a consent decree.

The new standards, in sum, would eliminate fee entitlement for counsel in the multitude of lawsuits in which plaintiffs prevail through settlement or favorable mooting of their case.

c. Interim Fees

For a plaintiff to satisfy section 3(9), a plaintiff would have to do the following: first, obtain a "final decision"; second, succeed on a "significant issue" in controversy; and third, obtain "significant relief."[163] Establishing these criteria as prerequisites to fee entitlement under section 5(1),[164] in all contexts under sections 4(a) and 4(b),[165] would effectively bar all interim fee awards.[166]

This new standard, as noted, would seriously contravene congressional standards authorizing interim fees where plaintiffs prevail on an important matter in the course of ongoing and sometimes protracted litigation.[167] The new standard would also overturn court decisions authorizing fees where plaintiffs prevail on important matters such as establishing liability,[168] or winning a preliminary injunction.[169]

The effect of this new fee-denial standard on plaintiffs' counsel, as the

Inc. v. Andersen, 569 F.2d 1027 (8th Cir. 1978) (defendants rescinded regulations barring free speech only after the lawsuit was filed).

162. 448 U.S. 122, 127, 129-30 (1980), *aff'g* 594 F.2d 336, 339-41 (2d Cir. 1979). In *Maher*, fee entitlement under the Fees Act was upheld based upon a consent decree in which plaintiff, while not prevailing in every particular, obtained substantially all of the benefits sought in her complaint. In response to the argument made by the government defendants— that plaintiffs should not be allowed to prevail through a consent decree, the Supreme Court pointed out that Congress through "the Senate Report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.' " 448 U.S. at 129 (citation omitted).

163. S. 1580, 99th Cong., 1st Sess. § 3(9) (1985).

164. S. 1580, 99th Cong., 1st Sess. § 5(1) (1985).

165. S. 1580, 99th Cong., 1st Sess. §§ 4(a) & (b) (1985).

166. The Justice Department's only discussion in its Section-by-Section Analysis of interim fee awards occurs not in the context of section 3(10), which defines "final decision," but in the context of new section 5(1), which allows fees only where a party has "prevailed on the merits." 131 CONG. REC. S10881 (daily ed. Aug. 1, 1985). In this limited discussion, the Justice Department states that, in its view, an interim award of fees "would not be appropriate for a party who has prevailed only on a motion for preliminary injunction." *Id.* Even this limitation would work a substantial change of settled case law based on congressional standards. *See infra* note 169 and accompanying text. Nowhere, however, does the Justice Department point out that the broader effect of sections 3(9) and 3(10) would be the elimination of virtually all interim fee awards in all contexts.

167. *See supra* note 40 and accompanying text.

168. *See infra* note 171.

169. *See, e.g.*, Chu Drua Cha v. Levine, 701 F.2d 750 (8th Cir. 1983); Coalition for Basic Human Needs v. King, 691 F.2d 597 (1st Cir. 1982); Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983); Deerfield Medical Center v.City of Deerfield Beach, 661 F.2d 328 (5th Cir. 1981); Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980), *cert.*

Supreme Court pointed out prior to the 1976 enactment of the Fees Act, would be harsh indeed: "To delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel, and discourage the institution of actions despite the clear congressional intent to the contrary."[170] More to the point, without the availability of interim fees, not only would plaintiffs' counsel "be discouraged from bringing such suits because of the risks of protracted litigation and the extended financial drain represented by such a risk," but regularly paid defense counsel "may be tempted to seek victory through an economic war of attrition against the plaintiffs."[171]

d. Fees Against Intervenors

Section 4(d) of the bill would expressly bar fee awards against parties who intervene in lawsuits to defend government laws or actions.[172]

In a departure from its characteristic silence, the Justice Department, in its Section-by-Section Analysis, argues that it is essentially unfair to impose fees upon intervenors "whose conduct did not give rise to the controversy and [who] did not violate the constitutional or statutory rights of" the prevailing plaintiffs.[173] Not mentioned by the Justice Department is the fact that intervenors not only multiply litigation proceedings but also impose considerable time and expense burdens on plaintiffs' counsel who have to respond to the litigation activities of such intervenors.[174]

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denied, 450 U.S. 1012 (1981); Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980), *cert. denied*, 451 U.S. 993 (1981); Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423 (8th Cir. 1978).

The courts have also allowed fees where plaintiffs essentially succeed as a result of obtaining a temporary restraining order. *See, e.g.*, Virzi Subaru, Inc. v. Subaru of New England, Inc., 742 F.2d 677 (1st Cir. 1984); Fitzharris v. Wolff, 702 F.2d 836 (9th Cir. 1983); Iranian Students Ass'n v. Edwards, 604 F.2d 352 (5th Cir. 1979).

170. Bradley v. School Board, 416 U.S. 696, 723 (1974). Not incidently, *Bradley* is both discussed favorably and cited with approval in the Senate Report, *supra* note 14, at 5 and in the House Report, *supra* note 14, at 8. *See also supra* note 40.

171. James v. Stockham Valves and Fittings Co., 559 F.2d 310, 358-59 (5th Cir. 1977). The foregoing observation in *James* was later quoted with approval in two similar cases in which interim fees were authorized after plaintiffs had established defendants' liability. *See* Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608, 633 (5th Cir. 1983); Hameed v. International Ass'n of Bridge Workers, Local 396, 637 F.2d 506, 523 (8th Cir. 1980).

172. S. 1580, 99th Cong., 1st Sess. § 4(d) (1985). The entirety of section 4(d) states:

> No award of attorneys' fees or related expenses shall be made under a federal fee-shifting statute against a party who has intervened to defend the validity of a law or action of the United States, or a state or local government, and who has not been found to have violated a constitutional or statutory right of the party seeking the award.

173. 131 CONG. REC. S10880 (daily ed. Aug. 1, 1985).

174. As described by a court in a recent race discrimination case, "once the unions intervened as defendants they placed themselves in a position to prevent plaintiffs from obtaining relief. Then, they litigated vigorously in an attempt to deny plaintiffs various aspects of the relief that plaintiffs sought"; as such, "[t]heir efforts imposed substantial costs upon plaintiffs." Vulcan Soc'y v. Fire Dep't, 533 F. Supp. 1054, 1062 (S.D.N.Y. 1982). Intervenor-defendants, in fact, often litigate more vigorously than the named defendants. For example, in another recent case:

This new standard contravenes Congress' intent[175] as well as the basic format of most fee-shifting statutes including the Fees Act, which "itself could not be broader" as it "applies to 'any' action brought to enforce certain civil rights laws" and "contains no hint of an exception for" certain defendants or for intervening defendants.[176]

Consistent with congressional intent and statutory format, the courts have routinely awarded fees against defendants and plaintiffs alike who violated no rights.[177] The courts have also routinely awarded fees to counsel for prevailing plaintiffs for time expended against intervening defendants,[178] particularly when intervenors litigate independently in remedial proceedings,[179] take over the entire effort to defend an unconstitutional statute or other unlawful action,[180] or appeal alone unsuccessfully.[181]

The Justice Department's proposal once again contravenes both Congress' standards and well settled law.

3. Fee Computation

As a result of the foregoing provisions of S. 1580,[182] counsel for successful plaintiffs would rarely be entitled to fees. Yet, even those few lawyers for successful plaintiffs who might actually be able to surmount the new barriers

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> The [intervenor-defendants] filed nearly 40 documents in the case, including at least 14 to which plaintiffs had to independently respond. Intervenor-defendants took an active role at trial, occasionally requiring the court to stop their inquiry into areas beyond the permitted scope of intervention. On appeal, intervenor-defendants challenged the district court decision, and fully participated in the proceedings at the Court of Appeals. They also unsuccessfully petitioned the United States Supreme Court for a writ of certiorari and filed briefs in the consolidated appeals of the other parties. Counsel for the intervenor-defendants ultimately argued this case before the Supreme Court on behalf of the city-defendants.

Akron Center for Reproductive Health v. Akron, 604 F. Supp. 1268, 1272 (N.D. Ohio 1984).

175. As Congress directed through the Senate Report: "In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee paying client, 'for all time reasonably expended on a matter.'" Senate Report, *supra* note 14, at 6 (citations omitted).

176. Hutto v. Finney, 437 U.S. 678, 694 (1978).

177. . *See, e.g., In re* Kansas Congressional Districts Reapportionment Cases, 745 F.2d 610 (10th Cir. 1984) (plaintiffs successfully challenged an unconstitutional law which had not yet gone into effect); Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir. 1981)) the successful plaintiffs were parents whose rights had not been violated), *cert. denied*, 454 U.S. 863 (1981). Fees also are awarded against another set of parties who never violated their adversaries' constitutional or statutory rights: losing plaintiffs who file frivolous lawsuits. *See supra* note 34.

178. *See supra* note 174; *see also, e.g.*, Burney v. Housing Auth., 735 F.2d 113 (3d Cir. 1984); Decker v. Department of Labor, 564 F. Supp. 1273 (E.D. Wis. 1983).

Would-be intervenor-defendants who lose their motions to intervene are similarly liable for fees. *See, e.g.*, Thompson v. Sawyer, 586 F. Supp. 635 (D.D.C. 1984); Robideau v. O'Brien, 525 F. Supp. 878 (E.D. Mich. 1981); *cf.* Van Hoomissen v. Xerox, 503 F.2d 1131 (9th Cir. 1974) (would-be intervenor-plaintiff is liable for fees).

179. Haycroft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979).

180. May v. Cooperman, 578 F. Supp. 1308 (D.N.J. 1984).

181. Moten v. Bricklayers Int'l Union, 543 F.2d 224 (D.C. Cir. 1976).

182. 99th Cong., 1st Sess. (1985).

to fee entitlement in S. 1580 would not receive entitlements corresponding to "reasonable" market-based fees as Congress provided for.[183] Instead, counsel could only recover unreasonably low fees.

Among the fee computation standards previously dictated by Congress—now a matter of settled law—which would be reversed by various sections of S. 1580, are the following: (a) counsel would no longer be entitled to compensation for most of the hours reasonably expended, but instead would be compensated only for time spent on specific procedural and substantive issues on which plaintiffs actually prevailed; (b) counsel would no longer be entitled to compensation at market-based hourly rates, but instead would be subject to an hourly rate ceiling of $75 per hour in all cases; (c) salaried public interest attorneys and law firm associates would no longer be entitled to compensation at market-based hourly rates, but instead would be subject not only to the $75 hourly ceiling but also to further rate reductions under impossible-to-calculate cost-based formulae; and (d) counsel would no longer be eligible for upward adjustments of hourly rates or of the hours-times-rates lodestar in difficult or protracted cases, but instead would be barred from receiving upward adjustments, while ironically, fee awards would be subject to downward adjustment relative to the monetary or injunctive relief won by plaintiffs.

All of these proposals are contrary to Congress' reasonable fee standards; standards which are ignored by the Justice Department in its Section-by-Section Analysis. For example, the Justice Department fails to mention that the Ninety-Fourth Congress made a direct analogy to fee compensation in other complex federal litigation, such as antitrust litigation by stating that the same standards should apply in civil rights cases.[184] Congress also approved as appropriate the fee computation standards used by the courts in several illustrative civil rights cases:

> The appropriate standards, see *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a mat-

183. *See generally supra* notes 3-10 & 49.

184. This direct analogy is set forth most completely in the Senate Report, *supra* note 14, at 6. "It is intended that the amount of fees awarded under [the Fees Act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." This same comparison with fee compensation in antitrust cases is made in the House Report, *supra* note 14, at 8-9 (footnotes omitted).

ter." *Davis, supra; Stanford Daily, supra;* at 684.[185]

What is particularly important about the foregoing directive is not just Congress' reliance on *Johnson*[186] but Congress' observation that the *Johnson* factors were "correctly applied" in such cases as *Stanford Daily*,[187] *Davis*,[188] and *Swann*,[189] cases in which fees were calculated under the lodestar method common in antitrust cases: all hours reasonably expended on all issues, multiplied

185. Senate Report, *supra* note 14, at 6. Congress also pointed out "that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing [the Fees Act]." House Report, *supra* note 14, at 8; *see also* Senate Report, *supra* note 14, at 4.

186. In Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), the Fifth Circuit rejected a trial court's low and arbitrarily calculated fee award, *id.* at 717; directed trial courts to consider twelve factors commonly used to determine counsel fees, *id.* at 717-19; and pointed out that these twelve factors were "consistent with those recommended by the American Bar Association's Code of Professional Responsibility, Ethical Consideration 2-18, Disciplinary Rule 2-106," *id.* at 719.

187. In Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), fees were calculated under the lodestar method. First, as to hours expended, all 750 hours were allowed as compensable including time spent on the clients' behalf on an unsuccessful motion for a preliminary injunction. *Id.* at 683-84. Second, market-based noncontingent hourly rates averaging $50 per hour were allowed since the hourly rates "fairly reflect [the attorneys'] experience" and since they "compare favorably with the rates charged by other attorneys in this area for work involving complex questions of fact and law." *Id.* at 685. Finally, and primarily in view of "the American Bar Association's determination that attorneys deserve higher compensation for contingent than for fixed fee work," because upward contingency adjustments "provide full and fair compensation," and also because a contingency adjustment providing a reasonable fee "helps attract attorneys to the enforcement of important constitutional principles and significant congressional policies which might otherwise go unrepresented," an upward adjustment of approximately 28% was allowed to insure a reasonable fee. *Id.* at 685.

188. This same methodology was followed in Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974). First, after certain insufficiently documented hours were disallowed, all properly documented hours were deemed compensable including time spent on matters lost or not ruled on. *Id.* at 5048. As to the latter time:

> It . . . is not legally relevant that plaintiff's counsel expended a certain limited amount of time pursuing certain issues of fact and law that ultimately did not become litigated issues in the case or upon which plaintiffs ultimately did not prevail. Since plaintiffs prevailed on the merits and achieved excellent results for the represented class, plaintiffs' counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter.

Id. at 5049. Second, as to time expended in the early 1970s, fees were allowed according to market-based noncontingent hourly rates ranging from $10 per hour for a law clerk and a paralegal up to $65 per hour for lead counsel. *Id.* at 5048. Finally, because of the contingent representation and the excellent results obtained, an upward adjustment of approximately 18% was allowed to insure a reasonable fee. *Id.*

189. The court in the third illustrative case cited with approval in the Senate Report, Swann v. Charlotte-Mecklenburg Board of Educ., 66 F.R.D. 483 (W.D.N.C. 1975), did not necessarily use the lodestar method. Instead, the court listed the 2,700 hours expended, the market rates in Charlotte at that time of $30 to $35 per hour and up, the exceptional experience of counsel, the excellent results obtained, and the difficulty of the case. After reviewing all of these factors, the court awarded plaintiffs' lawyers $175,000 in fees. By whatever method was used by the court to compute this fee award (the court either doubled the market rates or doubled the lodestar), the court did attempt to assure that plaintiffs' counsel received a reasonable award of fees.

times market rates, with upward adjustments of the hours-times-rates lodestar where appropriate.

The foregoing congressional standards are, however, altogether irrelevant to the Justice Department, which balks at Congress' approval of market-based standards and seeks to nullify hundreds of court decisions implementing those standards,[190] as well as the Supreme Court's fee computation decisions in *Hensley v. Eckerhart*[191] and *Blum v. Stenson*.[192] The Justice Department, in essence, seeks to insure that reasonable fees will never be awarded to plaintiffs' counsel in cases brought against government wrongdoers.

a. Time Spent on Winning Issues

Section 5(2)(A) of the bill requires plaintiffs' counsel, when applying for fees, to establish that the work for which fees are sought was performed "in connection with issues upon which the party prevailed against" the government.[193] Stated in the negative, counsel would not be entitled to compensation for time spent on "issues" which were lost or which were never ruled upon.

In its Section-by-Section Analysis, the Justice Department makes clear that it is not merely seeking to limit fees in lawsuits in which there are legally and factually unrelated *claims* for relief but that it instead is seeking to limit fees in all lawsuits to time expended on "issues, substantive or procedural, upon which the party prevailed in the disposition of the controversy."[194]

The Justice Department's proposal is directly contrary to the standards already approved by Congress.[195] The proposal would also undermine and effectively nullify the Supreme Court's decision in *Hensley v. Eckerhart*,[196] a

190. *See, e.g., infra* notes 205, 224 & 238.

191. 461 U.S. 424 (1983).

192. 465 U.S. 886 (1984).

193. S. 1580, 99th Cong., 1st Sess., § 5(2)(a) (1985).

194. 131 CONG. REC. S10881 (daily ed. Aug. 1, 1985).

195. Congress explained the manner by which fees were to be awarded for all the time reasonably expended by counsel. First, civil rights fee awards were "intended" to "be governed by the same standards which prevail in other types of complex Federal litigation, such as antitrust cases." Senate Report, *supra* note 14, at 6; *see also* House Report, *supra* note 14, at 8-9. There of course is no such "issue" limitation for fee compensation in antitrust cases. *See generally* E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 161-240 (1981).

Second, "counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' " Senate Report, *supra* note 14, at 6 (citations omitted). There of course is no known method of billing in private practice by which a fee-paying client is not billed for time spent on issues lost or not ruled upon.

Third, the "appropriate standards" of fee compensation were "correctly applied," *id.*, in such cases as Stanford Daily v. Zurcher, 64 F.R.D. at 684, where the court expressly compensated counsel for time spent on a lost motion for a preliminary injunction since the motion "advanced their clients' interest"; Davis v. County of Los Angeles, 8 E.P.D. at 5049, where the Court explicitly refused to deny compensation for time spent on issues on which plaintiffs did not prevail, *see supra* note 188; and Swann v. Charlotte-Mecklenburg Board of Educ., 66 F.R.D. at 484, where the court compensated counsel for all time expended despite plaintiffs' losses on various "contentions" during the course of the litigation.

196. 461 U.S. 424 (1983).

case not involving the division of cases into *issues* won and not won, but instead involving compensation where entirely separate *claims* for relief are asserted.[197]

Apart from these regressive effects, section 5(2)(A) would have a devastating effect on the amount of fees available to counsel who represent plaintiffs who ultimately are successful. This is because during the course of most lawsuits there are numerous procedural and substantive issues which are raised and addressed, or more often not addressed, prior to the final judgments or appeals which determine the winners.[198] Nevertheless, under the Justice Department's formulation, counsel would be compensated not for all time reasonably expended on behalf of their clients, but instead only for the limited time expended on discrete substantive and procedural issues which were addressed and on which plaintiffs prevailed.

b. Rate Ceiling of $75 Per Hour

One of the Justice Department's most dramatic attempts to eliminate "fees which are adequate to attract competent counsel"[199] is its proposal to eliminate market-based hourly rates. Section 6(a)(1) of the bill, as drafted by the Justice Department, states very simply that no award of fees against the

197. The Supreme Court in Hensley v. Eckerhart, 461 U.S. 424 (1983), held that the amount of fee compensation depends on the nature of the *claims* asserted and on the overall result achieved. First, in the relatively rare case in which "a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories . . . these unrelated claims [should] be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Id.* at 434-35 (footnote omitted). Second, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee" including compensation for time spent on alternative claims: "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Id.* at 435. Finally, where a plaintiff asserts interrelated "claims" and achieves "only partial or limited success," a court in its discretion *may* reduce the fee award depending upon the particulars of each case. *Id.* at 436-37.

In its Section-by-Section Analysis, *see* 131 CONG. REC. S10881 (daily ed. Aug. 1, 1985), the Justice Department selectively and misleadingly quotes from passages of *Hensley* in an effort to garner support for its proposal to divide all cases into time spent on *issues* won (which would be compensable) and time spent on *issues* lost or not ruled upon (which would not be compensable). *Hensley*, which addresses *claims* for relief, provides no support for and is even contrary to the Justice Department's proposal which focuses primarily upon issues won or lost in a particular action.

198. For example, a plaintiff may ultimately win on appeal even though in the trial court, for example, a motion for a temporary restraining order had been denied, or a motion for a preliminary injunction had never been ruled on, or numerous motions to compel discovery had been resolved informally, or a motion for summary judgment had been denied because defendant contended there was a material fact in dispute which had to be aired at trial, and so on. In this not unusual example, counsel for a prevailing plaintiff who ultimately was 100% successful on appeal apparently would, under the Justice Department's formulation, be entitled only to appellate fees and would not be entitled to any compensation for time spent on issues pursued unsuccessfully in the trial court.

199. Senate Report, *supra* note 14, at 6.

government "shall exceed $75 per hour."[200]

In its Section-by-Section Analysis, the Justice Department attempts to restructure the market-based standards approved by Congress and thereby to undermine the Supreme Court's adherence to congressional intent. The Justice Department argues that its reason for the $75 per hour ceiling is simply "to assure that fees paid to private counsel in fee-shifting cases are brought somewhat more in line with the salaries of attorneys who represent the government in these cases."[201] The Justice Department's argument is both misleading and wrong.

At the outset, Congress has explicitly stated not only that it intended the amount of fees awarded in civil rights cases to be governed by the same standards as prevail in antitrust cases,[202] but also that it intended counsel to be compensated in the same manner as is traditional for attorneys compensated by a fee-paying client.[203] Congress also observed that the appropriate standards of fee computation were correctly applied in the *Stanford Daily*, *Davis*, and *Swann* cases in which counsel were compensated at market-based hourly rates.[204]

Based on these express congressional standards, as well as on case law developed well before the enactment of the Fees Act, the federal courts have uniformly and routinely awarded fees computed at market-based hourly rates, which vary based upon the relative experience and expertise of counsel.[205]

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200. S. 1580, 99th Cong., 1st Sess. § 6(a)(1) (1985).

201. 131 CONG. REC. S10882 (daily ed. Aug. 1, 1985).

202. *See supra* note 184 and accompanying text.

203. *See supra* note 185 and accompanying text.

204. *See supra* notes 185-89 and accompanying text.

205. *See, e.g.*, Glass v. Petro-Tex Chem. Corp., 757 F.2d 1554 (5th Cir. 1985) (flat rate of $150 under Title VII); Stathos v. Bowden, 728 F.2d 15 (1st Cir. 1984) (average rate of $100 under § 1988); Chescheir v. Liberty Mutual Ins. Co., 713 F.2d 1142 (5th Cir. 1983) (flat rates of $150 and $70 for each of two attorneys under Title VII); Gabriele v. Southworth, 712 F.2d 1505 (1st Cir. 1983) ($70 out of court and $75 in court under § 1988); Ingram v. Madison Square Garden Center, 709 F.2d 807 (2d Cir.), ($100 flat rate under Title VII) *cert. denied*, 464 U.S. 937 (1983); Alexander v. National Farmers Org., 696 F.2d 1210 (8th Cir. 1982), ($125 rate for appellate services under the Clayton Act); Maceira v. Pagan, 698 F.2d 38 (1st Cir. 1983) (flat rate of $100 per hour under the LMRDA); Gautreaux v. Chicago Hous. Auth., 690 F.2d 601 (7th Cir. 1982) (flat rate of $125 under § 1988 for litigation conducted from 1965 to 1980), *cert. denied*, 461 U.S. 961 (1983); Strama v. Peterson, 689 F.2d 661 (7th Cir. 1982) (requested $80 rate under § 1988); Thomas v. New Orleans, 687 F.2d 80 (5th Cir. 1982) (requested $90 rate under § 1988); Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087 (5th Cir. 1982) (requested rates up to $150 per hour under the Clayton Act); Janowski v. International Bhd. of Teamsters Local No. 710 Pension Fund, 673 F.2d 931 (7th Cir. 1982) (rates of $125 and $100 under ERISA), *vacated and remanded in light of Hensley v. Eckerhart*, 463 U.S. 1222 (1983); Laje v. R.E. Thompson Gen. Hosp., 665 F.2d 724 (5th Cir. 1982) ($100 rate under § 1988); Mills v. Eltra Corp., 663 F.2d 760 (7th Cir. 1981) ($150 rate for work in 1969 in securities litigation); Hedrick v. Hercules, Inc., 658 F.2d 1088 (5th Cir. 1981) (flat $120 rate under the ADEA); Manhart v. Los Angeles Dep't of Water and Power, 652 F.2d 904 (9th Cir. 1981) (requested $100 rate for partners under Title VII), *vacated and remanded on other grounds*, 461 U.S. 951 (1983); *cf.* Green v. Francis, 705 F.2d 846 (6th Cir. 1983) (lowering the allowable rate for trial work to $200 per hour as reasonable in Nashville under § 1988).

Moreover, in *Blum v. Stenson*,[206] the Supreme Court, following a brief recitation of Congress' standards accompanying the Fees Act,[207] unanimously held that the "statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel."[208]

Disregarding congressional intent and settled law, the Justice Department nevertheless argues that its $75 per hour ceiling would equitably compensate plaintiffs' counsel in a manner equivalent to the manner in which counsel who represent government wrongdoers are compensated. The Justice Department's simplistic reasoning fails, however, for three reasons.

First, government counsel are paid whether they win or lose. Plaintiffs' public interest counsel, on the other hand, are paid—rarely during the course of a lawsuit[209]—only when the plaintiffs win, and in fact the plaintiffs must win in order for counsel to be entitled to court-awarded fees.[210]

Second, it is common for government agency defendants to hire private outside counsel at market rates—often as high as $250 or $275 per hour—to defend government wrongdoers in civil rights cases.[211] By seeking to place an hourly rate ceiling on plaintiffs' counsel while at the same time permitting state and local government defendants to continue to pay market rates to their outside counsel,[212] the Justice Department seeks to increase vastly the already existing disparities in litigating power between civil rights plaintiffs without means and tax-supported government defendants.[213]

Finally, neither the take-home salaries of government lawyers nor the

206. 465 U.S. 886 (1984).

207. *Id.* at 893-95. In addition to reciting and relying on Congress' standards, the Supreme Court in *Blum*, 465 U.S. at 894 n.10, observed that "Congress was legislating in light of experience when it enacted the 1976 fee statute," that "[b]y that time, courts were familiar with calculating fee awards" in civil rights cases, and that in the cases decided at that time "[r]eference to market rate was uniform."

208. *Id.* at 895 (footnote omitted). Not questioned in *Blum*, a case arising in New York City, was the reasonableness of the market-based rates allowed each of plaintiffs' three young lawyers: rates of $95, $100 and $105 per hour. *Id.* at 890 & n.4.

209. Although plaintiffs' counsel are sometimes able to obtain interim fees where plaintiffs prevail, for example, through a preliminary injunction, *see supra* note 169 and accompanying text, this interim fee entitlement vanishes (*i.e.*, the fees must be repaid) where plaintiffs ultimately lose. *See, e.g.*, Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980).

In any event, the Justice Department now seeks to eliminate all interim fee entitlement for plaintiffs' counsel. *See supra* notes 163-71 and accompanying text.

210. *See generally supra* notes 34-40 and accompanying text.

211. *See, e.g., Legal Fees Equity Act: Hearing on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 376-400 (1984) (testimony and statement of Charles Victor McTeer, civil rights lawyer in private practice in Mississippi); *id.* at 669-92 (statement of the Alliance for Justice).

212. Although § 10 of S. 1580 proposes to limit somewhat the ability of some United States agencies to hire private outside counsel at rates in excess of $75 per hour, § 10 is riddled with exceptions, *see supra* note 128; and nothing in the bill affects the ability of state and local governments to continue to retain highly paid private outside counsel.

213. *See supra* notes 209-10 and accompanying text.

market-based fees paid by government to retained outside counsel have anything to do with the congressional goal of attracting competent counsel to represent civil rights plaintiffs in cases against government wrongdoers. Yet, it is because of this objective, in part, that Congress authorized market-based fee awards under fee-shifting statutes such as the Fees Act to "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights," and thereby "to promote the enforcement of the Federal civil rights acts, as Congress intended."[214]

c. Cost-Based Fees

The $75 per hour ceiling is only one proposal to eliminate the use of market rates. A related proposal is found in section 6(b)(1)(B) which invites a court to reduce or deny a fee award if the amount "unreasonably exceeds the hourly salary" of the attorney.[215]

In its Section-by-Section Analysis, the Justice Department concedes that its proposal is designed to limit fee awards so they do not "exceed the actual cost of the litigation."[216] And although the Justice Department states that this limitation would apply "to all attorneys who are paid on a salaried basis" such as "associates in a law firm,"[217] its primary targets are undoubtedly salaried legal aid and legal services attorneys, salaried civil rights attorneys, and other salaried public interest attorneys.

The Justice Department's attempt to impose cost-based fees is contrary to congressional standards, well settled law applying those standards, and established rationales for allowing market-based fees. As the courts have advised us, a system of cost-based fee compensation would involve inquiries of massive proportions, and would be essentially unworkable.

Congress, by enacting the Fees Act, fully endorsed market-based fees without exception.[218] Additionally, in each of the three illustrative fee computation cases—*Stanford Daily*, *Davis*, and *Swann*—the courts awarded market-based fees not cost-based fees to all counsel including salaried civil rights

214. House Report, *supra* note 14, at 9. *See generally supra* notes 71-91 and accompanying text. The Justice Department does not attempt to support its proposed $75 per hour ceiling by invoking an analogy to the $75 per hour ceiling in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A) (West Supp. 1986)—the only civil statute with a rate ceiling—an hourly rate ceiling which now actually exceeds $90 per hour, *see, e.g.*, Hirschey v. Federal Energy Regulatory Comm'n, 777 F.2d 1 (D.C. Cir. 1985). To analogize would be inappropriate since there are different rationales for fee shifting. The purpose of public interest fee-shifting statutes such as the Fees Act is to attract counsel to represent plaintiffs whose rights might otherwise be unenforced. *See supra* notes 71-91 and accompanying text. In contrast, the purpose of the Equal Access to Justice Act, a noncivil rights catch-all statute, was not to encourage counsel to represent private companies in suits against the United States. Instead, the purpose of the Equal Access to Justice Act is to allow the companies reimbursement of some of their tax-deductible legal expenses when the Federal government's regulatory action was not substantially justified.

215. S. 1580, 99th Cong., 1st Sess., § 6(b)(1)(B) (1985).

216. 131 CONG. REC. S10882 (daily ed. Aug. 1, 1985).

217. *Id.*

218. *See supra* notes 184-89 and accompanying text.

lawyers.[219]

Additionally, arguments similar to those now being made by the Justice Department were rejected by the Supreme Court in *Blum v. Stenson*.[220] In that case, the State of New York specifically urged the Supreme Court "to require that all fee awards under § 1988 be calculated according to the cost of providing legal services rather than according to the prevailing market rate."[221] The Justice Department, "as amicus curiae, urge[d] the Court to adopt a cost-related standard only for fee awards made to nonprofit legal aid organizations."[222] Based primarily on Congress' standards, the Supreme Court rejected both cost-based contentions and unanimously held "that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel."[223]

In rejecting the state and federal governments' arguments in *Blum*, the Supreme Court merely reiterated Congress' standards and confirmed what every federal court of appeals in the nation had already recognized.[224]

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219. *See supra* notes 187-89 and accompanying text.

220. 465 U.S. 886 (1984).

221. *Id.* at 892 (footnote omitted). In the accompanying footnote, the Supreme Court pointed out that petitioner New York State "specifically" urged "that fees be based on the 'cost of providing [legal] services plus, where appropriate, a margin for profit.'" *Id.* at 892 n.6 (citation omitted).

222. *Id.* at 892.

223. *Id.* at 895.

224. FIRST CIRCUIT: Palmigiano v. Garrahy, 616 F.2d 598, 601-02 (1st Cir.) (market fees for the ACLU), *cert. denied*, 449 U.S. 839 (1980); Reynolds v. Coomey, 567 F.2d 1166, 1167 (1st Cir. 1978) (market fees for the NAACP Legal Defense Fund).

SECOND CIRCUIT: Carey v. New York Gaslight Club, Inc., 598 F.2d 1253, 1255 n.1 (2d Cir. 1979) (market fees for the NAACP), *aff'd*, 447 U.S. 54 (1980); Beazer v. New York City Transit Authority, 558 F.2d 97, 100 (2d Cir. 1977) (market fees for the Legal Action Center), *rev'd on other grounds*, 440 U.S. 568 (1979); Torres v. Sachs, 538 F.2d 10, 13-14 (2d Cir. 1976) (market fees for the Puerto Rican Legal Defense Fund).

THIRD CIRCUIT: Inmates of Allegheny County Jail v. Pierce, 716 F.2d 177, 180 (3d Cir. 1983) (market fees for Neighborhood Legal Services of Pittsburgh); Pawlak v. Greenawalt, 713 F.2d 972, 979 (3d Cir. 1983) (market fees for the Public Citizen Litigation Group); Miller v. Apartments and Homes of New Jersey, Inc., 646 F.2d 101, 113 (3d Cir. 1981) (market fees for the National Committee Against Discrimination in Housing, and for the Middlesex County Legal Services Corporation); Rodriguez v. Taylor, 569 F.2d 1231, 1247-48 (3d Cir. 1977) (market fees for the Community Legal Services of Philadelphia), *cert. denied*, 436 U.S. 913 (1978).

FOURTH CIRCUIT: Tillman v. Wheaton-Haven Recreation Assoc., 517 F.2d 1141, 1148 (4th Cir. 1975) (market fees for the ACLU).

FIFTH CIRCUIT: Morrow v. Finch, 642 F.2d 823, 825-26 (5th Cir. 1981) (market fees for the Lawyers' Committee); Watkins v. Mobile Hous. Board, 632 F.2d 565, 567 (5th Cir. 1980) (market fees for the Legal Services Corporation of Alabama); Thompson v. Madison County Bd. of Educ., 496 F.2d 682, 689 (5th Cir. 1974) (market fees for the Lawyers' Committee); Fairley v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974) (market fees for the Lawyers' Committee).

SIXTH CIRCUIT: Louisville Black Police Officers Org. v. Louisville, 700 F.2d 268, 276-78 (6th Cir. 1983) (market fees for the NAACP Legal Defense Fund); Northcross v. Board of Educ. of Memphis, 611 F.2d 624, 637-38 (6th Cir. 1979) (market fees for the NAACP Legal Defense Fund), *cert. denied*, 447 U.S. 911 (1980).

SEVENTH CIRCUIT: Gautreaux v. Chicago Hous. Auth., 690 F.2d 601, 613 (7th Cir.

In reaching unanimity, the courts of appeals frequently explained the fundamental premise supporting market-based fee awards for public interest organizations: full fee awards further the purpose of fee-shifting statutes by enabling the continuation of similar litigation.[225] At the same time, the courts pointed out that a cost-based formulation would be unworkable and would require massive ancillary litigation. For example, as the en banc Court of Appeals for the District of Columbia Circuit observed in rejecting a cost-based argument: "The problems associated with administering a 'cost-plus' calculus are multifarious . . . . The necessity, under 'cost-plus', of answering these questions creates the specter of a monumental inquiry on an issue wholly ancillary to the substance of the lawsuit." The far-reaching inquiries would " 'assume massive proportions, perhaps even dwarfing the case in chief,' " and the result would be that a " 'cost-plus' method of calculating fees would indeed become the inquiry of 'massive proportions' that we strive to avoid."[226]

The Justice Department, in its zeal to discourage civil rights enforcement, seeks to impose upon plaintiffs' counsel and the courts themselves ancillary cost-based fee litigation of massive proportions.[227]

1982) (market fees for the ACLU), *cert. denied*, 461 U.S. 961 (1983); Mary & Crystal v. Ramsden, 635 F.2d 590, 601-602 (7th Cir. 1980) (market fees for the Youth Policy and Law Center); Hairston v. R & R Apartments, 510 F.2d 1090, 1092-93 (7th Cir. 1975) (market fees for Legal Services).

EIGHTH CIRCUIT: McLean v. Arkansas Bd. of Educ., 723 F.2d 45, 47 (8th Cir. 1983) (market fees for the ACLU); Collins v. Hoke, 705 F.2d 959, 964 (8th Cir. 1983) (market fees for the Legal Services Corporation of Iowa); Oldham v. Ehrlich, 617 F.2d 163, 168-69 (8th Cir. 1980) (market fees for the Nebraska Legal Aid Organization).

NINTH CIRCUIT: Domingo v. New England Fish Co., 727 F.2d 1429, 1446-47 (9th Cir. 1984) (market fees for the Alaska Legal Services Corporation, and for the Northwest Labor & Employment Law Office); Dennis v. Chang, 611 F.2d 1302, 1305-09 (9th Cir. 1980) (market fees for the Legal Aid Society of Hawaii).

TENTH CIRCUIT: Ramos v. Lamm, 713 F.2d 546, 551-52 (10th Cir. 1983) (market fees for the ACLU).

ELEVENTH CIRCUIT: *See* Fifth Circuit decisions binding on the Eleventh Circuit.

DISTRICT OF COLUMBIA CIRCUIT: Donnell v. United States, 682 F.2d 240, 251-52 (D.C. Cir. 1982) (market fees for the Lawyers' Committee); Copeland v. Marshall, 641 F.2d 880, 898-900 (D.C. Cir. 1980) (en banc) (market fees are to be awarded to all public interest organizations).

225. As the Second Circuit explained in Torres v. Sachs, 538 F.2d 10, 13 (2d Cir. 1976), a full fee award to public interest organizations "promotes their continued existence and service to the public," and thus "full recompense for the value of services in successful litigation helps assure the continued availability of the services to those most in need of assistance." *See also* Palmigiano v. Garrahy, 616 F.2d at 602 ("a full market fee award will enable it to undertake further civil rights litigation," and a full fee thus "serves the clearly expressed legislative purpose of encouraging private enforcement of civil rights laws"), *cert. denied*, 449 U.S. 839 (1980); Dennis v. Chang, 611 F.2d 1302, 1306 (9th Cir. 1980) (a full market fee award "encourages the legal services organization to expend its limited resources in litigation aimed at enforcing the civil rights statutes").

226. Copeland v. Marshall, 641 F.2d 880, 896 (D.C. Cir. 1980) (en banc) (citations omitted), *vacating* 594 F.2d 244 (D.C. Cir. 1978).

227. Particularly relevant here is the Supreme Court's admonition that "a request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983), *quoted with approval* in Blum v. Stenson, 465 U.S. 886, 902 n.19 (1984).

d. Lodestar Adjustments

Section 6(a)(2) explicitly states that "[b]onuses or multipliers shall not be used in calculating awards of attorneys' fees" against the government.[228] Somewhat in contradiction, section 6(b)(2)(A) invites courts to use a negative multiplier, or to otherwise reduce or deny fees, where the fee award "unreasonably exceeds the monetary result or value of injunctive relief achieved in the proceeding."[229]

In its Section-by-Section Analysis, the Justice Department provides no discussion of its proposal for a complete ban on bonuses or multipliers, other than to reiterate that it proposes such a ban, which presumably also includes the more commonly used upward adjustments of hours-times-rates lodestars, to provide reasonable fees in cases involving contingency risks, delays in payment, or excellent results.[230] Regarding its proposed use of negative multipliers, on the other hand, the Justice Department, urges that fee awards be reduced or denied in any case in which fees exceed the monetary result, or in which fees exceed the value of the injunctive relief.[231]

The Justice Department characteristically fails to explain either that its proposal contradicts congressional standards as well as settled law, or that the proposal guarantees unreasonably low fees. By approving for civil rights litigation the fee computation standards governing antitrust litigation—where upward adjustments are routine if not standard operating procedure and where downward adjustments are unheard of[232]—Congress could only have intended similar results to follow in civil rights cases.[233] Further, Congress did not cite with approval any cases involving downward adjustments (there were, undoubtedly, none to cite), but did state that the standards were correctly applied in cases such as *Stanford Daily*, *Davis*, and *Swann*, all of which involved the use of upward adjustments.[234]

Based on Congress' intent, the Supreme Court in *Blum v. Stenson*[235] re-

228. S. 1580, 99th Cong., 1st Sess., 6(a)(2) (1985).

229. S. 1580 § 6(b)(2)(A) (1985).

230. 131 CONG. REC. S10882 (daily ed. Aug. 1, 1985). The Justice Department's reference only to bonuses and multipliers appears to be more than mere semantics, since reference to upward adjustments is generally considered to be more fair. "As we think the latter characterization is fairer, we will use it." Blum v. Stenson, 465 U.S. 886, 896 n.12 (1984).

231. 131 CONG. REC. S10882 (daily ed. Aug. 1, 1985).

232. Illustrative of the adjustments routinely allowed in antitrust cases are *In re* Chicken Antitrust Litigation, 560 F. Supp. 963 (N.D. Ga. 1980) (after allowing noncontingent hourly rates up to $150 for counsel, $35 for law clerks, and $25 for paralegals, the court allocated multipliers of 2.25 for lead and liason counsel, 2.0 for other principal counsel, and 1.75 for all other counsel, resulting in a fee award of more than $3.6 million); *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F. Supp. 680 (D. Minn. 1975) (after allowing noncontingent hourly rates of $100 per hour for 16 lead counsel for work performed in the early 1970s, the court allocated multipliers ranging from 2.0 to 2.5 covering dozens upon dozens of lawyers in 16 law firms). These cases are not unusual. *See generally* E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 161-240 (1981).

233. *See supra* note 184 and accompanying text.

234. *See supra* notes 185-89 and accompanying text.

235. 465 U.S. 886 (1984).

jected the government petitioner's argument that upward adjustments were improper.[236] Instead, upward adjustments, where necessary to provide for reasonable fee awards, are available in cases in which plaintiffs establish that there were substantial contingency risks, considerable delays in payment, or excellent results.[237] Not surprisingly, the lower federal courts, subsequent to *Blum*, have continued to allow modest upward adjustments where appropriate.[238] The courts have certainly not allowed downward adjustments in cases where plaintiffs have vindicated their rights but obtained less than optimal monetary or injunctive relief.[239] Although upward adjustments have thus

236. *Id.* at 896-97. Although the Court in *Blum* recognized that there is no per se bar to the use of upward adjustments, the Court held that certain factors by themselves were not necessarily sufficient to warrant upward adjustments. For example, the novelty and complexity of the issues in a case are ordinarily accounted for in the billable hours component of the lodestar rather than through a subsequent upward adjustment of the lodestar. *Id.* at 898. Similarly, the quality of representation is generally accounted for in the hourly rates rather than through an upward adjustment of the lodestar. *Id.* at 899. As to the permissible adjustment factors, *see supra* notes 47-49 and accompanying text, and *infra* note 238 and accompanying text.

237. *See supra* notes 47-49 and accompanying text; *see also infra* note 238 and accompanying text.

238. Clayton v. Thurman, 775 F.2d 1096 (10th Cir. 1985) (affirmance of a 33% upward adjustment for lead counsel to account for excellent results); Kelley v. Metropolitan County Bd. of Educ., 773 F.2d 677 (6th Cir. 1985) (affirmance of a 25% upward adjustment for contingency risks); Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985) (upholding the appropriateness of an upward adjustment for contingency risks, but remanding for a determination of the amount); Vaughns v. Board of Educ., 770 F.2d 1244 (4th Cir. 1985) (affirmance of a 7 1/2% upward adjustment for contingency risks); LaDuke v. Nelson, 762 F.2d 1318 (9th Cir. 1985) (affirmance of a 20% upward adjustment for contingency risks); Delaware Valley Citizens' Council v. Commonwealth of Pennsylvania, 762 F.2d 272 (3d Cir. 1985) (affirmance of an upward adjustment factor of 2 for several phases of an enforcement proceeding and of a factor of 4 for another phase based on contingency risks, results obtained, and superior representation), *cert. granted*, 54 U.S.L.W. 3223 (U.S. Oct. 7, 1985); Institutionalized Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897 (3d Cir. 1985) (affirmance of a 25% upward adjustment for delay in payment; remand as to an adjustment for contingency and quality); Sierra Club v. Clark, 755 F.2d 608 (8th Cir. 1985) (affirmance of a 30% upward adjustment); Garrity v. Sununu, 752 F.2d 727 (1st Cir. 1984) (affirmance of a 20% upward adjustment for plaintiffs' two lead counsel based on exceptional results and on quality of representation not reflected in counsel's low hourly rates); Craik v. Minnesota State Univ. Bd., 738 F.2d 348 (8th Cir. 1984) (25% upward adjustment, to account for contingency, in award of appellate fees); Burney v. Housing Auth., 735 F.2d 113 (3d Cir. 1984) (upward adjustment available so long as plaintiffs satisfy their burden of proof on remand).

The upward adjustments in the foregoing cases generally follow the pattern established prior to *Blum*. *See, e.g.*, Burney v. Pawtucket, 728 F.2d 547 (1st Cir. 1984) (10% upward adjustment for contingency risks); Action on Smoking and Health v. Civil Aeronautics Bd., 724 F.2d 211 (D.C. Cir. 1984) (10% upward adjustment); White v. Richmond, 713 F.2d 458 (9th Cir. 1983) (upward adjustment of 1.5 for contingency risks and the results obtained); Gabriele v. Southworth, 712 F.2d 1505 (1st Cir. 1983) (10% upward adjustment for contingency); Louisville Black Police Officers Org. v. Louisville, 700 F.2d 268 (6th Cir. 1983) (upward adjustment of 1.33 for contingency factors); Graves v. Barnes, 700 F.2d 220 (5th Cir. 1983) (upward adjustment of 2 for contingency factors); Dowdell v. Apopka, Florida, 698 F.2d 1181 (11th Cir. 1983) (upward adjustment of 1.15 for contingency risks); Maceira v. Pagan, 698 F.2d 38 (1st Cir. 1983) (upward adjustment of 1.5 for contingency and quality factors); Minority Employees at NASA v. Frosch, 694 F.2d 846 (D.C. Cir. 1982) (10% upward adjustment for contingency risks).

239. *See, e.g.*, DiFilippo v. Morizo, 759 F.2d 231 (2d Cir. 1985) (reversing a 50% down-

been viewed by Congress and the courts as appropriate components of determining reasonable fees,[240] there is little doubt that the current Justice Department opposes this position.

4. Government Fee Liability

The Justice Department seeks to lessen government fee liability generally, as well as specifically, through section 6(c) by making the plaintiffs themselves, rather than the government wrongdoers, initially liable for fees in monetary cases. Specifically, section 6(c) states that, whenever a monetary judgment is awarded, "a portion of the judgment (but not more than 25% thereof) shall be applied to satisfy the amount of attorneys' fees to be awarded against" the government.[241] In other words, fee awards initially would have to be satisfied by the wrongdoers' victims rather than by the government wrongdoers themselves.

In its Section-by-Section Analysis, the Justice Department seeks to support its proposal through an analogy which is wholly inapplicable in the context of fee-shifting statutes.[242]

And the Justice Department fails to explain that its proposal is totally contrary to the history and purpose of fee shifting and settled law. As the very words "fee shifting" imply, the premise of fee-shifting statutes is that fees are

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ward adjustment for low monetary recovery, on the ground that low monetary recoveries are the norm in fair housing cases); Lynch v. Milwaukee, 747 F.2d 423 (7th Cir. 1984) (reversing a 25% downward adjustment for low monetary recovery).

240. As the court reasoned in the illustrative fee computation case of Stanford Daily v. Zurcher, 64 F.R.D. at 685, court decisions allowing upward adjustments to account for contingency risks "parallel the American Bar Association's determination that the attorneys deserve higher compensation for contingent than for fixed-fee work." Similar observations have been made by the Fifth Circuit en banc:

> Lawyers who are to be compensated only in the event of victory expect *and are entitled to be paid more* when successful than those who are assured of compensation regardless of result. This is neither less nor more appropriate in civil rights litigation than in personal injury cases. The standard of compensation must enable counsel to accept apparently just causes without awaiting sure winners.

Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir.) (en banc) (emphasis added), *cert. dismissed*, 453 U.S. 950 (1981).

241. S. 1580, 99th Cong., 1st Sess., § 6(c) (1985).

242. 131 CONG. REC. S10882 (daily ed. Aug. 1, 1985). According to the Justice Department, *id.*, forcing successful plaintiffs to pay 25% of their monetary judgments as fees is really no different from the allegedly similar situation under § 206 of the Social Security Act, 42 U.S.C. § 406 (198—). The fallacy in the Justice Department's attempted analogy is that the foregoing provision of the Social Security Act is not a fee-shifting statute, as is for example the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (1986). Thus, in situations where a social security claimant is entitled to fees under the fee-shifting Equal Access to Justice Act, both the 25% limitation in § 206 of the Social Security Act and that statute itself become irrelevant, with the result that it is the federal government which is liable for all of counsel's fees. *See, e.g.*, Watford v. Heckler, 765 F.2d 1562 (11th Cir. 1985), and cases cited therein.

Here, of course, the Justice Department's proposal is made only in the context of fee-shifting statutes under which the losing defendants have been, by definition, the parties liable for counsel's fees.

to be shifted from the winner to the loser.[243] Based on this premise, Congress has enacted nearly 200 fee-shifting statutes which shift fees in this way.[244]

For example, in antitrust cases, under section 4 of the Clayton Act,[245] plaintiffs who recover not just single damages but treble damages are not statutorily liable for the fees of their attorneys, but rather all fees are shifted to the losing defendants.[246] And, Congress expressly incorporated the standards governing fee compensation in antitrust cases into civil rights cases.[247]

In the course of implementing the congressional standards, no court has held prevailing plaintiffs liable for any portion of their lawyers' fees under any civil rights fee-shifting statute, or any other fee-shifting statute.[248] The Justice Department's novel proposal is contradictory of the very premise of fee shifting.

Nevertheless, as pernicious as this specific proposal would be with regard to prevailing plaintiffs themselves, this proposal would do little to lessen government fee liability in the overall context of S. 1580.[249] This occurs because other provisions in the legislation would limit governmental fee liability much more extensively, and often eliminate it altogether.[250]

5. *Private Enforcement*

Limiting fees against government defendants, such as is proposed in S. 1580,[251] would have a devastating impact on private enforcement litigation against government wrongdoers.

First, the protections against fee liability provided to government wrongdoers would adversely affect the litigation process itself. For example, as the

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243. *See supra* note 1.

244. *See supra* notes 3-10 and accompanying text.

245. 15 U.S.C.A. § 15 (West 1973).

246. *See, e.g.*, Twin City Sportservice, Inc. v. Charles O. Finley, 676 F.2d 1291, 1312-17 (9th Cir. 1982), and cases cited therein.

247. *See supra* note 184 and accompanying text. *See also supra* notes 185-89 and accompanying text.

248. To the contrary, even in those monetary cases where counsel have contingency fee agreements with their clients, the courts have uniformly held that those agreements do not limit defendants' fee liability and are irrelevant to determining the extent of defendants' liability under fee-shifting statutes. *See, e.g.*, Easley v. Empire, Inc., 757 F.2d 923 (8th Cir. 1985); Sisco v. J.S. Alberici Constr., 733 F.2d 55 (8th Cir. 1984); United Slate Workers, Local 307 v. G & M Roofing and Sheet Metal, 732 F.2d 495 (6th Cir. 1984); Cooper v. Singer, 719 F.2d 1496 (10th Cir. 1983) (en banc); Sullivan v. Crown Paper Bd., 719 F.2d 667 (3d Cir. 1983); Criswell v. Western Airlines, Inc., 709 F.2d 544 (9th Cir. 1983); Sanchez v. Schwartz, 688 F.2d 503 (7th Cir. 1982); Cleverly v. Western Elec., 594 F.2d 638 (8th Cir. 1979); Sargeant v. Sharp, 579 F.2d 645 (1st Cir. 1978).

249. 99th Cong., 1st Sess. (1985).

250. *See generally supra* notes 140-240 and accompanying text, discussing many but not all of the Justice Department's anti-fee proposals. For a discussion of several of the Justice Department's additional anti-fee proposals, *see Legal Fees Equity Act: Hearings on S. 1580 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (testimony of E. Richard Larson and prepared statement of the ACLU); *id.* at ____ (statement of the Alliance for Justice).

251. 99th Cong., 1st Sess. (1985).

en banc Court of Appeals for the District of Columbia pointed out in the context of discussing diminished fee awards in employment discrimination cases: "The incentive to employers not to discriminate is reduced if diminished fee awards are assessed when discrimination is established."[252] Additionally, where diminished fee awards are promised, defendants "will be subject to a lesser incentive to settle a suit."[253] As the Ninth Circuit similarly concluded: "if the state could immunize itself against a fee award . . . the state would have less incentive to settle pending litigation and more incentive to resist civil rights compliance by defending against the suit until trial."[254]

Second, and more importantly, the elimination or reduction of the incentive of court-awarded fees would effectively terminate most private enforcement since private counsel would no longer be able to afford to represent plaintiffs whose rights had been violated.[255] One experienced civil rights lawyer in private practice noted several years ago while testifying before Senator Hatch's Subcommittee on the Constitution that a mere ban on the possibility of upward adjustments to approximate reasonable fees would effectively preclude competent counsel from representing civil rights plaintiffs:

> The [Fees] Act [would] no longer attract competent counsel in the private enforcement of civil rights, should this amendment be adopted, for the simple reason that it would bar the awarding or "reasonable" attorneys' fees. . . . Absent.contingency or multiplier adjustments, this amendment [would] end my civil rights practice on behalf of plaintiffs.[256]

In fact, every private practitioner who has testified on the Legal Fees Equity Act[257] has concluded that the Justice Department's proposals, if enacted, would foreclose any further representation of potential plaintiffs who have been harmed by government wrongdoers.[258] This testimony is hardly surpris-

252. Copeland v. Marshall, 641 F.2d 880, 899 (D.C. Cir. 1980) (en banc).

253. *Id.* The court explained:

That is so because the marginal cost of each hour of continued litigation would be reduced. Defendant's counsel could inundate the plaintiff with discovery requests without fear of paying the full value of the legal resources wasted in response. We do not think that Title VII intended that defendants should have an incentive to litigate imprudently.

254. Dennis v. Chang, 611 F.2d 1302, 1307 (9th Cir. 1980).

255. *See supra* notes 71-91 and accompanying text.

256. *Attorney's Fees Awards: Hearing on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 53-54 (1982) (testimony of Fletcher Farrington, civil rights lawyer in private practice in southern Georgia).

257. S. 1580, 99th Cong., 1st Sess. (1985); S. 2802, 98th Cong., 2d Sess. (1984).

258. *Legal Fees Equity Act: Hearings on S. 1580 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (forthcoming) (testimony of James E. Ferguson, II, civil rights lawyer in private practice in Charlotte, North Carolina); *id.* (testimony of Philip G. Sunderland, environmental lawyer in private practice in Washington, D.C.); *see also Legal Fees Equity Act: Hearing on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 376-400 (1984) (testimony of Charles Victor McTeer, civil rights lawyer in private practice in Mississippi).

ing, particularly in view of the findings made by Congress a decade ago when it enacted the Fees Act.[259]

Irrespective of these realities (or perhaps because of them), Senators Hatch and Thurmond have continued to urge the Ninety-Ninth Congress to enact the Justice Department's Legal Fees Equity Act.[260]

B. Legislation to Bar Fee Awards to Counsel for Prevailing Plaintiffs in § 1983 Cases Against Judicial Officials

Although the Legal Fees Equity Act represents the boldest attack yet on court-awarded attorneys' fees, it is not the only attack on fees which has surfaced during the Ninety-Ninth Congress. A more narrow attack has been made through separate legislation which would bar fee awards under the Fees Act to counsel for plaintiffs who prevail in lawsuits brought successfully under 42 U.S.C. § 1983 against judicial officials.

Most prominent among the various versions of this legislation are S. 1794 and S. 1795.[261] These bills, which were introduced in the Senate on October 28, 1985 by Senators Strom Thurmond and Orrin Hatch, respectively,[262] were the subjects of an unannounced hearing held the following day before Senator Hatch's Subcommittee on the Constitution.[263] The only witnesses invited to testify on these bills at the October 29 hearing[264] were representatives of two

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259. *See supra* notes 71-91 and accompanying text.

260. S. 1580, 99th Cong., 1st Sess. (1985). At the time that this article was written — Spring, 1986 — S. 1580 had not yet been voted out of Senator Hatch's Subcommittee on the Constitution.

261. S. 1794, 99th Cong., 1st Sess. (1985), would amend the Fees Act to bar fee awards against a "judicial officer who would be immune from actions for damages arising out of the same act or omission about which complaint is made."

S. 1795, 99th Cong., 1st Sess. (1985), would amend the Fees Act somewhat more broadly by adding the following exception: "except that no justice, judge, or judicial officer of a court of a State, shall be held liable for any costs, including attorney fees, in any proceeding brought against such justice, judge, or judicial officer for actions taken in an official capacity." Lest there be any doubt, § 2 of S. 1795 also states: "Notwithstanding any other provision of law, no justice, judge, or judicial officer of a court of a State, shall be held liable for any costs, including attorney fees, in any proceeding brought against such justice, judge, or judicial officer for actions taken in an official capacity.

Two similar bills were introduced in the House, *see* H.R. 877, 99th Cong., 1st Sess. (1985) (Rep. Gekas); H.R. 2170, 99th Cong., 1st Sess. (1985) (Rep. Darden). No hearings have been held on these bills.

262. 131 CONG. REC. S14252-54 (daily ed. Oct. 28, 1985).

263. At the outset of the October 29, 1985 hearing on S. 1580, the Legal Fees Equity Act, *see supra* notes 120-260, Senator Hatch announced that the hearing was being expanded to include consideration of S. 1794 and S. 1795 and that the hearing would be the only hearing on those bills. *Legal Fees Equity Act: Hearings on S. 1580 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (forthcoming).

264. *Id.* At the October 29 hearing a witness testifying on behalf of the American Civil Liberties Union against S. 1580 objected to the lack of notice and opportunity to testify against S. 1794 and S. 1795 and requested that future hearings be scheduled with adequate prior notice. *Legal Fees Equity Act: Hearings on S. 1580 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985)(forthcoming)(testimony of E. Richard Larson). This request was subsequently repeated in the formal Comments of the

new opponents of fee-shifting: the Conference of Chief Justices, and the Judicial Conference of the United States.[265]

This legislative activity was not prompted so much by the Fees Act itself, as by the state judges' interpretation of the Supreme Court's decision in *Pulliam v. Allen*,[266] a case in which the Court upheld the appropriateness of a fee award under the Fees Act following the entry of injunctive relief against a state judicial official in her official capacity. Although *Pulliam* technically involved only the appropriateness of the fee award, the Court in the major portion of its decision reaffirmed the propriety of allowing injunctive relief against judicial officials.[267] Thereafter, the Court quickly affirmed the appropriateness of fee awards in such cases:[268]

> Congress has made clear in § 1988 its intent that attorney's fees be available in any action to enforce a provision of § 1983. See also Hutto v. Finney, 437 U.S. 678, 694 (1978). The legislative history of the statute confirms Congress' intent that an attorney's fee award be available even when damages would be barred or limited by "immunity doctrines and special defenses, available only to public officials." H.R. Rep. No. 94-1558, p. 9 (1976). See also Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719, 738-39 (1980) ("The House Committee Report on [§ 1988] indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damages awards").[269]

American Civil Liberties Union on S. 1794 and S. 1795. *Id.* at —— (forthcoming); *see also id.* at —— (forthcoming) (Comments of the Alliance for Justice on S. 1794 and S. 1795). These requests were ultimately rejected, *see, e.g.*, Letter to E. Richard Larson from Senator Hatch (January 29, 1986).

265. *Legal Fees Equity Act: Hearings on S. 1580 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985)(forthcoming) (testimony and prepared statement of Oregon Chief Justice Edwin J. Peterson on behalf of the Conference of Chief Justices); *id.* at ——(forthcoming) (testimony and prepared statement of United States District Judge S. Hugh Dillin on behalf of the Judicial Conference of the United States).

Although no proponents of fee-shifting were invited or prepared to testify on S. 1794 and S. 1795 at the October 29 hearing, the hearing record was kept open and formal comments were later submitted. *See supra* note 264.

266. 466 U.S. 522 (1984).

267. *Id.* at 528-43. *See generally* Mitchum v. Foster, 407 U.S. 225 (1972); *Ex Parte* Virginia, 100 U.S. 339 (1880).

268. Seeking to foreclose this result, the state argued that "judicial immunity bars a fee award because attorney's fees are the functional equivalent of monetary damages," because "monetary damages indisputably are prohibited by judicial immunity," and because "the chilling effect of a damages award is no less chilling when the award is denominated attorney's fees." *Pulliam*, 466 U.S. at 543. The Supreme Court responded that although there was, "perhaps, some logic" to the state's argument, the "weakness in it is that it is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common law immunity." *Id.* (citing Pierson v. Ray, 386 U.S. 547, 554 (1967)).

This same argument, rejected by the Supreme Court, is now being made to Congress.

269. *Pulliam*, 466 U.S. at 543-44. In an accompanying footnote, the Supreme Court also pointed out:

Seeking to amend the Fees Act and to overturn *Pulliam* in part, the affected judges and their representatives argue that the prospect of fee awards against them personally will have a chilling effect on the traditional independence of the state judiciary.[270]

There are, however, three major problems with the judges' argument. First, since defendants in official capacity lawsuits are immune from personal liability,[271] a bar on fee awards against judges in their personal capacities is unnecessary. Second, it thus appears that the judges' true aim, despite their disclaimers, is to curtail the number of suits brought against them.[272] Finally, the proposal is one-sided: while barring fee awards for for prevailing plaintiffs, it would still permit awards for judicial defendants.[273]

When government officials are sued and found liable only in their official capacities, relief on the merits, and in regard to fees, runs against government entities. In fact, relief cannot be collected from the officials in their personal capacities. The Supreme Court fully explained these principles and affirmed this rule in *Kentucky v. Graham*:[274]

> Official capacity suits . . . "generally represent only another way of pleading an action against an entity of which an officer is an agent." As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity.[275]

As further indication of Congress' intent that § 1988 apply to judicial officers, the House Report [at 9 n.17] contains a citation to Pierson v. Ray, 386 U.S. 547 (1967). [The state] suggests that the citation to Pierson refers to another aspect of the decision, regarding qualified immunities of officials in the Executive Branch. We see no need to adopt such a strained interpretation. The House Report clearly referred to public officials against whom damages were *precluded*, as well as those against whom damages were limited. Of the three cases cited by the House Report, only Pierson involved complete preclusion of a damages award.

Id. at 543 n.23 (emphasis by the Court).

270. *Legal Fees Equity Act: Hearings on S. 1580 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985)(forthcoming) (testimony and prepared statement of Oregon Chief Justice Edwin J. Peterson); *see also id.* at —— (forthcoming) (testimony and prepared statement of United States District Judge S. Hugh Dillin).

271. *See infra* notes 274-83 and accompanying text.

272. *See infra* notes 284-87 and accompanying text.

273. *See infra* notes 288-93 and accompanying text.

274. 105 S. Ct. 3099 (1985).

275. *Id.* at 3105 (citations omitted) (emphasis in original). In contrast, the Court pointed out, "[p]ersonal-capacity suits [usually damages actions] seek to impose personal liability upon a government official." *Id.*

Official-capacity lawsuits and personal-capacity lawsuits also differ with regard to the substitution of parties.

Should the official die pending final resolution of a personal-capacity action, the plaintiff would have to pursue his action against the decedent's estate. In an official-capacity action in federal court, death or replacement of the named official will result in

Thus, "in an official-capacity action . . . a plaintiff who prevails [is] entitled to look for relief, both on the merits and for fees to the governmental entity."[276] In fact, "a plaintiff seeking to recover on a damages judgment [much less on a fees judgment] in an official-capacity suit *must* look to the government entity itself."[277]

Since *Graham* unequivocally recognizes that no personal liability can arise from an official-capacity lawsuit, all measures to immunize judges from personal liability in such suits are wholly unnecessary. Earlier Supreme Court cases also support this conclusion. In *Brandon v. Holt*,[278] the Court recognized that in an official-capacity lawsuit, relief on the merits runs against the entity which the official represented.[279] In *Hutto v. Finney*,[280] the court held that fees in an official-capacity lawsuit against state officials were properly assessed under the Fees Act against the state although it was not a formal party to the lawsuit.[281] Consequently, the fee immunity legislation now being pur-

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automatic substitution of the official's successor in office. See Fed. Rule Civ. Proc. 25(d)(1); Fed. Rule App. Proc. 43(c)(1); this Court's Rule 40.3.

Id. at 3105 n.11.

276. *Id.* at 3108. In contrast, "an award of damages against an official in his personal capacity can be executed only against the official's personal assets." *Id.* at 3105. The same is true, in a personal-capacity lawsuit, as to fees. *Id.* at 3107.

277. *Id.* at 3105 (emphasis added) (footnote omitted). At issue in this case, a lawsuit for retrospective damages brought successfully against state officials in their personal capacities was whether a subsequent fee award could be assessed against the state itself. Because Eleventh Amendment immunity protects each state from retrospective damages, and since the state could not have been liable on the merits, the Court held that the state could not be liable for fees.

This decision is in accord with the scope of and the limitations on Eleventh Amendment immunity in the context of official-capacity lawsuits. First, relief for retrospective damages is barred. Edelman v. Jordan, 415 U.S. 651 (1974). But, second, prospective relief such as an injunction is permissible and available. *Id.*; *see generally Ex Parte* Young, 209 U.S. 123 (1908). In fact, prospective relief requiring the expenditure of millions of dollars from the state treasury is permissible and available. Millken v. Bradley, 433 U.S. 267 (1977). Finally, ancillary relief such as fees and costs—relief ancillary to a prospective injunction—is also permissible and available. Hutto v. Finney, 437 U.S. 678 (1978); Fairmont Creamery v. Minnesota, 275 U.S. 70 (1927). And, as the Supreme Court made clear in Hutto v. Finney, 437 U.S. at 693-700, this ancillary relief of fees and costs is properly assessed against a state itself regardless of whether the state was a formal party in the lawsuit.

278. 105 S. Ct. 873 (1985).

279. In *Brandon*, where a government official had been found liable in his official capacity, the Court made explicit that a judgment against an official-capacity defendant effectively imposes liability upon the government itself:

> In at least three recent cases arising under § 1983, we have plainly implied that a judgment against a public servant "in his official capacity" imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond. We now make that point explicit.

105 S. Ct. at 878 (footnote omitted). Among the three cases relied on by the *Brandon* Court was *Hutto v. Finney*, a case which the *Brandon* Court characterized as providing "express recognition that an order requiring the Arkansas Commissioner of Corrections to pay the plaintiff's counsel fees would be satisfied with state funds. . . . We considered it obvious that the State would pay the award because the defendants had been sued in their 'official capacities.' *Id.* (footnote omitted). *See infra* note 281.

280. 437 U.S. 678 (1978).

281. *Id.* at 693-700. Dictating this result was the legislative history of the Fees Act in

sued by the judges is entirely unnecessary to protect them from personal-capacity fee liability.[282] Yet, the legislation would serve to immunize the states and other governmental entities from paying fees in official-capacity lawsuits.[283]

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which Congress specifically explained that in cases where injunctive relief is successfully obtained against government officials in their official capacities, fee awards are properly collected from the governments themselves:

> In such cases it is intended that the attorney's fees, like other items of costs, will be collected either directly from the official, *in his official capacity*, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

Senate Report, *supra* note 14, at 5 (footnotes omitted) (emphasis added); *see also* House Report, *supra* note 14, at 7 ("The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities").

This congressional directive was followed in *Hutto*, an official-capacity lawsuit in which the Supreme Court held that the fee award under the Fees Act was properly assessed against the state itself even though the state was not a formal party in the case. In reaching this result, the Court quoted from the legislative history set forth above, 437 U.S. at 694; pointed out that the defendant state officials had been represented by the state's lawyers, *id.* at 699; and thus held:

> Like the Attorney General, Congress recognized that suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself. The legislative history makes it clear that in such suits attorney's fee awards should generally be obtained "either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." S. Rep. No. 94-1011, p.5 (1976).

Id. at 700.

This adherence to Congress' directive in *Hutto* was recently reaffirmed by the Supreme Court in Kentucky v. Graham, 105 S. Ct. at 3104-05 and in Brandon v. Holt, 105 S. Ct. at 885-86.

282. *See supra* notes 274-81 and accompanying text. Of course, judicial officials could be held liable for damages for their judicial acts in personal-capacity lawsuits. No such liability is at issue, however, because judicial officials are absolutely immune from damages liability for judicial acts in personal-capacity lawsuits. This absolute immunity attaches even when the judicial official act is concededly malicious at least so long as the judicial official did not act in the "clear absence of all jurisdiction." Stump v. Sparkman, 435 U.S. 349, 356-57 (1978). *See also, e.g.*, Harris v. Deveaux, 780 F.2d 911, 914-16 (11th Cir. 1986).

283. In official-capacity lawsuits, fee judgments against government officials (as with judgments on the merits) are routinely assessed against and collected from the government entities. *See, e.g.*, Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982); Gary v. Louisiana, 622 F.2d 804 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981); Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980); *see also* Collins v. Thomas, 649 F.2d 1203 (5th Cir. 1981).

The same of course is true with regard to official-capacity lawsuits against government officials who are judicial officials. For example, as pointed out in testimony before Senator Hatch's Subcommittee on the Constitution, the fee award in Pulliam v. Allen, 466 U.S. 522 (1984), was paid by Virginia; the fee award in Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), *on remand*, 505 F. Supp. 822 (E.D. Va. 1981), *aff'd in relevant part*, 688 F.2d 218 (4th Cir. 1982), *cert. denied*, 462 U.S. 1137 (1983), was also paid by Virginia; and the fee award in Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981), was paid by Pennsylvania. *Legal Fees Equity Act: Hearings on S. 1580 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985)(forthcoming)(prepared statement of United States District Judge S. Hugh Dillin).

The fact that the states and other governmental entities not only represent judicial officials in litigation but also pay any resulting fee awards was also explained to the Supreme Court in *Pulliam*: "In virtually all of the states, the Attorneys General, as the chief legal officers of those

Since judicial officials cannot be assessed fees personally in official-capacity lawsuits,[284] and since the judges disclaim any chilling effect from the *pro se* lawsuits filed against judicial officials,[285] the judges' actual agenda appears to be to discourage, if not effectively bar, the filing of meritorious cases against them—either in their judicial capacities[286] or their administrative capaci-

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states, have responsibility for defending actions against judges. In all of the states, the Attorneys General are legal counsel for the governments which will likely bear the financial burden of those awards." Brief of the State of Minnesota [and of 47 other states] Amici Curiae at 2, Pulliam v. Allen, 466 U.S. 522 (1984). *See also infra* note 286.

284. *See supra* notes 274-81 and accompanying text. As a caveat, the only instance where fees might not be assessed against the state itself is when the state was given no notice about the official-capacity lawsuit. States, however, always receive such notice since the lawsuits are always defended by state attorneys general or by other state or local government attorneys. *See supra* note 283; *see also* CONFERENCE OF CHIEF JUSTICES, SURVEY OF STATE STATUTES AND CURRENT ACTIVITIES REGARDING JUDICIAL IMMUNITY, INDEMNIFICATION AND INSURANCE, 33-38 (Jan. 1985); CONFERENCE OF CHIEF JUSTICES, 42 U.S.C. § 1983 LITIGATION AGAINST JUDGES: SURVEY RESULTS, 4-24 (Sept. 1985). Both of these surveys are reprinted in *Legal Fees Equity Act: Hearings on S. 1580 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (forthcoming) (surveys introduced by Oregon Chief Justice Edwin J. Peterson).

285. *See Legal Fees Equity Act: Hearings on S. 1580 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (forthcoming) (testimony of Oregon Chief Justice Edwin J. Peterson); *see also* CONFERENCE OF CHIEF JUSTICES, 42 U.S.C. § 1983 LITIGATION AGAINST JUDGES: SURVEY RESULTS (Sept. 1985).

Pro se lawsuits should also be of little concern to state judges because even when pro se litigants win and become prevailing parties, they are not entitled to attorneys fees because they are not attorneys and by definition are not represented by attorneys. This conclusion is shared by every court of appeals except one:

FIRST CIRCUIT: Crooker v. EPA, 763 F.2d 16 (1st Cir. 1985); Lovell v. Snow, 637 F.2d 170 (1st Cir. 1981); Crooker v. Department of Justice, 632 F.2d 916 (1st Cir. 1980).

SECOND CIRCUIT: Kuzma v. United States Postal Serv., 725 F.2d 16 (2d Cir. 1984); Crooker v. Department of the Treasury, 634 F.2d 48 (2d Cir. 1980).

THIRD CIRCUIT: Owens-El v. Robinson, 694 F.2d 941 (3d Cir. 1982); Pitts v. Vaughn, 679 F.2d 311 (3d Cir. 1982); Cunningham v. FBI, 664 F.2d 383 (3d Cir. 1981).

FIFTH CIRCUIT: Barrett v. Bureau of Customs, 651 F.2d 1087 (5th Cir. 1981); *cert. denied*, 455 U.S. 950 (1982); Cofield v. Atlanta, 648 F.2d 986 (5th Cir. 1981); Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

SIXTH CIRCUIT: Wolfel v. United States, 711 F.2d 66 (6th Cir. 1983); Wright v. Crowell, 674 F.2d 521 (6th Cir. 1982).

SEVENTH CIRCUIT: Smith v. DeBartoli, 769 F.2d 451 (7th Cir. 1985); DeBold v. Stimson, 735 F.2d 1037 (7th Cir. 1984); Redding v. Fairman, 717 F.2d 1105 (7th Cir. 1983).

EIGHTH CIRCUIT: Davis v. Parratt, 608 F.2d 717 (8th Cir. 1979).

NINTH CIRCUIT: Hannon v. Security Nat'l Bank, 537 F.2d 327 (9th Cir. 1976).

TENTH CIRCUIT: Turman v. Tuttle, 711 F.2d 148 (10th Cir. 1983).

ELEVENTH CIRCUIT: Clarkson v. IRS, 678 F.2d 1368 (11th Cir. 1982).

Only the District of Columbia Circuit has allowed fees to a nonlawyer *pro se* party. *See* Crooker v. Department of the Treasury, 663 F.2d 140 (D.C. Cir. 1980); Cox v. Department of Justice, 601 F.2d 1 (D.C. Cir. 1979).

286. Lawsuits against judicial officials in their judicial capacities often seek redress of widespread or egregious violations of constitutional rights by judicial officials. Illustrative of such violations are the facts in Pulliam v. Allen, 466 U.S. 522 (1984), a case in which judicial officials were found to have violated fundamental constitutional rights by incarcerating indigents alleged to have committed non-incarcerable offenses. In other words, indigents were being unconstitutionally and routinely incarcerated while awaiting trial on charges upon which, if convicted, the indigents could not have been incarcerated. Because of the incentive of fees,

ties[287]—by removing the incentive of court-awarded fees.

Finally, the primary legislative vehicles being pursued by the judges, S. 1794 and S. 1795, would have the unprecedented, one-way effect of barring fees for counsel who represent prevailing plaintiffs while continuing to allow the government attorneys who represent defendant judicial officials to recover fees against losing plaintiffs.[288] This result would occur because the Fees Act, which the judges seek to amend in favor of government entities, is a two-way "prevailing party" statute[289] which authorizes fees for prevailing plaintiffs' counsel as a matter of course and which allows the assessment of fees against losing plaintiffs whose lawsuits were frivolous, unreasonable, or groundless.[290] Under this dual standard, as applied in official-capacity lawsuits against judicial officials, fees have already been assessed more frequently against losing plaintiffs than they have in favor of counsel for prevailing plaintiffs.[291] Nevertheless, the judges seek to restructure the Fees Act into a one-way statute under which plaintiffs could be assessed fees but could never recover fees, and under which the government representatives of the judicial officials could only recover fees with no downside liability.[292] Congress has never enacted such a

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private counsel, from a small private firm, was able to provide successful legal representation to the indigents.

Cases from lower federal courts are equally illustrative. For example, in Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981), judicial officials were found to have violated conceded constitutional rights by convicting and incarcerating indigents for petty offenses without first affording them the right to counsel as is constitutionally required by Argersinger v. Hamlin, 407 U.S. 25 (1972). Although these unconstitutional practices were formally brought to the attention of the judicial officials by counsel for the plaintiffs well before the lawsuit was filed, the judicial officials declined to cease their unconstitutional practices. Only after the filing of this federal lawsuit did the judicial officials terminate their widespread unconstitutional practices.

287. Illustrative of the types of cases brought against judicial officials in their administrative and enforcement capacities are Supreme Court of New Hampshire v. Piper, 470 U.S. —, (1985) (holding unconstitutional a judicial rule limiting admission to the bar to bona fide state residents); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) (involving the unconstitutionality of restrictions on lawyer advertising as enforced through judicial disciplinary rules), *on remand as to fees*, 505 F. Supp. 822 (E.D. Va. 1981), *aff'd in relevant part*, 688 F.2d 218 (4th Cir. 1982), cert. denied, 462 U.S. 1137 (1983).

288. Of the two bills on this general subject in the House, *see supra* note 261, only H.R. 2170 would also have this unprecedented one-way effect. The other bill, H.R. 877, would have a two-way effect by disallowing fees in any action against judicial officials.

289. *See supra* note 10.

290. *Compare, e.g.*, Hensley v. Eckerhart, 461 U.S. 424, 429 & n.2 (1983), *with* Hughes v. Rowe, 449 U.S. 5 (1980). *See generally supra* note 34.

291. CONFERENCE OF CHIEF JUSTICES, 42 U.S.C. § 1983 LITIGATION AGAINST JUDGES: SURVEY RESULTS 4-24, 37-40, 43-46 (SEPT. 1985).

292. Through S. 1795, the judges go even further by proposing not just unprecedented one-way fee shifting but also unprecedented one-way cost shifting. By denying even statutory costs to prevailing plaintiffs in cases against judicial officials in their official capacities, S. 1795 would eliminate the presumption—as to prevailing plaintiffs—in FED. R. CIV. P. 54(d) that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." *See also* FED. R. APP. P. 39; Sup. Ct. R. 50. This one-way cost shifting in favor of the government, like the proposed one-way fee shifting, would be totally unprecedented in the history of Congress.

one-way fee-shifting statute.[293]

All of the foregoing concerns relating to the judges' proposed legislation to exempt the states from liability for fees were set forth in written comments submitted to Senator Hatch's Subcommittee on the Constitution.[294] Senators Hatch and Thurmond have apparently chosen to ignore those comments by continuing to urge the enactment of their bills during the Ninety-Ninth Congress.[295]

CONCLUSION

In his separate opinion in *Hensley v. Eckerhart*,[296] Justice Brennan correctly observed: "The more obstacles that are placed in the path of parties who have won . . . and then seek reasonable attorney's fees, the less likely lawyers will be to undertake the risk of representing . . . plaintiffs seeking equivalent relief in other cases."[297] As a corollary, if the obstacles contained in the anti-fee proposals discussed herein are given serious consideration by Congress, and subsequently enacted, it will be unlikely indeed that competent private counsel will be available to represent potential plaintiffs whose rights have been violated by government wrongdoers.

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293. Although Congress has enacted one-way fee-shifting statutes in favor of prevailing plaintiffs, *see supra* note 34, Congress has never enacted a one-way statute favoring prevailing defendants, much less favoring government defendants.

294. *See supra* note 263.

295. At the time this Article was written —Spring, 1986—neither S. 1794 nor S. 1795 had yet been voted out of Senator Hatch's Subcommittee on the Constitution.

296. 461 U.S. 424 (1983).

297. 461 U.S. at 456 (Brennan, J., concurring and dissenting).