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THE TRUE "AMERICAN RULE"
DRAFTING FEE LEGISLATION
IN THE PUBLIC INTEREST

Mary Frances Derfner*

One of the most fertile fields for new legislation in the past decade has been the field of court awarded attorneys fees. The traditional American Rule, which is unique among the common law nations of the world, provides that all parties to the litigation pay their own attorneys fees, regardless of the outcome. Federal courts are permitted to assess the fees of the winning litigant against the losing party in only limited circumstances, the most common being when a federal statute provides for such fee shifting. Prior to the 1960's, the fee statutes which Congress adopted were relatively few and were only rarely used. Beginning with that decade, however an attorneys fees revolution took place. As Congress began to pass civil rights and public interest laws, it recognized that private enforcement was essential to make the new laws effective, and that incentives to litigate were essential to promote private enforcement. The result was the creation of a species

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1. The system which prevails elsewhere is known variously as the English rule, the continental rule, or the European rule, wherein prevailing litigant is reimbursed by the loser for at least part of his attorneys fees routinely. See note 11 infra.

2. In addition to this statutory exception to the American rule, fees are allowed, in American federal courts, where provided by contract; in diversity cases where provided in applicable state statutes or practices; or under three equitable exceptions. The first of these is the common fund theory, where named plaintiff causes the creation of fund which will be shared by persons not party to the litigation, and the litigant fees are paid out of the fund in order to prevent the unjust enrichment of the nonparties. See, e.g., Sprague Tisco Nat'l Bank, 307 U.S. 161 (1939); Trustees v. Greenough, 105 U.S. 527 (1881). A second equitable exception is the bad faith, or obdurate obstinacy rationale—the punitive assessment of fees against party who either brings or defends suit in bad faith, or engages in bad faith during the course of litigation. See, e.g., Vaughn v. Atkinson, 369 U.S. 527 (1962). The third equitable exception to the American rule is the common benefit theory, which allows fee shifting when litigant produces generally nonmonetary benefit shared by nonparties, and the assessment of fees against the defendant will serve to spread the cost evenly among the beneficiaries. See, e.g., Hall Cole, 412 U.S. 1 (1973); Mills Electric Auto-Lite Co., 396 U.S. 375 (1970).
of private attorney general, or citizen who sued to vindicate a policy that Congress considered of the highest priority and a proliferation of statutes authorizing awards of attorneys' fees to such litigants.

For a time, the courts seemed to be full partners in the extension of the private attorney general theory and Congress adoption of new statutes authorizing fees was matched by court decisions invoking equity powers to award private attorney general fees in areas not specifically dealt with by Congress. This partnership was

3. The term "private attorney general" was first used by Judge Jerome Frank, to describe one who brings private enforcement suit. Associated Indus., Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), vacated as moot, 320 U.S. 707 (1943).


5. The number of such fee-authorizing statutes has almost doubled since 1960. Most fee statutes passed since 1960 have involved the broad areas of discrimination based on age, race, sex, handicap or other suspect classification, civil rights, and consumer and environmental protection. E.g., the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976); the Privacy Act of 1974, Id. § 552a(g)(3)(B); the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c(a)(2), 15c(d)(2), 26 (1976); the National Traffic and Motor Vehicle Safety Act of 1966, Id. § 1400(b); the Truth in Lending Act, Id., § 1640(a); the Fair Credit Reporting Act, Id. § 1681n; the Equal Credit Opportunity Act, Id. § 1691e(d); the Motor Vehicle Information and Cost Savings Act, Id. §§ 1918(a), 1989(a); the Consumer Product Safety Act, Id. §§ 2059(e)(4), 2060(c), 2072(a), 2073; the Toxic Substances Control Act, Id. § 2619(c)(2); the Education Amendments of 1972, 20 U.S.C. § 1617 (1976); the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-624 (1976); the Rehabilitation Act of 1973, 29 U.S.C.A. § 794a(b) (West Cum. Supp. 1979); the State and Local Fiscal Assistance Amendments of 1976, 31 U.S.C. § 1244(e) (1976); the Federal Water Pollution Control Act, 33 U.S.C. §§ 1365(d), 1367(c) (1976); the Ocean Dumping Act, Id. § 1415(g)(4); the Deepwater Port Act of 1974, Id. § 1515(d); the Safe Drinking Water Act, 42 U.S.C. § 300j-8(d) (1976); the Clean Air Act, Id. § 1857h-2(d); the Voting Rights Act Amendments of 1975; Id. § 1973l(e); fee provisions in Titles II and VII of the Civil Rights Act of 1964, Id. §§ 2000a-3(b), 2000e-5(k); Title VIII of the Civil Rights Act of 1968, Id. § 3612(c); the Omnibus Crime Control & Safe Streets Act of 1968, Id. § 3766(c)(4)(B); the Noise Control Act of 1972, Id. § 4911(d); and the Age Discrimination Act of 1975, 42 U.S.C.A. § 6104(e) (West Cum. Supp. 1979).

6. Most nonstatutory "private attorney general" fee awards were made in cases brought under the Reconstruction Civil Rights Acts, 42 U.S.C. §§ 1981-1986 (1976), and involved issues ranging from discrimination in schools, housing, jobs and juries to first and fourth amendment violations, police harassment, and redistricting. See generally M. Derfner, Attorneys' Fees in Pro Bono Publico Cases: A Compilation of Federal Court Cases (1972) (Lawyers' Comm. for Civil Rights, Wash., D.C.), reprinted in Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess., 862, at 888-1025 (1973). By the time of Alyeska Pipeline Serv Co. Wilderness Soc 421 U.S. 240 (1975), the private attorney general theory was also being applied to cases involving, inter alia, union democracy and fair representation and consumer and environmental protection. E.g., M. Derfner, Attorneys' Fees in Pro Bono Publico Cases: A Compilation of Federal Court Cases (1972) (Lawyers' Comm. for Civil Rights, Wash., D.C.), re-
dissolved in 1975, when the United States Supreme Court ruled in *Alyeska Pipeline Service Co. v. Wilderness Society*\(^7\) that federal courts had no equity power to award fees,\(^8\) and that it was up to Congress, not the courts, to specify which congressional policies should be promoted by fee awards.\(^9\)

\(^7\) 421 U.S. 240 (1975).
\(^8\) The Court in *Alyeska* held that, 28 U.S.C. § 1923 (1976), costs statute basically unchanged since 1853, deprives federal courts of any equitable power to award fees, notwithstanding an unbroken line of cases since 1882 which had held that courts could exercise such power where necessary to do justice. 421 U.S. at 257.

In 1939, the Supreme Court held:
Allowance of [attorneys fees] in appropriate situations is part of the historic equity jurisdiction of the federal courts. Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional [statutory] taxable costs is part of the original authority of the chancellor to do equity in particular situation.

*Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164, 166 (1939) (Frankfurter, J.).* In 1973, the Supreme Court held:

Although the traditional American rule ordinarily disfavors the allowance of attorneys fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys fees when the interests of justice so require. [F]ederal courts do not hesitate to exercise this inherent equitable power whenever overriding considerations indicate the need for such recovery.


The *Alyeska* Court did not even attempt to explain why this statutory bar should apply to the private attorney general theory and not to the common fund, common benefit and bad faith theories which it reaffirmed. *See* note 2 *supra.* Mr. Justice Marshall, dissenting, concluded “that the Court is willing to tolerate the equitable exceptions to its analysis, not because they can be squared with it, but because they are by now too well established to be casually dispensed with. 421 U.S. at 278.

\(^9\) Congressional utilization of the private-attorney-general concept cannot in no sense be construed as grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys fees whenever the courts deem the public policy furthered by particular statute important enough to warrant the award.

Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys fees under some, but not others. But it would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys fees only in connection with the former.

421 U.S. at 263-64.
The increasing importance of attorneys' fees for public interest litigants, and the Supreme Court's curbing of the courts' ability to fill out congressional policy have made the literal language of attorneys' fees statutes worthy of critical study and have highlighted the need for a careful analytical look at the different types of provisions which may be used to effectuate certain legislative goals.

In the following analysis, which deals with some of the drafting categories in which fee statutes may fall, it is important to remember that a provision for attorneys' fees is designed to affect the policy balance, and that fee provisions will inevitably stimulate or retard certain goals and policies, giving an advantage, in varying degrees, to one interest or another. There is no such thing as a neutral attorneys' fees policy or statute. How the balance is affected, and to what degree, depends on the specific form of the fee provision. This article evaluates how drafting affects legislative policy in two areas: The breadth of statutory coverage and the standards for receipt of fees, including how recipient eligibility is determined and how readily fees are awarded.

I. THE BREADTH OF COVERAGE

There are three general categories of fee legislation: Omnibus, specific, and generic. A provision which authorizes fee shifting in any civil litigation, whether the interests promoted are public or purely private, is an omnibus provision; one which authorizes fee awards under a single statute, or a single section of a single statute, is specific; and one which authorizes fees for cases which fall into a specifiable category is generic.

10. While it might be argued that the English Rule, where fees are automatically shifted to the losing litigant upon completion of a case, is neutral, such a system favors the wealthier litigant in private litigation, and the defendant in public interest litigation. See notes 16-23 infra and accompanying text.

11. This is the English rule, which prevails almost universally. The English system is described at length in Goodhart, Costs, 38 Yale L.J. 849 (1929). In England itself, the fee award is discretionary but the usual practice is to allow it, and the amounts awarded follow a rigid schedule of maximum permissible fees for each task within each court level. The English system has been adopted, with but few modifications, in other nations within the British Commonwealth, such as Australia, Canada and New Zealand. Williams, Fee Shifting and Public Interest Litigation, 64 A.B.A.J. 859 (1978). The system has been altered and adapted in other countries and varies widely from place to place. See ABA Int'l & Comparative Law Section Proceedings—Report of the Committee on Comparative Procedure & Practice (1962).

The United States, of course, has no omnibus fee provision.

12. The vast majority of American fee shifting provisions fall under this category.

13. The United States Code currently contains but a handful of generic provisions. See notes 56-58 infra and accompanying text.
A. Omnibus Fee Legislation

Adoption of an omnibus attorneys fees provision would either reverse or substantially modify the American Rule," depending upon whether the provision mandated fee shifting or merely authorized it. Either approach—adoption of the English system of universal indemnity or authorization of fee shifting “in the interests of justice, or under similar standards—poses dangers for the public interest litigant, especially when applied to purely private cases.

1. Universal Indemnity

The benefits and drawbacks of the traditional American rule as applied to private litigation have been hotly contested in recent years. Proponents of the rule argue that a change would deter litigation by creating a likelihood that litigants would be forced to pay double costs. Opponents of the rule argue that a party who wins a lawsuit is not made whole if he must pay an attorney’s fee out of his own pocket. Since the country has had no experience with indemnity in purely private litigation, no one really knows what ef-

14. See, e.g., Avilla, Shall Counsel Fees Be Allowed? CALIF ST. B.J., March, 1938 at 42; Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 CALIF L. REV 792 (1966); Ehrenzweig, Shall Counsel Fees Be Allowed? 26 CALIF ST. B.J. 107 (1951); Greenberger, The Cost of Justice: An American Problem, An English Solution, 9 VILL. L. REV 400 (1964); Kuenzel, The Attorney Fee: Why Not Cost of Litigation? 49 IOWA L. REV 75 (1963); Mause, Winner Takes All: A Reexamination of the Indemnity System, 55 IOWA L. REV 26 (1969); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 MINN. L. REV 619 (1931); McLaughlin, The Recovery of Attorney Fees: A New Method of Financing Legal Services, 40 FORDHAM L. REV 761 (1972); Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. COLO. L. REV 202 (1966); Note, Attorney Fees as an Element of Damages, 15 U. CIN. L. REV 313 (1941); Note, Attorney Fees: Where Shall the Ultimate Burden Lie? 20 VAND. L. REV 1216 (1967); Note, Distribution of Legal Expense Among Litigants, 49 YALE L. J. 699 (1940); Comment, Court Awarded Attorney Fees and Equal Access to the Courts, 122 U. PA. L. REV 636 (1974). In fact, both sides of the controversy often offer their theory as the remedy for the same problem. For instance, the supporters of the American rule argue that it allows the poorer citizen to press his claims in court without the fear that he will be forced to pay both his own and his opponent’s lawyer; supporters of the English rule, on the other hand, argue that poor citizen will be more, not less, likely to sue under system of universal indemnity if convinced the often prohibitive expenses of litigation would be borne by his opponent. Proponents of the American rule argue that, if this is true, adoption of universal indemnity would increase court congestion by encouraging recourse to the courts and the institution of more small claims; opponents argue that adoption of universal indemnity would clear the courts by encouraging out of court settlement.

15. The traditional American rule, as applied to purely private cases, has great weight of history behind it, no matter how slim the initial justification. The statutes which Congress has passed abrogating the rule have, by and large, concerned litigation in the public interest, and even those fee provisions, such as the
fect universal indemnity would have on such litigation.\textsuperscript{16} What effect adoption of universal indemnity would have on the private attorney general, however, is clear. He would become one of our most endangered species.

Public interest litigation is always uncertain at best. The past decade has seen the erection of a multitude of procedural and jurisdictional barriers: immunities have appeared out of nowhere,\textsuperscript{17} injured parties have been told they lack standing to complain about the acts that injured them,\textsuperscript{18} and litigants have found themselves

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\textsuperscript{16} In England, there is much less litigation than there is in the United States. This fact has led many commentators to believe that universal indemnity would increase the instances of out-of-court settlement and decrease litigation, thereby acting as a solution to court congestion. See, e.g., Goodhart, Costs, 38 YALE L.J. 849, 862-72 (1929); Kuenzel, The Attorney Fee: Why Not Cost of Litigation? 49 IOWA L. REV 75, 80 (1963). What is unfortunate is that adoption of the English rule, if it would decrease litigation here, would doubtless deter the less wealthy litigant more than the wealthy one. See generally Mause, Winner Takes All: A Reexamination of the Indemnity System, 55 IOWA L. REV 26 (1969) (examines the English rule under mathematical formula and draws from psychology in an attempt to discover what effect indemnity would have on private litigation in this country).

Under the American rule, it is said that poor plaintiffs in private cases are kept out of court because they cannot afford a lawyer to represent them. But this is rarely true in private federal litigation, where the unique American contingent fee system permits the litigant to hire an attorney. Here, the plaintiff risks costs and expenses, and the attorney risks uncompensated hours; neither is significantly out of pocket if the suit is unsuccessful. Under the English system, however, the poor plaintiff, should he lose, owes both his own attorney and that of his opponent. Unless plaintiff is judgment proof, he is going to think twice before filing even the most meritorious case.

The most frequently cited example of the unfairness of the American rule is the small claim whose value is exceeded by the lawyer fee. If an injured party is not wealthy, the chances of his risking more than twice the potential damages to recover are slim indeed, even with an all but airtight case.


frustrated by bizarre exhaustion and abstention rules.\textsuperscript{19} Simply gaining a judge’s ear is hard enough, but then one must prove one’s case, and is now often required to prove an intent on the part of the defendants to disobey the law.\textsuperscript{20} The rules of the game can, and often do, change in midcase.

As public interest law becomes more sophisticated and more complicated, the time and expense involved increases. The opponent in public interest litigation is more often than not either a public body or a corporation, with resources to litigate every point to the hilt, including multiple appeals and remands.

A purely private case is less uncertain, less complicated and less expensive than a public interest case. Furthermore, private litigation often produces a monetary recovery for the plaintiff which justifies the risk inherent in litigation. If universal indemnity deters the less wealthy litigant in a purely private case, the deterrent effect of universal indemnity on a private attorney general must be staggering.

In England, Canada, and the other Commonwealth nations, there are very few private attorneys general.\textsuperscript{21} While rules which limit standing may partially explain this,\textsuperscript{22} it is logical to assume that universal indemnity is also largely to blame.\textsuperscript{23} There is no country which adopts universal indemnity and has laws treating

\begin{itemize}
\item \textsuperscript{19} See, e.g., Stone Powell, 428 U.S. 465 (1976); Hicks Miranda, 422 U.S. 332 (1975).
\item \textsuperscript{21} Williams, Fee Shifting and Public Interest Litigation, 64 A.B.A.J. 859, 862 (1978).
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Law reform bodies in Australia and Canada have acknowledged that costs indemnity effectively bars the private enforcer from access to the courts, and they recognize the merits of the American costs practice in this type of litigation.

That Australia and Canada, which traditionally have applied fee shifting in all cases, should now be ready to abandon the principle in public interest suits in order to make the proceeding viable is instructive. Experience in these countries indicates that the introduction of fee shifting in the United States could well end the role of the private enforcer in litigation of this kind. Fee shifting undoubtedly would help compensate the successful party, but what its advocates fail to acknowledge is that for the government, corporation, or individual charged with breach of the public interest, the benefit would be much more significant. The threat of litigation would all but disappear.
\end{itemize}

\textit{Id.}
a public interest litigant and a private litigant differently when it comes to fee shifting. The American Rule, however, has permitted the United States to engage its private citizens in helping to enforce its laws by passing fee provisions which typically protect the private attorney general from assessment of his opponent's counsel fees should he lose, and encourage him to sue by making fee awards almost automatic should he win.

It is not a mere coincidence that public interest litigation, the contingent fee, and the American rule are all unique to the United States. Adoption of universal indemnity would obviously dispose of the contingent fee. The possibility that it would also dispatch the private attorney general should make legislators and public interest groups extremely wary.

2. Modified Indemnity

Several attempts have been made in recent years to authorize fee shifting in any civil case when a fee award would serve the "interests of justice." While this approach seems, on its face, more equitable and less risky for the private attorney general, it shares many of the drawbacks of universal indemnity because it covers both public interest and private actions.

The differences between public interest cases and private cases are simply too great to encompass within the language of a single, general fee statute. The largest difference between private and public interest cases is that private cases generally reflect no specific policy no goal to be favored, no claim or defense to be encouraged or discouraged. In short, they reflect a preference for strict neutrality and a focus purely on the individual case. Conversely public interest cases arise under specific statutes enacted to achieve certain legislative goals. Clearly the "interests of jus-

24. E.g., H.R. 7826 & 8221, 94th Cong., 2d Sess. (1976) (sponsored by Rep. John F Seiberling, Democrat of the 14th Congressional district of Ohio). The Bill was introduced less than month after Alyeska. "If in civil action the court determines the interests of justice so require, the court shall award reasonable attorneys fees to the prevailing party. The United States shall be liable for such fees the same as private party. Id. When the 94th Congress failed to act on this measure, Rep. Seiberling reintroduced the bill to the next Congress. H.R. 10105, 95th Cong., 1st Sess. (1977).

25. Even if this type of language is, through legislative history or otherwise, seen as restoration of the "private attorney general" rationale, authorizing fees only in public interest litigation, it is an inadequate answer to the problem of encouraging private citizens to sue in the public interest. See notes 61-64 infra and accompanying text.
"Public Interest Litigants"

The "public interest" standard could not have the same meaning in purely private cases, where neutrality is necessary and in public interest cases, where equity favors the side seeking to assert and vindicate congressional policy. Would fees be awarded as a matter of course, or only rarely? Should a court treat plaintiffs and defendants equally or favor one side or the other? The answers are, of course, different for private and public interest cases, and even for different types of public interest cases, yet any attempt to develop different standards from identical language would be apt to create dangerous confusion within the courts. This confusion would be intensified by the difficulty which often arises in defining the dividing line between private cases and public interest cases, especially in those many cases which have both private and public elements.

B. Specific Fee Legislation

By far the greatest number of federal fee provisions are specific, that is, they authorize fees for suits under only particular statutes, or particular sections of those statutes. Such provisions are clearly adjuncts to specific legislative policies, and as such are generally attached only to those statutes which Congress deems of the utmost importance.

The greatest benefit of the specific statute is that it can be tailored to the particular situation with great precision.


27. One can, in fact, get an interesting view of American history since the Reconstruction by ascertaining which statutes contained fee shifting provisions. For example, our first fee shifting measures were contained in the Enforcement Act of 1870, Ch. 114, § 12, 16 Stat. 140, which prohibited certain acts of racial discrimination in voting. Similarly, in the decade following the Crash of 1929, fee provisions were included in, inter alia, the Securities Act of 1933, 15 U.S.C. § 77k(e) (1976); the Securities Exchange Act of 1934, Id. §§ 78i(e), 78r(a); the Trust Indenture Act, Id. §§ 77700(e), 77www(a); the Norris-LaGuardia Act, 29 U.S.C. § 107(e) (1976); the Fair Labor Standards Act, Id. § 216(b).

28. For example, the Norris-LaGuardia Act fee provision, 29 U.S.C. § 107(e)
tors at least must face questions of how the provision should be drafted to promote the goals of one very explicit, limited citizen suit provision. Greater care can be taken to answer those questions than is possible with a broader fee provision. Confusion in the courts is also avoided. The courts, at least after Alyeska, know whether they can or must award fees in a given case depending upon whether the suit is brought under a statute which authorizes fee shifting. As the legislative history of specific fee provisions is becoming more and more detailed, judges discretion is becoming correspondingly circumscribed, and decisions more uniform.

On the other hand, in light of Congress increasing reliance upon private citizens to enforce the laws which it passes, and the Supreme Court's insistence that fees be awarded only when Congress has specifically so authorized, this approach seems both time-consuming and inefficient. In order for congressional response to Alyeska to be complete, it would be necessary under the specific approach, to isolate every law Congress has ever passed; to decide which of these laws contain a congressional policy important enough to merit fee shifting (or which sections of a law do and

(1976), authorizes fees to successful defendants alone, because under that Act it is the defendants rather than the plaintiffs who assert the federal right. Likewise, under the Trademark Act fee provision, 15 U.S.C. § 1117 (1976), fees are allowed "in exceptional cases, and to plaintiffs and defendants equally, because the right being asserted or protected is basically private one.

29. Under the nonstatutory private attorney general rationale, the judges discretion was necessarily extremely broad, and different jurisdictions frequently came to different conclusions about virtually identical cases. Compare Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331 (1st Cir. 1973), with Natural Resources Defense Counsel, Inc. v. EPA, 512 F.2d 1351 (D.C. Cir. 1975). The broader the coverage of the fee provision, the broader the judges discretion, so that this situation might well repeat itself under both an omnibus provision and an extremely broad generic provision. See notes 61-64 infra and accompanying text.

which do not contain such important policies); and then, to draft language amending the laws, one by one. Also, care would have to be taken to include fee provisions in all future statutes which involve strong congressional policies. The legislative process simply does not lend itself to this, and thus, the limitations of the specific approach would remain if Congress were to continue to rely upon it almost solely.

The specific approach is limited mainly because it carves out a particular portion of an area of the law and deals with it without simultaneously dealing with related areas of the law sometimes even in other portions of the same statute. So long as the federal courts were able to fill in the interstices, granting fees in cases which promoted strong congressional policies but were brought under laws for which fees were not specifically authorized, then a degree of consistency was achieved. Now that the courts have been

31. Representative John Sieberling, testifying on number of attorneys fee bills, highlighted problems of both inattention and politics which create difficulties when the specific approach is used:

We can often have an anomalous situation on particular bill, for example, the Federal Insecticide, Fungicide, and Rodenticide Act, which is now in the process of being worked through the House. I expect to offer an amendment to that act to authorize the awarding of attorneys fees, and yet it is possible that the House will reject that—you never know from one bill to the next how the mood is going to be. We could end up with a peculiar situation where some statutes have such provision, and others do not.


32. Attorney fee provisions are included in a great number of environmental statutes, e.g., the Toxic Substances Control Act, 15 U.S.C. § 2619(c)(2) (1976), the Water Pollution Prevention & Control Act, 33 U.S.C. § 1365(d) (1976); the Ocean Dumping Act, 33 U.S.C. § 1415(g)(4); the Safe Drinking Water Act, 42 U.S.C. § 300j-8(d) (1976), the Clean Air Act, 42 U.S.C. § 1857h-2(d), the Noise Control Act, 42 U.S.C. § 4911(d), and yet they are not included in, inter alia, the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 131(d) (1976), although this Act has been amended or supplemented four times since Representative Seiberling comments. See note 31 supra.

33. Title VIII of the Civil Rights Act of 1968 contains two citizen suit provisions. 42 U.S.C. §§ 3610, 3612 (1976). Fees are available under the latter, but not the former. Similarly prior to passage of the Civil Rights Attorney Fees Awards Act of 1976, fees were allowed under Titles II and VII of the Civil Rights Act of 1964, but not under Title VI of the same Act. And, prior to passage of 15 U.S.C. § 26 (1976), section of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, fees were allowed in antitrust actions where treble damages were recovered, but not in antitrust actions resulting in only injunctive relief.

34. Prior to passage of the Civil Rights Attorney Fees Awards Act of 1976, 42 U.S.C. § 1982 (1976), housing discrimination statute passed during Reconstruction, did not provide for attorneys fees, but the Fair Housing Act of 1968, which pro-
stripped of the power to act interstitially the specific approach inevitably includes certain types of cases while excluding others that involve the same congressional policies.

The only solution under the specific approach is to pass more fee authorizing statutes. That course presents problems which have become evident in the past few years as the number of fee provisions proposed and enacted has increased dramatically. The sheer number of fee bills proposed under the specific approach poses the twin dangers that legislators will tire of them quickly and stop passing them, or at the opposite extreme, they will become a traditional part of the apparatus and will not be scrutinized closely enough.

Should Congress continue to rely solely upon specific fee legislation, perhaps a modification by which fees are authorized, when appropriate, under all citizen suit provisions of a particular statute, rather than section by section, would be more sensible. More significant modifications are needed, however, if the concept of attorneys' fees as a means of promoting legislative policy is to have adequate force in the 1980's and beyond.

C. Generic Fee Legislation

The generic, or categorical, attorneys fees provision is midway between the omnibus and specific statute. Under the generic approach, Congress selects an area of the law in which it determines that fees are essential, and authorizes fees in that area, rather than statute by statute. Even before Alyeska, Congress passed several

ected the same rights, did. 42 U.S.C. § 3612(c) (1976). The nonstatutory private attorney general rationale permitted the courts to award fees under the former, older law. See, e.g., Lee Southern Home-Sites, Inc., 444 F.2d 143 (5th Cir. 1971). Similarly, prior to Alyeska, many courts used their equity powers to award fees in cases under sections of statutes which were silent as to fees where other sections of the same statute provided for fees. See, e.g., Hall v Cole, 412 U.S. 1 (1973); Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331 (1st Cir. 1973).

35. See note 5 supra. The 95th Congress alone authorized fees under one or more sections of 17 different acts. Id.

36. From the point of view of those who have been most interested in fee legislation, such as pro-civil rights, pro-consumer, pro-environment public interest advocates, the widespread recognition of how important fees are has negative side: the prospect that their opponents will succeed in using fee legislation to promote anti-civil rights, anti-environmental, or pro-big business policies. Some of the recent bills authorizing fees against the United States, two of which have, incredibly, passed the Senate, have made this prospect quite real. See notes 58 & 95 infra. A great number of Senators are now obviously used to the idea of attorneys' fees as being in the public interest, and have ceased to examine them in any but cursory fashion.

37. Congress had earlier passed several generic provisions in commercial areas.
generic provisions in public interest areas, in an attempt to avoid the straitjacket of specific statutes. 38

The generic approach can encompass provisions of varying scope and breadth. Under the generic approach, Congress might authorize fee shifting in cases that vindicate a congressional policy as reflected in federal statutes, on (broadly) environmental protection, or (narrowly) air pollution, whether suit is brought under the Clean Air Act 39 or section 1983, 40 inter alia. Also, fees might be authorized when a private suit vindicates statutory policies on (broadly) consumer protection or (narrowly) fair lending practices. In addition, the generic approach can, as in the Civil Rights Attorney’s Fees Awards Act of 1976 41 or the Truth in Lending Act fee provision, 42 merely lump together various statutes which involve similar rights, and authorize fees under those statutes, in which case the breadth of the measure depends upon the breadth of the statutes listed.

Our narrowest generic public interest fee statute is the fee provision in the Truth in Lending Act, 43 initially a specific provision authorizing fees for proof of violations of the Act’s disclosure provisions. In 1974, the provision was amended to cover suits brought under the Fair Credit Billing Act, 44 and in 1976, it was again amended to cover suits brought under the Consumer Leasing Act 45 as well. This provision is narrow both because it merely lists specific statutes, making it, in essence, the equivalent of three specific provisions, and because the statutes which it covers are pre-


43. Id.
close and limited in their coverage. It is generic, nonetheless. Congress chose fair lending practices as an area for which fees were appropriate, and proceeded to authorize them in relevant statutes.

Another generic fee provision which lists a number of statutes in a given area is the Civil Rights Attorney's Fees Awards Act of 1976. The Congress chose civil rights as an area for which fees were essential, and authorized them in cases under six civil rights provisions. Unlike the Truth in Lending Act, however, the 1976 Act is the broadest fee statute to date because of the breadth of one of the statutes covered, section 1983.

Two additional public interest generic fee provisions, section 402 of the Voting Rights Act Amendments of 1975 and section 718 of the Education Amendments of 1972, are drafted differently. Although these provisions are less broad than the Civil

49. 42 U.S.C. § 1983 (1976). This section provides cause of action for violations of federal constitutional and statutory rights by state or local officials. It was, and still is, the workhorse of civil rights law in that § 1983 allows suits for jury discrimination, school desegregation, violations of voting rights, misuse of federal funds, violation of first and fourth amendment rights, denial of due process or equal protection, police misconduct, and even some consumer and environmental issues. Section 1983 is, in fact, so broad that it covers majority of the cases covered by the generic fee provisions in both the Education Amendments and the Voting Rights Act Amendments.

An Administration spokesperson, testifying at hearings on the Civil Rights Attorney Fees Awards Act and other fee bills, best summed up the breadth of § 1983 and the consequent breadth of the Attorney Fees Act:

[Section] 1983 is by its nature so broad, that this would be tantamount to virtually saying in all civil rights actions attorneys fees would be awarded.

The language of 1983, applies to any rights, privileges, or immunities secured by the Constitution and laws. 1983 is not even limited to the Constitution: it also applies to rights secured by the laws of the United States. It would be a general private attorney general piece of legislation if it were enacted.

Rights Attorney’s Fees Awards Act of 1976, they are broader than the Truth in Lending Act. The Voting Rights Act fee provision authorizes fees for proof of violations of the voting guarantees of the fourteenth and fifteenth amendments; the Education Amendments fee provision authorizes fees for proof of racial discrimination in public elementary and secondary education. Both of these provisions, unlike the Fees Awards and the Truth in Lending Acts, define their coverage in words rather than sections, and therefore, cover an area in blanket fashion, regardless of the statute under which suit is brought. The Voting Rights Act fee provision is less narrow than the Education Amendments measure simply because its definition of the area covered is broader.

All generic statutes passed to date have dealt with substantive categories, but the generic approach also might be used for procedural categories of cases. For example, a statute might authorize the award of fees in certain types of administrative hearings, or in certain types of rulemaking, ratemaking, licensing, or adjudicatory proceedings. Also, a statute might authorize fee shifting when-

54. One attendant benefit of this type of drafting is that the provision covers not only current statutes which the drafters might have overlooked, but future statutes in the area as well, so that it becomes difficult for a case or class of cases to slip through the holes.
55. 20 U.S.C. § 1617 (1976). Section 1617 could well have included discrimination based on sex, handicap or age as well as race, and state institutions of higher education as well as elementary and secondary schools.
56. Several pieces of specific legislation covering administrative hearings have been passed in the last few years. Only one of those, however, section 122 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C.A. § 2632(a) (West Cum. Supp. 1979), is truly fee shifting provision, permitting the assessment of the fees of successful intervenors in ratemaking proceedings against the utility seeking the rate increase. The other two fee provisions in the Federal Power Act, Id. § 825q-1(b)(2), and the Federal Trade Commission Improvement Act, 15 U.S.C.A. § 57a(h)(1) (West Cum. Supp. 1979), allow federal agency to indemnify intervenors in administrative hearings out of funds appropriated for that purpose by the agency itself.
57. It would be necessary to qualify such statutes, so that they resulted in promotion of the public, rather than private, interest. One way of accomplishing this would be to combine the categorial and procedural generic approach and to authorize fees when participation in hearings has resulted in promotion of consumer or environmental interests. Another way of qualifying such procedural statute would be to allow fees to only those intervenors who met certain criteria, such as by requiring that an intervenor have little or no financial interest in the outcome of the hearing or to require that an intervenor prove financial hardship before fees can be allowed. The first method, combining procedural and substantive categories, is by far the best solution. It is more effective way of ensuring payment to intervenors who promote
ever a private citizen is successful in having the United States or one of its officials held in contempt.58

The merits and drawbacks of generic fee legislation vary according to the breadth of the provision. Any generic measure avoids the major problems of the omnibus provision by dealing with only one area of the law at a time, so that the congressional policies involved are basically the same, and uncertainty and inconsistency are diminished.59 The generic provision also deals con-

58. Since the Alyeska decision, several legislators have introduced bills which would authorize or mandate fees against the United States any time it lost civil case. E.g., H.R. 4903, 95th Cong., 1st Sess. (1977) (Rep. Samuel Devme), mandating fees against the United States as either plaintiff or defendant any time it did not succeed; H.R. 913, 95th Cong., 1st Sess. (1977) (Rep. John Hammerschmidt), mandating fees against the United States as unsuccessful plaintiff only. S. 1001, 95th Cong., 1st Sess. (1977) (Sen. Pete Domenici), mandating fees against the United States as plaintiff or defendant when it loses case, mandating proportional fees against the United States as plaintiff or defendant when it partially loses, and authorizing fees against the United States as plaintiff or defendant when it wins; S. 265, 96th Cong., 1st Sess. (1979) (Sen. Pete Domenici), mandating fees against the United States as plaintiff or defendant when it loses, unless it can show its position was substantially justified. Both S. 1001 and S. 265 limited eligibility to individuals with net worth of less than $1 million, and businesses with net worth of less than $5 million.

While these bills may seem generic, they are actually omnibus, because they authorize fee shifting in an almost limitless range of private as well as public cases.

Both S. 1001 and S. 265 were passed by the Senate. S. 1001 passed in late 1977 as an amendment to the Legal Services Corporation Act, but was rejected as non-germane by the House of Representatives in conference. S. REP No. 96-253, 96th Cong., 1st Sess. 2 (1979). S. 265 was recently passed by vote of 94 to 3 in the Senate, 125 CONG. REC. S10,924 (daily ed. July 31, 1979), and was sent to the House, where its future is uncertain. See note 95 infra.

59. The similarities within existing fee provisions in one area indicate that Congress has normally adopted the same standards, and often the same statutory language, for cases arising within the same area. For example, most of the statutes authorizing awards of attorneys fees in the environmental law field are the same: the Water Pollution Prevention and Control Act, 33 U.S.C. § 1365(d) (1976), the Deepwater Ports Act, Id. § 1515(d), the Ocean Dumping Act, Id. § 1415(g)(4), and the Noise Control Act, 42 U.S.C. § 4911(d) (1976), the Clean Air Act, Id. § 1857h-2(d), the Safe Drinking Water Act, Id. § 300j-8(d) all use identical language. The same standards apply in most consumer protection fee provisions, e.g., Fair Credit Reporting Act, 15 U.S.C. § 1681(n) (1976), Truth in Lending Act, Id. § 1640(a), and two provisions of the Motor Vehicle Information and Cost Savings Act,
sistently with more than one statute at a time, and therefore, accomplishes Congress goals more quickly and rationally than the specific approach. With the generic fee provision, it is also easier to adapt rules of construction from one case to another than if there are different types of fee provisions for cases under different statutes.\textsuperscript{60}

As with omnibus legislation, the problems which accompany the broadest type of generic fee provision revolve around difficulties in definition and consistency in application. Because a generic provision does not cover both private and public interest cases, these problems are less severe for generic than for omnibus measures, yet they still exist, and the broader the provision, the more severe the difficulties.

The broadest type of generic fee provision is represented by a bill offered by Representative Robert Drinan shortly after \textit{Alyeska} was handed down, authorizing fee shifting in suits under “any provision of law which provides for the protection of civil or constitutional rights.”\textsuperscript{61} The intent of such a provision is to restore the pre-\textit{Alyeska} situation, and reinstate the equity power of courts to continue the evolutionary process by which the private attorney general theory was gradually developed. Courts would exercise broad discretion in keeping with the statutory and constitutional policies to be enforced in the cases before them.

At the same time, a statute such as that proposed by Representative Drinan would restore the uncertainty that characterized the private attorney general line of cases as they stood at the time of \textit{Alyeska}.\textsuperscript{62} If this situation were merely restored, environmental

\textit{Id.} \textsuperscript{60}§§ 1918(a), 1989(a). Similarly, the majority of antidiscrimination fee provisions contain identical language, e.g., Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), e-5(k) (1976), Voting Rights Act Amendments of 1975, \textit{Id.} \textsuperscript{61}§ 1973l(e), and Civil Rights Attorney Fees Awards Act of 1976, amending \textit{Id.} \textsuperscript{62}§ 1988; and even where the language is different (as with the Education Amendments of 1972, 20 U.S.C. § 1617 (1976), and the Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1976)) the judicial interpretation and legislative history have been similar.

\textsuperscript{60} For example, there is potential conflict between 42 U.S.C. § 1982 (1976), for which fees are authorized by the Civil Rights Attorney Fees Awards Act of 1976, and 42 U.S.C. § 3612(c) (1976), the fee provision of Title VIII of the Civil Rights Act of 1968, both of which cover housing discrimination, but only one of which, § 3612(c), requires showing that plaintiff is unable to afford counsel before an award can be made.


\textsuperscript{62} See note 29 supra.
protection might warrant fee shifting in Oklahoma but not in Tennessee, and the same suit brought in two different districts might warrant fees in one court and not in the other. It is, perhaps, easy enough to define a constitutional right. But what is a civil right? It would be difficult for Congress to eliminate confusion and uncertainty effectively in the language or legislative history of such a broad generic provision. Therefore, the degree of consistency achieved would depend upon judicial discretion, which can never be certain.

In areas in which Congress can legislate with greater specificity, it should do so, and thereby avoid the problems of uncertainty and inconsistency. In combination with both specific and less broad generic fee provisions, however, a broad, carefully drafted generic statute would be useful. It would restore to the courts the power to fill in the interstices when Congress had not acted specifically. If the courts were instructed that the law provided fees in cases under legislation or constitutional provisions expressing specific substantive policy inconsistency might be minimized.

As generic fee statutes become less broad, they become easier for courts to handle. Environmental protection, consumer protection, and housing discrimination are all relatively easy to recognize, even if they are not easy to define. Standards are easier to draft when a more specific case is involved, and the same standards can safely be applied to all cases within the area. This does not mean, however, that less care need be taken in drafting the standards. More care is necessary because the provision will cover a greater number of cases than would the ordinary specific statute, and any mistake would, therefore, affect more cases.

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64. While the differences among public interest laws are much less striking than the differences between public interest laws and laws involving private interests, these differences do exist. Hence, the similarities in fee provisions for given type of public interest case (fees to "the prevailing party in civil rights laws) do not necessarily carry over to fee provisions in other public interest areas (fees to any party in environmental laws). But, because fee awards in all of these cases are based upon the same rationale of encouraging vindication of strong congressional policies, some of the broader technical questions could be answered, in only general fashion, for such provision.

65. See note 59 supra.
II. DRAFTING THE STATUTE

A. Standards for Receipt

The previous section has discussed the ways Congress might define the areas in which attorneys' fees can be awarded. In a system in which attorneys' fees are viewed not as a regular means of indemnifying a prevailing litigant, but as a means of promoting national policies, the selection of subject matter areas is meaningless, or even dangerous, unless there is some limitation on the parties who are eligible to recover fees in the covered areas. Thus, while the English routinely award fees in a neutral fashion to either side, in the United States, Congress must always specify in each of its fee statutes, inter alia, who may recover fees and how readily fees may be awarded.

Almost invariably Congress has favored plaintiffs who were suing to enforce congressional policies.66 As the number of fee provisions has grown, however, Congress' method of achieving this goal has varied. For many years, the sole format provided mandatory fees to plaintiffs only when plaintiffs prevailed. More recently Congress has passed many statutes authorizing a discretionary fee award to plaintiffs or defendants, maintaining the pro-plaintiff tradition by establishing different standards for awarding fees to prevailing plaintiffs and prevailing defendants. Under the new "two-way" statutes, prevailing plaintiffs have been awarded fees almost as a matter of course, while defendants have been entitled to fees only rarely.

From the Enforcement Act of 187067 until the Civil Rights Act of 1964 nearly a century later the major fee provisions, except for those in cases mainly involving private rights, limited eligibility to plaintiffs. Nineteenth century cases involving state attorneys' fees statutes expressed grave doubts about the constitutionality of one-way measures, and held many of them unconstitutional.68 A distinction was soon drawn, however, favoring the validity of one-way statutes which authorized fees in pursuance of a remedial statutory purpose.69 Thus, in 1915, the Supreme Court upheld the provision of the Interstate Commerce Act70 which authorized fees for plain-

66. But see note 28 supra.
67. Ch. 64, 16 Stat. 140 (1870).
70. 49 U.S.C. § 16(2) (1976).
tiffs only noting that the fee authorization was confined to cases wherein a recovery is had for damages resulting from the violation of some duty imposed in the public interest by the act to regulate commerce, and that one purpose of the fee provision was "to promote a closer observance of the duties so imposed." 71

The same concept was applied several decades later by Judge Wyzanski, in a case under the Fair Labor Standards Act:

The rationale in all the federal statutes is the same. The argument runs as follows. The government has set up a regulatory system for the benefit of persons in the plaintiff's class. To make the regulation effective private suits as well as public prosecutions are permitted. Suits by plaintiffs, if well founded, are in the public interest. Therefore, the cost of prosecuting successful suits should be borne not by those who were victims but by those who have violated the regulations and caused the damage. The fear of this liability for double damages and attorney's fees not only aids compliance, but promotes the settlement of controversies at the conference table or in the administrative office rather than the courts. No similar points, it is thought, can be made for imposing on an unsuccessful plaintiff the costs of the defendant's lawyer. The defendant's vindication in a larger sense serves the interests of justice, but no more so than the successful defense of any suit. Therefore, the public is not more interested in aiding him than any other successful defendant. Moreover, to allow him to recover his out-of-pocket expenses would deter suits by the plaintiffs who under the Fair Labor Standards Act, the Interstate Commerce Act, the Anti Trust Acts, the Packers and Stockyards Act and so forth are assumed, often correctly to be necessitous persons requiring the protective hand of the legislature. Such deterrence runs counter to the policy of the Act in placing reliance for enforcement both upon private suits and public suits. 72

Because the American custom calls for statutory attorneys fees only in order to effectuate congressional policy the pattern described in Hutchinson v. William C Barry, Inc. 73 guaranteeing fees to plaintiffs while denying them to defendants, is the appropriate type of attorneys fees statute, or at least the appropriate starting point. In fact, none of our statutes, save those mainly dealing

73. Id.
with private rights, has ever departed in any significant respect from this model.

There have been, however, variations in the language of these provisions, some of which could have allowed for significant changes from the traditional and appropriate \textit{Hutchinson} pattern. Beginning with the fee provisions in the Civil Rights Act of 1964,\textsuperscript{74} Congress has passed a number of fee provisions that authorize fees, rather than mandate them, to "the prevailing party"\textsuperscript{75} to any party \textsuperscript{76} or to a party who has substantially prevailed.\textsuperscript{77} This language had the potential for producing far-reaching and irrational changes in the pattern of American fee statutes, either by watering down the entitlement of plaintiffs to collect fees, or, more dangerously by making defendants eligible for fees to such an extent that plaintiffs would be deterred and litigation to enforce national policies chilled.\textsuperscript{78}

These statutes, however, have been neither intended nor construed in that way. Instead, they have been uniformly construed to make only slight modifications in the \textit{Hutchinson} pattern. Under the two-way discretionary fee provisions, plaintiffs almost always are entitled to fees and defendants rarely are awarded them. In the more recent fee provisions, this dual standard has been spelled out either in the statutory language\textsuperscript{79} or in the legislative history\textsuperscript{80} in the earliest two-way public interest fee provisions, Titles II and VII

\textsuperscript{74} 42 U.S.C. §§ 2000a-3(b) to e-5(k) (1976).
\textsuperscript{76} E.g., Ocean Dumping Act, 33 U.S.C. § 1415(g)(4) (1976); Water Pollution Prevention & Control Act, \textit{Id.} § 1365(d); Clean Air Act Amendments of 1970, 42 U.S.C. § 1857h-2(d).
\textsuperscript{78} Not a single fee provision Congress has ever passed, aside from the Norris-LaGuardia Act, 29 U.S.C. § 107(e) (1976), has permitted the ready recovery of fees by defendants. This is true even for those fee provisions protecting private rights, under which neither plaintiffs nor defendants may recover readily. See, e.g., Phillips Petroleum Co. v. Esso Standard Oil, 185 F.2d 672 (4th Cir. 1950) (patents); Steak & Brew, Inc. v. Beef & Brew Restaurant, Inc., 370 F Supp. 1030 (S.D. Ill. 1974) (trademarks); Davis E.I. DuPont de Nemours & Co., 257 F Supp. 729 (S.D.N.Y. 1966) (copyrights).
of the Civil Rights Act of 1964, neither the statute nor the debates shed any light on how the provisions should be interpreted. The Supreme Court, in a pair of unanimous decisions a decade apart, made it clear that the proper construction, for that Act and any other one with similar language, is a dual standard close to the Hutchinson rule.

In 1968, in Newman v. Piggie Park Enterprises, Inc. the Supreme Court held in a suit to enforce the public accommodations provisions of the Civil Rights Act that a prevailing plaintiff was a private attorney general, the type of litigant whom Congress intended to encourage to seek judicial relief. The proper standard for awarding attorneys fees to such a plaintiff was, therefore, broad: "It follows that one who succeeds in obtaining an injunction under [the public accommodations] Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.

Ten years later, the Supreme Court turned to the standard for a defendant who prevails in a similar suit. In Christiansburg Garment Co. v. Equal Employment Opportunity Commission, an employment discrimination suit under title VII of the 1964 Act, a prevailing defendant argued that the neutrality of the statutory language entitled it to fees on an equal footing with a prevailing plaintiff. The Supreme Court responded unanimously: "[T]he permissive and discretionary language of the statute does not even invite, let alone require, such a mechanical construction." Rather, the Court continued, the congressional policy required that plaintiffs and defendants be treated differently so that defendants were entitled to fees only under a very narrow standard, rather than under the broad Newman standard.

81. 390 U.S. 400 (1968).
82. Id. at 402.
83. Id.
85. Id. at 418.
86. First, as emphasized so forcefully in Piggie Park, the plaintiff is the chosen instrument of Congress to vindicate policy that Congress considered of the highest priority. Second, when district court awards counsel fees to prevailing plaintiff, it is awarding them against violator of federal law. As the Court of Appeals clearly perceived, "these policy considerations which support the award of fees to prevailing plaintiff are not present in the case of prevailing defendant.
87. "[A] district court may in its discretion award attorney fees to prevailing defendant in Title VII case upon finding that the plaintiff's action was frivolous,
In some fee provisions, Congress has attempted to make coverage even more specific by distinguishing among different categories of plaintiffs eligible for fees and defendants against whom fees might be assessed. For example, the Fair Housing Act of 1968 authorizes discretionary fees to plaintiffs alone, but only if they cannot afford to pay a fee.88 A recent variation of this theme has appeared in two statutes governing certain specific types of regulatory proceedings. Two provisions in the Public Utility Regulatory Procedures Act,89 passed in 1978, allow fees in specific regulatory proceedings to prevailing intervenors who meet tests of financial hardship.90

Similarly the United States always has been treated in a manner different from other plaintiffs or defendants. In cases in which the United States is entitled to bring suit, an applicable fee provision will always specify that fees are available to the prevailing party other than the United States.91 Under no federal attorneys fees provision is the United States entitled to recover fees.92

unreasonable, or without foundation, even though not brought in subjective bad faith. Id. at 421 (1978). The Supreme Court warned lower courts not to engage in post-hoc analysis making it too easy to decide a case was frivolous. The growing number of defendants fees (some from judges who have never found for a plaintiff in an employment discrimination case) suggests that the Supreme Court’ warning is being ignored.

88. 42 U.S.C. § 3612(c) (1976). Courts have construed this to mean inability to pay reasonable fee (which may often be quite large), but not requiring pauper status. See, e.g., Moore Townsend, 525 F.2d 482 (7th Cir. 1975). But see Stevens v. Dobs, Inc., 373 F. Supp. 618 (E.D.N.C. 1974).


90. Several other acts have included legislative history to the same effect. See, e.g., S. REP. NO. 1200, 93d Cong., 2d Sess. 9-10 (1974), reprinted in [1974] 3 U.S. CODE CONG. & AD. NEWS 6285 (Freedom of Information Act). Limitations of this sort are most frequently seen in bills which concern administrative hearings and agencies. It may be preferable in such instances to narrow or further define the types of proceedings covered, rather than to draw distinctions among classes of intervenors who would be eligible. See note 57 supra.


92. Of course, the Legal Services Corporation, while federally funded, is not the United States for purposes of attorneys fee awards. The Corporation may be assessed fees if its employees or clients engage in groundless, frivolous or vexatious litigation, 42 U.S.C. § 2996e(f) (1976), see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 262n.36 (1975), and may receive attorneys fees under federal fee provisions. Id. See also, e.g., Rios v. Enterprise Ass'ns Steamfitters Local 638, 542 F.2d 579 (2d Cir. 1976); Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974); Kulkarni v. Nyquist, 466 F. Supp. 1274 (N.D.N.Y. 1977).


ment immunity statute, section 2412, has the effect of eliminating the federal government from the category of covered defendants as well, unless there is an explicit intention shown to waive this immunity. For this reason, the statutes under which litigation against the federal government is specially desired by Congress generally have a provision authorizing fees against the United States. A major example is the 1972 amendments to Title VII of the Civil Rights Act of 1964, which specifically authorized employment discrimination litigation against the federal government based on extensive legislative history showing Congress awareness that the United States was engaged in widespread employment discrimination.

95. In recent years there has been a steady trend in the very rational direction of putting the United States on the same footing as other parties in paying fees. The 1972 amendments to Title VII are a principal example, because they simply imposed upon the Government the same equal employment obligations, including payment of attorneys' fees, as those born by all other employers.

For the past three or four years, however, attempts have been made to impose upon the United States obligations borne by no other litigant, private or public, in this country or any other. While on the surface bills making the United States and federal agencies liable for fees whenever they lose almost any civil case may seem to resemble traditional attorneys' fee legislation, in fact such bills are not only wholly unprecedented one-way omnibus legislation, but also legislation which would retard, rather than augment, the policies of Congress. See, e.g., note 58 supra.

An extreme example of this type of legislation was S. 1001, which passed the Senate in 1977 as an amendment to the Legal Services Corporation Act. See note 58 supra. This year, the Senate passed a similar bill, S. 265. Id. Although this bill tones down some of the more extreme features of S. 1001, it remains wholly unprecedented and dangerous omnibus legislation, contrary to both the form and aims of all previous fee provisions.

Fees are mandated in all civil cases under S. 265 (except tort cases and except where an existing statute provides different rules) for any plaintiff, defendant, or participant in an administrative adjudication who prevails against the United States or federal agency unless the federal government or agency can show that its position was substantially justified. Fees cannot be awarded an individual whose net worth is more than $1 million, or business worth more than $5 million. To emphasize the risks to the Government, S. 265 requires that any fee award be taken out of the particular office or agency budget, which may not be supplemented for that purpose.

First, this bill would have greater impact than any fee legislation before it. Because the federal government is the principal litigator in the federal courts, S. 265 would have enormous scope. The Congressional Budget Office estimated that under S. 265 fees would be awarded against the United States and its agencies in nine thousand cases a year, for total of more than $108 million. S. REP NO. 253, 96th Cong., 1st Sess. (1979). No figures are available for comparison, but it seems likely that both the caseload and dollar amounts are at least ten times the totals for awards under all existing attorneys' fee provisions combined.

Second, many of the cases in which fees would be awarded against the federal government would be private cases, ranging from cases involving condemnation and
The selection of subject matter areas and limitations on coverage of plaintiffs and defendants are not the only techniques for shaping an attorneys' fee provision, but they are probably the most important. When the purpose of a fee provision differs substantially from the customary one of encouraging citizens to sue in the public interest, as it does in the areas of copyrights, trademarks, and patents, Congress has not limited the coverage of plaintiffs and defendants, but instead, has limited the readiness with which fees should be awarded. Similarly statutes which provide mandatory attorneys' fees along with damages may suggest that a judgment is required for entitlement to a fee award, while the two-way dis-

96. Fee provisions in both the Trademark Act, 15 U.S.C. § 1117 (1976), and the Patent Act, 35 U.S.C. § 285 (1976), limit fees to exceptional cases. While the language of the Copyright Act fee provision, 17 U.S.C. § 505 (1976), does not contain this explicit limitation, it has been interpreted in pari passu with the other provisions. See, e.g., note 78 supra.


forfeiture to cases involving government contracts and other unconnected categories, in which there has been no showing of any necessity for such legislation. There is no statute anywhere in the world which provides fees to one side alone in purely private cases, nor is there in the United States statute involving private rights which allows the assessment of fees in the absence of exceptional circumstances.

While the coverage of so great a variety of private cases, under standards which allow ready recovery for one side alone, is departure of enormous magnitude, the true danger of S. 265 and other similar measures, is that they provide fees to defendants who successfully avoid attempts at enforcement of congressional policies. Under all of our previous fee statutes, plaintiffs have never had to prove good faith, or substantial justification (a much harder test), to avoid fee assessment. Rather, defendants have had to prove either bad faith or some variation of bad faith on the part of plaintiffs in order to obtain fees. A major portion of the government's litigation is statutory enforcement proceedings, such as voting suits to protect the rights of black voters, OSHA cases to allow employees to work in safety, or FDA proceedings to keep dangerous drugs off the market. In these cases, the government is pursuing the national interest in protecting rights that Congress has guaranteed to its citizens. Under S. 265, the government as plaintiff would be unable to add to its budget when it succeeded in enforcing congressional policies, but would be deterred from initiating enforcement proceedings by the prospect of budget reduction which could not be indemnified by additional appropriations.

Obviously, the fact that the government could avoid fee liability by showing substantial justification for the position it unsuccessfully advanced, and the fact that the very rich would be ineligible for fees, would limit somewhat the damage that S. 265 and its relatives would do to enforcement of our laws. There can be little doubt, however, that the damage would be substantial.

Through the years, Congress has carefully designed attorneys' fee provisions to foster law enforcement by encouraging the work of private attorneys general. This bill would undermine all that work by its meat-ax approach to the critical enforcement work of the public Attorney General.
cretionary statutes have generally been construed to allow a court to award fees upon a consent decree.\textsuperscript{98}

These differences all have effects on the operation of our laws that go far beyond what one might expect from the relatively minor differences in the wording of the attorney's fee provisions. For this reason, the precise wording of fee provisions is of vital importance to effectuate the purposes for which Congress passes them.

B. Precise Wording

If an attorneys fees provision is to be applied exactly as Congress intends, Congress must scrutinize, carefully every word contained in the provision. A careless attitude on the part of Congress can result not only in attorneys fee provisions which are ineffective or anomalous, but also in provisions which are extremely counterproductive.

Section 718 of the Education Amendments of 1972,\textsuperscript{99} for example, authorizes fees "upon the entry of a final order by a court of the United States. The requirement of a final order may have been a legislative compromise, or it simply may have been an experiment with a new form of fee legislation. This is now particularly evident in school desegregation cases, which often drag on for a decade or more, as an example of the type of drafting which breeds confusion. Fortunately the Supreme Court, in \textit{Bradley v. School Board},\textsuperscript{100} interpreted the provision as granting a judge discretion to award fees and costs incident to the final disposition of interim matters."\textsuperscript{101} The legislative history of section 718 gave no indication whether the wording was intended to require that a case be completed prior to an award, or whether the Supreme Court's interpretation was correct. In this one instance, little damage was done, but this defect could have seriously thwarted Congress' purpose.

Similarly the Clayton Act\textsuperscript{102} fee provision mandates an award of fees to anyone "injured in his business or property by reason of


\textsuperscript{100} 416 U.S. 696 (1974).

\textsuperscript{101} Id. at 723.

anything forbidden in the antitrust laws. 103 The wording of
the provision, requiring a showing of injury prevented payment of
fees to those who were successful in enjoining antitrust violations,
so that litigants who prevented the violations received neither
damages nor fees, while litigants who received treble damages for
the violations also were awarded fees. This extreme anomaly finally
was eliminated by passage of a fee section in the Hart-Scott-Rodino
Antitrust Improvements Act of 1976 which authorized fees in anti­
trust injunction cases.104

An example of a provision in which Congress did proceed
carefully is the Allen Amendment, that portion of the Civil Rights
Attorney's Fees Awards Act of 1976 which authorizes fees to
a taxpayer who prevails "in any civil action or proceedings, by or
on behalf of the United States of America, to enforce, or charging a
violation of, a provision of the United States Internal Revenue
Code."105 This generic provision within a generic provision
was drafted to provide a small measure of relief for taxpayers in the
most extreme cases, and its precise wording has accomplished just
that purpose.

The Allen Amendment was inserted in the Senate bill (S.
2278)106 which became the 1976 Act, as a compromise. Proponents
of the bill, who were interested in passing a provision to enhance
civil rights, accepted the Amendment as a way to end a filibuster
by Senator James Allen of Alabama. After seven days of debate,
the Allen Amendment was adopted unanimously 107 and debate on
the Senate bill immediately came to a close. While proponents of
the bill were willing to accept the Allen Amendment as a means of
ending the Senator's filibuster they carefully made sure, in several
ways, that the effect of their concession would be minimal.

First, and most vitally the Amendment's precise wording al­

ows a taxpayer to recover fees in a suit only when brought "by or
on behalf of the United States."108 In almost all tax litigation,
of course, it is the taxpayer who, having paid a challenged assess-

103. Id.
104. Id. § 26.
107. 122 CONG. REC. 33312 (1976). This vote was taken after floor manager of
S. 2278 indicated that the Amendment was acceptable. Id. (remarks of Sen. James
Abourezk). Senator James Allen indicated that the filibuster would end if the
Amendment were adopted. 122 CONG. REC. 33311 (1976).
ment, sues for a refund.\textsuperscript{109} Second, repeated statements made during debate over the bill in both Houses showed that Congress intended the provisions to be interpreted exactly as written.\textsuperscript{110} Speakers in both Houses were also careful to point out that, even in those few tax cases in which the United States was a plaintiff, the standard applied to a prevailing taxpayer would be that applied to other prevailing defendants under the Senate bill; that is, the taxpayer could receive fees only when the United States had brought suit frivolously or vexatiously \textsuperscript{111}

One judge has opined that Congress was simply unaware that taxpayers are almost always plaintiffs in tax litigation, and did not realize that the Allen Amendment would have so minor an effect.\textsuperscript{112} Several commentators have agreed with this assessment.\textsuperscript{113}

\begin{footnotes}
\footnote{109. When the Government asserts and the taxpayer denies liability for tax, the Internal Revenue laws are so framed that it is the taxpayer who must sue. If the taxpayer should wait for the Government to sue him, he would allow the assessment to become final, and his right to contest his liability would be gone forever. Aparacor, Inc. v. United States, 571 F.2d 552, 558 (Ct. Cl. 1978) (en banc) (Nichols, J. concurring).


What it does is to add to the civil rights attorneys fees provision provision that if the Internal Revenue Service or the U.S. Government brings civil action against taxpayer, then the court, in its discretion, just as in the other cases, would be entitled to award the taxpayer reasonable attorneys fees. That is all it does, and I hope the amendment will be agreed to. \textit{122 CONGO REC.} 33311 (1976) (remarks of Sen. James Allen).


The Senate floor leaders, who were responsible for agreeing with Senator Allen on the wording of an acceptable amendment, knew what effect the wording would have. While Senator Allen subsequently indicated that he had intended the Amendment to have far broader application, what he and those who joined him in both the filibuster and sponsorship of the Allen Amendment thought is of no moment, except for students of legislative tactics and the legislative process. Neither Allen nor his cosponsors voted for final passage of the bill, even as amended. While those senators not responsible for shepherding the bill or filibustering for its acceptance may not have known that taxpayers are almost always plaintiffs, they could not have expected widespread application of the Allen Amendment. All those present at the debates heard floor statements made both before acceptance of the Amendment and after passage of the bill that the Amendment would apply only to those cases in which the government acted in bad faith.

A number of tax lawyers and other commentators have tried to recast the Allen Amendment as they wish Congress had drafted it, ignoring the reality of what Congress did. They have emphasized the minor effect the provision has had, and have argued against

114. Most tellingly, Senator John Tunney, original sponsor of S. 2278, dealt with potential hole by specifying, before adoption of the Amendment, that it would not apply to the situation where the Government is plaintiff on appeal since the Government did not bring the action in the first instance. 122 CONG. REC. 33312 (1976).


116. Cosponsors of the Amendment were also those who had, from time to time during the debate, joined in the filibuster with Senator Allen: Senators Jesse Helms of North Carolina, Strom Thurmond of South Carolina, and William Scott of Virginia.


119. The same is true on the House side, where the Congressmen were told by the House floor leader that fees would be allowed under the Allen Amendment only in unique and really impossible circumstances, and that the cost of the Amendment to the federal government would be negligible because of the Amendment's limited application. 122 CONG. REC. 35116, 35122 (1976) (remarks of Rep. Robert Drinan).

120. There have been but two fee awards under the Allen Amendment since its adoption more than three years ago. United States v. Garrison Constr. Co., [1977] 2 U.S. Tax Cas. ¶ 9705, at 88,387 (N.D. Ala. 1977); Levno v. United States, 440 F Supp. 8, 11 (D. Mont. 1977). The latter ignored the Amendment's wording and legislative history. But those who argue that Congress could not possibly have intended such limited result should be aware that there have been no awards made under either § 1985 or § 1986, two other provisions for which the Civil Rights Attorney Fees Awards Act of 1976 authorizes fees.
a literal” and “too technical” reading of the Amendment,121 assuming that Congress must have intended to do more. Although courts have, with one exception,122 followed precisely the instructions of Congress, they have called the wording of the Allen Amendment ambiguous” and have invented “confusion in the courts because of its supposed ambiguity and its “unclear and inconsistent” legislative history 123 Any legislation, however can be called ambiguous, unclear, and inconsistent when given an interpretation which was unintended by its drafters.

The argument that the Allen Amendment should be given an interpretation not permitted by its terms, so that it can be one of the most significant developments for the future of tax law (and tax lawyers),”124 overlooks the care and deliberation with which the bill was drafted. The argument rests on the premise that Congress, in the midst of crucial debate over the long-studied125 subject of fee awards that would make it possible for civil rights litigants (many of them poor and of minority groups) to bring suits to end racial and sex discrimination and enforce long-neglected constitutional rights, suddenly diverted from that path so that they could casually enact an enormously far-reaching change in the highly technical field of fundamental tax enforcement policy for the benefit of those wealthy individuals and corporate taxpayers who feel that they have been overcharged enough to merit litigation. With all due respect to those who put this theory forward, it somehow seems more sensible to read the law as Congress wrote it.

122. See note 120 supra.
123. Comment, supra note 121, at 1386.
As the Allen Amendment shows, courts do interpret the laws as Congress writes them, and because they do, extreme care must be taken to avoid language the technical interpretation of which makes possible unintended results. The placement of certain language must be examined carefully and the most well understood terms of art must be scrutinized lest a fee provision be given a broader or narrower effect than intended.

**CONCLUSION**

*Alyeska Pipeline Service Co. v Wilderness Society* stated the American rule: "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys fee from the loser". That case has made it necessary to recognize that the real American rule, every bit as deeply rooted in our history and in congressional policy is that attorneys fees are granted in the United States to private parties who act as agents of public policy.

Statutory provisions authorizing fees to private attorneys general are not exceptions to, but an integral part of, the American rule. Those many provisions which Congress has passed over more than a century have not been, as may appear on the surface, hap-

126. For example, the Civil Rights Attorney Fees Awards Act of 1976, as amended by the Allen Amendment, read:

In any action or proceeding to enforce provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging violation of, 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 fee as part of the costs.

127. Had the Amendment been included within the original language of the provision, the placement of the Amendment might have been read to preclude fees in suits under title VI unless such suits were initiated by the United States.

128. Again, the Allen Amendment includes the term action or proceeding to enforce Some have argued that the word proceeding includes the sending of tax deficiency notice to taxpayer by the Internal Revenue Service; hence the taxpayer who subsequently files suit contesting the determination of deficiency is defendant in proceeding, even if plaintiff in an action, to enforce the Internal Revenue Code. While courts have rejected this, and similar, arguments, see, e.g., Aparacor, Inc. v. United States, 571 F.2d 552, 553-56 (Ct. Cl. 1978) (en banc); Engel v. United States, 448 F Supp. 201, 202 (W.D. Pa. 1978), fee legislation should be drafted with precision, to avoid even the possibility that such arguments might be accepted.

129. 421 U.S. at 240.
130. Id. at 271.
hazard. Rather they have all fit this pattern. As Congress begins to rely even more heavily on the private attorney general, it must examine the dimensions, standards, and wording of its ever increasing number of fee statutes lest it inadvertently abrogate the true American rule.