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AWARDS OF ATTORNEYS' FEES AGAINST THE UNITED STATES THE SOVEREIGN IS STILL SOMEWHAT IMMUNE

Henry Cohen*

I. INTRODUCTION

In *Alyeska Pipeline Service Co. v. Wilderness Society*¹ the United States Supreme Court wrote: "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys fee from the loser"² This is known as the "American Rule" and derives from the common law. It has, however, numerous statutory exceptions; some, if not most, of which Congress enacted to encourage private litigation to implement public policy.³ It also has two major common law exceptions, the common benefit doctrine and the bad faith doctrine, which derive from the historic authority of federal courts to do equity in particular situations.⁴

Apart from the American rule, awards of attorneys fees against the United States traditionally were barred at common law under the sovereign immunity doctrine. The sovereign immunity doctrine not only protects the government in suits against it, but also precludes a party from obtaining court fees when he wins a judgment against the government.⁵ This article will examine Congress' adoption of the sovereign immunity doctrine to bar fee awards against the United States. It will examine the availability of the common law exceptions to the American rule in suits against the United States and, in the appendix, it will present the statutory exceptions Congress has created to allow fee awards in such suits. Finally it will discuss the wisdom of continuing to bar awards of attorneys fees against the United States.

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1. 421 U.S. 240 (1975).

2. *Id.* at 247.

3. *Id.* at 263.

4. *Sprague v. Taconic Nat'l Bank*, 307 U.S. 161, 166 (1939).

5. *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 74 (1927).

II. SOVEREIGN IMMUNITY DOCTRINE

At common law an award of costs was allowed generally except when the judgment was against the United States.⁶ Adoption of the Federal Rules of Civil Procedure in 1938 continued this policy. Rule 54(d) provides:

Except when express provision therefor is made in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law.⁷

The Supreme Court has said that the phrase referring to costs against the United States was merely declaratory and effected no change in principle.⁸ Federal law prior to 1966 pursuant to section 2412 maintained the principle of sovereign immunity to preclude recovery of costs: "The United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress."⁹ In 1966, section 2412 was amended such that the statute would now permit recovery of costs, but not attorneys fees:

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity in any court having jurisdiction of such action.¹⁰

The purpose of this change was to correct a disparity between the United States and private litigants concerning the allowance of court costs. Until 1966, if the United States won on a claim, it recovered full costs, but only rarely would a successful private litigant receive court costs against the United States.¹¹ As attorneys fees, however generally were not recoverable by the United States, there apparently was no need perceived to make them recoverable against the United States. The First Circuit in *Natural Resources Defense Council, Inc. v. Environmental Protection Agen-*

6. *Pine River Logging Co. v. United States*, 186 U.S. 279, 296 (1902).

7. FED. R. CIV. P. 54(d).

8. *Reconstruction Fin. Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 83 (1941).

9. Act of June 25, 1948, Pub. L. No. 80-773, § 2412(a), 62 Stat. 973.

10. 28 U.S.C. § 2412 (1976), as amended by Act of July 18, 1966, Pub. L. No. 89-507 § 1, 80 Stat. 308.

11. S. REP. NO. 1329, 89th Cong., 2d Sess., reprinted in [1966] 2 U.S. CODE CONG. & AD. NEWS 2528.

cy¹² noted the apparent inconsistency of disallowance of attorneys fees against the United States in light of the congressional intent to eliminate unfairness. The court pointed out, however, that in 1966 there were few exceptions to the American rule, so the need to eliminate the inconsistency was not pressing. Supreme Court dicta in *Alyeska* confirmed that section 2414 on its face,¹³ and in light of its legislative history generally barred attorneys fees which, if allowable at all, must be expressly provided for by statute.¹⁴

III. COMMON LAW EXCEPTIONS TO THE AMERICAN RULE

The two major common law exceptions to the American rule are the common benefit doctrine and the bad faith doctrine. Use of these exceptions against the United States appears precluded by section 2412.¹⁵ The Supreme Court, however, has never explicitly ruled on the availability against the United States of the common law exceptions.

The common benefit, or common fund, doctrine shifts the burden of fees to those who benefit from the outcome of the lawsuit. In the leading case of *Trustees v. Greenough*,¹⁶ the Supreme Court approved an award against the beneficiaries of a trust in favor of a trustee. Noting that traditionally a trust paid for its own administration, the Court allowed reimbursement of the substantial cost which had been borne by the trustee during eleven years of litigation which was carried on to rehabilitate and protect the trust from waste. In *Mills v. Electric Auto-Lite Co.*¹⁷ the Court allowed a fee award against stockholders in a successful derivative suit even though the suit produced no monetary damages. That suit involved a claim that officers of the corporation had violated the Securities and Exchange Act by releasing a misleading proxy statement. The

12. 484 F.2d 1331, 1335 n.3 (1st Cir. 1973).

13. On its face, § 2412 bars awards of attorneys fees in all actions brought by or against the United States. 28 U.S.C. § 2812 (1976). There appears, however, to have been no intention to deprive the United States of its right to recover awards under common law exceptions to the American rule, and an award under the bad faith doctrine has been made without mention of § 2412 as possible bar. *Copeland v. Martinez*, 435 F. Supp. 1178 (D.D.C. 1977), *aff'd*, 603 F.2d 981 (D.C. Cir. 1979), *cert. denied*, 48 U.S.L.W. 3462 (Jan. 22, 1980) (No. 79-647). And, in *Burgess v. Hampton*, the court, without mention of § 2412, denied government motion for attorneys fees because it found no bad faith on the part of the losing party. 73 F.R.D. 540, 544 (D.D.C. 1976).

14. 421 U.S. at 267-68.

15. *Id.*

16. 105 U.S. 527 (1881).

17. 396 U.S. 375 (1970).

Court awarded fees from the corporate treasury on the theory that since it was the corporation that benefitted from the litigation, the corporation should pay the costs of the litigation. The common benefit doctrine ordinarily does not encounter the sovereign immunity doctrine, although the problem has occurred when the United States was successfully sued to disburse appropriated funds.¹⁸ Three decisions by the United States Court of Appeals for the District of Columbia Circuit indicate that section 2414 precludes use of such funds to pay attorneys fees.¹⁹ In *National Council of Community Mental Health Centers v. Mathews*,²⁰ the court acknowledged that the Supreme Court had not resolved the conflict arising between section 2414 and judicially created exceptions to the American rule in suits involving the United States or a federal agency.²¹

The second exception to the American rule of attorneys fees permits fee awards when the unsuccessful party has litigated in bad faith. A leading bad faith exception case is *Hall v. Cole*²² in which the Supreme Court described the bad faith exception as punitive²³ and noted that bad faith could be found not only in actions leading to litigation, but also in the conduct of the litigation itself.²⁴ The question of the availability against the United States of this exception has not been decided by the Supreme Court.²⁵ The First Circuit has said, however, that section 2412, because it is a limited waiver of sovereign immunity cannot be read to imply a bad faith exception to the American rule in attorneys fees awards against the United States.²⁶ The Sixth Circuit later followed the First Circuit, concluding that in the absence of express statutory authority attor

18. *National Ass'n of Regional Medical Programs, Inc. v. Mathews*, 551 F.2d 340 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 954 (1977); *Pealo Farmers Home Administration of the United States*, 562 F.2d 744 (D.C. Cir. 1977); *National Council of Community Mental Health Centers, Inc. v. Mathews*, 546 F.2d 1003 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977); *accord*, *American Ass'n of Marriage and Family Counselors, Inc. v. Brown*, 440 F. Supp. 1114 (D.D.C. 1977), *aff'd on other grounds*, 593 F.2d 1365 (D.C. Cir. 1979).

19. *See* note 18 *supra*.

20. 546 F.2d 1003 (D.C. Cir. 1976).

21. *Id.* at 1008 n.14.

22. 412 U.S. 1 (1973).

23. *Id.* at 5.

24. *Id.* at 15.

25. As of 1976, no court apparently had decided the question. *Shannon v. HUD*, 409 F. Supp. 1189, 1192 (E.D. Pa. 1976), *aff'd*, 577 F.2d 854 (3d Cir.), *cert. denied*, 439 U.S. 1002 (1978).

26. *Rhode Island Comm. on Energy v. General Servs. Administration*, 561 F.2d 397, 405 (1st Cir. 1977).

neys fees were not allowed against the government even though bad faith was involved.²⁷

One federal district court has awarded fees against the United States for acting in bad faith, but its holding was limited to cases brought under the Economic Opportunity Act of 1964.²⁸ This law does not explicitly allow fee awards, although the court held that it contained an implicit exception to section 2412 in cases of bad faith by the government.²⁹ The court noted that sovereign immunity which serves as the basis for the prohibition against the award of section 2412, was not a factor because the funds that were the source of the attorneys fees had already been authorized and appropriated by Congress.³⁰

IV CONTINUED CONGRESSIONAL BAR TO FEE AWARDS

The sovereign immunity doctrine grew out of the ancient belief in the divine right of kings.³¹ There is little doubt that the doctrine has no validity in modern American democracy.³² In 1793, the Supreme Court was unable to find sovereign immunity in the Constitution.³³ Although occasionally the view surfaces that there can be no legal right against the lawmaking authority there is virtually unanimous agreement that the expressed rationale for the doctrine of sovereign immunity is neither logical nor practical.³⁴ Whether there exists a basis in the Constitution and whether logical or practical, the sovereign immunity of the federal government is unlikely to be judicially overturned.³⁵ Simple justice requires that Congress, therefore, act at least with regard to awards of attorneys fees.

27. Gibson v. Davis, 587 F.2d 280, 281 (6th Cir. 1978), *cert. denied*, 99 S. Ct. 1993 (1979).

28. Red School House, Inc. v. Office of Economic Opportunity, 386 F. Supp. 1177 (D. Minn. 1974).

29. *Id.* at 1193-94.

30. *Id.* at 1197-98.

31. Comment, *Municipal Law—Construction of the Statute of Limitations—Test for Tort Immunity*, Marshall v. Town of Brattleboro, 160 A.2d 762 (Vt. 1960), 40 B.U.L. REV. 557, 559 n.12 (1960).

32. Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 592, 305 A.2d 877, 881-82 (1973). See also K. DAVIS, 3 ADMINISTRATIVE LAW TREATISE § 25.01, at 436-37 (1958).

33. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 425 (1793).

34. K. DAVIS, *supra* note 32, § 25.01, at 437 (1938).

35. In 1976 the Supreme Court affirmed that the United States "is immune from suit save as it consents to be sued." *United States v. Testan*, 424 U.S. 392, 399 (1976).

Currently twenty-nine federal statutes appear to modify the prohibition in section 2412³⁶ against awarding attorneys fees against the United States. The pertinent provisions of these statutes are set forth in the Appendix to this article. There are also many federal statutes that authorize fee awards generally but most fail to permit them against the United States expressly. Under section 2412, this failure places the United States in a privileged position, which, as previously noted,³⁷ seems inconsistent with the principle of uniformity behind the revision of the section. It also erects a barrier to the recovery of fees by a "private attorney general," as public interest litigation often involves defendants which are federal agencies.³⁸

On its face, and by judicial interpretation,³⁹ section 2412 precludes application of the bad faith exception against the United States. This, in addition to the "deep pocket" of the United States, permits the federal government to sue anyone, for any purpose, including harassment, and risk nothing more than losing the suit. A defendant must endure the time, expense, and trauma of legal proceedings, while the government attorney collects his or her salary. Bad faith aside, requiring the United States to pay the fees of persons it unsuccessfully sues, even when private parties would not be liable for fees, might partially equalize the contest between the inherently unevenly matched litigants. Perhaps some "reverse discrimination" is warranted.

The above arguments appear generally applicable to suits brought against the United States as well. It would be fair to make the United States liable for fees when it exercises bad faith in conduct provoking or defending a suit.⁴⁰ Furthermore, any action against the United States will usually be an uneven match whether the United States is prosecuting or defending. The argument that frivolous claims will be encouraged if fees are awarded in all successful suits against the United States may be answered by noting that the United States may recover fees against parties who bring such claims.⁴¹ Absent bad faith, whether attorneys fees should be

36. 28 U.S.C. § 2412 (1976), *as amended by* Act of July 18, 1966, Pub. L. No. 89-507, § 1, 80 Stat. 308.

37. *See* note 12 *supra*.

38. *Natural Resources Defense Council, Inc. v. EPA*, 512 F.2d 1351, 1353 (D.C. Cir. 1975).

39. *See* notes 26 & 27 *supra*.

40. *See* note 24 *supra*.

41. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), in which

awarded against parties other than the United States or other "deep pocketed" litigants is beyond the scope of this article. That issue does not have as clear-cut an answer as the question of whether sovereign immunity should continue to bar awards of attorneys fees against the United States.

V CONCLUSION

In recent years Congress has enacted many statutes that permit recovery of attorneys fees. Although a number provide that fees may be awarded against the United States as against any other party most do not, and section 2412 precludes awards against the United States unless expressly authorized by statute. Thus, even the common law rule that a party engaging in bad faith be held liable for fees is apparently inapplicable to the United States. In 1966, Congress expressed its concern about eliminating the disparity of treatment between private parties and the United States in the allowance of court costs. This principle now requires that attorneys fees be made recoverable against the United States at least in the same situations in which they would be recoverable against private parties. Even in circumstances in which fees would not be recoverable against private parties, a case can be made that they should be awarded to parties that prevail against the United States.

the Court held that Congress intended that under Title VII of the Civil Rights Act of 1964 attorneys fees be awarded to all prevailing plaintiffs absent special circumstances, but that they should be awarded to prevailing defendants only when the plaintiff's suit was "frivolous, unreasonable or without foundation. Behind this dual standard is the policy of encouraging suits to vindicate public policy while discouraging frivolous actions. The dual standard is also applied in cases under the Civil Rights Attorney Fees Awards Act of 1976, 42 U.S.C. § 1981 (1976). *Patzkowski v. United States*, 576 F.2d 134 (8th Cir. 1978); *Brown v. Culpepper*, 559 F.2d 274 (5th Cir. 1977).

APPENDIX

STATUTORY EXCEPTIONS TO 28 U.S.C. § 2412 (1976).⁴²

1. Ethics in Government Act of 1978:

The Senate may by resolution authorize the reimbursement of any Member, officer, or employee of the Senate who is not represented by the Counsel for fees and costs, including attorneys fees, reasonably incurred in obtaining representation. Such reimbursements shall be from funds appropriated to the contingent fund of the Senate.

2 U.S.C.A. § 288i(d) (West Cum. Supp. 1979).

2. Federal Contested Election Act:

“The committee [on House Administration of the House of Representatives] may allow any party reimbursement from the contingent fund of the House of Representatives of his reasonable expenses of the contested election case, including reasonable attorneys fees.

2 U.S.C. § 396 (1976).

3. Freedom of Information Act:

“The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

5 U.S.C. § 552(a)(4)(E) (1976).

4. Privacy Act of 1974:

“The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under

42. On July 31, 1979, the Senate passed a bill that would provide for awards of attorneys fees against the United States in some new circumstances. S. 265, 96th Cong., 1st Sess., 125 CONG. REC. S10,924 (daily ed. July 31, 1979). The bill would provide for fee awards in agency adjudications subject to 5 U.S.C.A. § 554 (West Cum. Supp. 1979) (except those to establish or fix a rate or grant or renew a license), in appeals of such agency adjudications, and in civil actions brought by or against the United States. Individuals worth over \$1 million and businesses worth over \$5 million would be ineligible for fee awards. In civil actions in which a private party would be liable for fees under common law or statutory exception to the American rule, the United States would be liable for fees to the same extent as a private party. In other civil actions (except cases sounding in tort, in which the United States would not be liable for fees) and in the agency adjudications and appeals of agency adjudications specified above, the United States would be liable for fees unless the court or agency found that the position of the United States as a party to the proceedings was substantially justified or that special circumstances would make an award unjust. Thus, in most cases the United States would probably not be liable for fees. The authorization for fee awards in all instances except those in which a private party would be liable under an exception to the American rule would expire three years after the date of enactment of the bill.

this paragraph in which the complainant has substantially prevailed.
Id. § 552a(g)(2)(B).

“The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.
Id. § 552a(g)(3)(B).

In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of the costs of the action together with reasonable attorney fees as determined by the court.

Id. § 552a(g)(4).

5. Government in the Sunshine Act:

The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

Id. § 552b(i).

6. Civil Service Reform Act of 1978:

An employee of an agency who is found to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or a part of the pay allowances, or differentials of the employee—(A) is entitled to receive (ii) reasonable attorney fees related to the personnel action which shall be awarded in accordance with standards established under section 7701(g) of this title.

5 U.S.C.A. § 5596(b)(1) (West Cum. Supp. 1979).

(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by the employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee, as the case may be, determines that payment by the agency is warranted in the interest of justice, including any case in which prohibited personnel practice was engaged in by the agency or any case in which the agency action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

Id. § 7701(g).

7 Right to Financial Privacy Act of 1978:

Any agency or department of the United States or financial institution obtaining or disclosing financial records or information contained therein in violation of this title is liable to the customer to whom such records relate in an amount equal to the sum of— (4) in the case of any successful action to enforce liability under this section, the costs of the action together with a reasonable attorney fee as determined by the court.

12 U.S.C.A. § 3417(a) (West Cum. Supp. 1979).

“In the event of any successful action [for injunctive relief], costs together with reasonable attorneys fees as determined by the court may be recovered. *Id.* § 3418.

8. Consumer Product Safety Act:

In any action under this subsection the court may in the interest of justice award the costs of suit, including reasonable attorneys fees and reasonable expert witnesses fees. Attorneys fees may be awarded against the United States (or any agency or official of the United States) without regard to section 2412 of title 28, United States Code, or any other provision of law

15 U.S.C. § 2059(e)(4) (1976).

A court may in the interest of justice include in such relief an award of the costs of the suit, including reasonable attorneys fees. Attorneys fees may be awarded against the United States (or any agency or official of the United States) without regard to section 2412 of title 28, United States Code, or any other provision of law.

Id. § 2060(c).

9. Toxic Substances Control Act:

The decision of the court in an action commenced under subsection (a), or of the Supreme Court of the United States on review of such a decision, may include an award of costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate.

Id. § 2618(d).

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate. Any court, in issuing its decision in an action brought to review such an order, may award costs of suit and reasonable fees for attorneys if the court determines that such an award is appropriate.

Id. § 2619(c)(2).⁴³

43. Section 2619(c)(2) allows awards of attorneys fees in the citizen suit provision of the Act, which is similar to the citizen suit provisions found in twelve other environmental laws: Endangered Species Act, Surface Mining Control and Reclama-

The court in issuing any final order in any action brought pursuant to subparagraph (A) may award costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate. Any court, in issuing its decision in an action brought to review such an order, may award costs of suit and reasonable fees for attorneys if the court determines that such an award is appropriate.

Id. § 2620(b)(4)(C).

10. Endangered Species Act of 1973:

“The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate. 16 U.S.C. § 1540(g)(4) (1976).

11. Education Amendments of 1972:

Upon entry of a final order by court of the United States against local education agency State (or agency thereof), or the United States (or an agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, of the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs.

20 U.S.C. § 1617 (1976).

12. Tax Reform Act of 1976:

In any suit brought under the provision of paragraph (1)(a) in which the Court determines that an employee of the Internal Revenue Service intentionally or willfully failed to delete in accordance with subsection (c), or in any suit brought under subparagraph (1)(B) in which the Court determines that an employee intentionally or willfully failed to act in ac-

tion Act, Federal Water Pollution Control Act Amendments of 1972, Marine Protection, Research, and Sanctuaries Act, Deepwater Port Act, Safe Drinking Water Act, Noise Control Act, Energy Policy and Conservation Act, Solid Waste Disposal Act, Clean Air Act Amendments of 1977, Outer Continental Shelf Lands Act, and Natural Gas Pipeline Safety Act Amendments of 1976. *See* appendix. These statutes do not specifically say that fees may be awarded against the United States, but each allows fee awards in actions brought pursuant to specified section, which in all cases includes the United States among possible defendants. Attorneys fees have been awarded against federal government defendants under some citizen suit provisions. *See, e.g.*, *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331 (1st Cir. 1973) (Clean Air Act); *Save Our Sound Fisheries Ass'n v. Callaway*, 429 F. Supp. 1136 (D.R.I. 1977) (Federal Water Pollution Control Act Amendments of 1972 and Marine Protection, Research, and Sanctuaries Act). Except for the Natural Gas Pipeline Safety Act, these statutes, on their face, do not limit fee awards only to prevailing parties.

cordance with subsection (g), the United States shall be liable to the person in an amount equal to the sum of the costs of the action together with reasonable attorney's fees as determined by the Court.

26 U.S.C. § 6110(i)(2) (1976).

13. Surface Mining Control and Reclamation Act of 1977

"The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including attorney and expert witness fees) to any party whenever the court determines such award is appropriate. 30 U.S.C.A. § 1270(d) (West Cum. Supp. 1979).

Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary resulting from administrative proceedings, deems proper.

Id. § 1275(e).

14. State and Local Fiscal Assistance Amendments of 1976:

"In any action under this section to enforce § 1242(a) of this title, the court in its discretion, may allow the prevailing party other than the United States, reasonable attorney fees, and the United States shall be liable for fees the same as a private person. 31 U.S.C. § 1244(e) (1976).

15. Federal Water Pollution Control Act Amendments of 1972:

"The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate. 33 U.S.C. § 1365(d) (1976).

16. Marine Protection, Research, and Sanctuaries Act:

"The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate. *Id.* § 1415(g)(4).

17. Deepwater Port Act:

"The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate. *Id.* § 1515(d).

18. Safe Drinking Water Act:

“The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such an award is appropriate. 42 U.S.C. § 300j-8(d) (1976).

19. Civil Rights Attorney s Fees Awards Act of 1976:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, 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. § 1988.⁴⁴

20. Civil Rights Act of 1964:

“In any action commenced pursuant to this subchapter, 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, and the United States shall be liable for costs the same as a private person. *Id.* § 2000a-3(b).

“In any action or proceeding under this subchapter the United States shall be liable for costs, including a reasonable attorney s fee, the same as a private person. *Id.* § 2000b-1.

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney s fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Id. § 2000e-5(k).

21. Legal Services Corporation Act Amendments of 1977

If an action is commenced by the corporation or by a recipient and a final order is entered in favor of the defendant and against the Corpora-

44. Fees may be recovered against the United States only in actions brought “by or on behalf of the United States to enforce the Internal Revenue Code. Shannon HUD, 577 F.2d 854 (3d Cir.), *cert. denied*, 439 U.S. 1002 (1978). And even in such cases they may be recovered only upon finding that the action was frivolous, unreasonable, or without foundation. *See note 41 supra*. NAACP v. Civiletti, No. 78-1639 (D.C. Cir. Sept. 26, 1979). Chief Judge Wright, dissenting in *Civiletti*, contended that Congress did not intend that fees be recoverable from the United States under the Act only in tax cases. One of his arguments was that the attorneys fees provision of the Rehabilitation Act of 1973, 29 U.S.C. § 794a(b), parallels the Civil Rights Attorney Fees Awards Act of 1976” and the former sponsor and the accompanying Committee Reports made it clear that this attorneys fees provision is to be used to vindicate rights against the federal government.

tion or a recipient's plaintiff, the court shall, upon motion by the defendant and upon a finding by the court that the action was commenced or pursued for the sole purpose of harassment of the defendant or that the Corporation or a recipient's plaintiff maliciously abused legal process, enter an order awarding reasonable costs and legal fees incurred by the defendant.

42 U.S.C.A. § 2996e(f) (West Cum. Supp. 1979).

22. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970:

(a) The Federal court having jurisdiction of a proceeding instituted by a Federal agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such a sum as will in the opinion of the court reimburse such the owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if—

(1) the final judgment is that the Federal agency cannot acquire the real property by condemnation; or

(2) the proceeding is abandoned by the United States.

(b) Any award made pursuant to subsection (a) of this section shall be paid by the head of the Federal agency for whose benefit the condemnation proceedings was instituted.

(c) The court in rendering a judgment for the plaintiff in proceeding brought under section 1346(a)(2) or 1491 of title 28, awarding compensation for the taking of property by a Federal agency or the Attorney General effecting settlement of any such proceeding, shall determine and allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

42 U.S.C. § 4654 (1976).

23. Noise Control Act of 1972:

"The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such an award is appropriate. *Id.* § 4911(d).⁴⁵

24. Energy Policy and Conservation Act:

"The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate. *Id.* § 6305(d).

45. See note 43 *supra*.

25. Solid Waste Disposal Act:

“The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such an award is appropriate. *Id.* § 6972(e).

26. Clean Air Act Amendments of 1977

In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought in any case where the court finds that such action was unreasonable.

42 U.S.C.A. § 7413(b) (West Cum. Supp. 1979).

“The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate. *Id.* § 7604(d).

“In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate. *Id.* § 7607(f).

27. Outer Continental Shelf Lands Act Amendments of 1978:

A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party whenever such court determines such award is appropriate. 43 U.S.C.A. § 1349(a)(5) (West Cum. Supp. 1979).

28. Natural Gas Pipeline Safety Act Amendments of 1976:

In any action under this section the court may, in the interest of justice, award the costs of suit, including reasonable attorney fees and reasonable expert witnesses fees, to a prevailing plaintiff. Such court may in the interest of justice, award such costs to prevailing defendant whenever such action is unreasonable, frivolous, or meritless.

49 U.S.C.A. § 1686(e) (West Cum. Supp. 1979).

29. Foreign Intelligence Surveillance Act of 1978:

An aggrieved person shall be entitled to recover reasonable attorneys fees and other investigation and litigation costs reasonably incurred. 50 U.S.C.A. § 1810 (West Cum. Supp. 1979).