

Ronald Reagan Presidential Library Digital Library Collections

This is a PDF of a folder from our textual collections.

Collection: Roberts, John G.: Files
Folder Title: Attorney's Fees (1 of 3)
Box: 5

To see more digitized collections visit:
<https://reaganlibrary.gov/archives/digital-library>

To see all Ronald Reagan Presidential Library inventories visit:
<https://reaganlibrary.gov/document-collection>

Contact a reference archivist at: reagan.library@nara.gov

Citation Guidelines: <https://reaganlibrary.gov/citing>

National Archives Catalogue: <https://catalog.archives.gov/>

WITHDRAWAL SHEET

Ronald Reagan Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	Michael J. Horowitz to Stockman and Harper, re Legal Fee Cap Bill (partial of pages 2,3,5; all of page 6)	7/22/82	P5 CJS 12/14/00
COLLECTION: ROBERTS, JOHN G.: Files			dlb
FILE FOLDER: Attorneys Fees [1 of 3] OA-127657 10017			3/1/96

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statute [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

WITHDRAWAL SHEET

Ronald Reagan Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	Michael J. Horowitz to Stockman and Harper, re Legal Fee Cap Bill (partial of pages 2,3,5; all of page 6)	7/22/82	P5
COLLECTION: ROBERTS, JOHN G.: Files			dlb
FILE FOLDER: Attorneys Fees [1 of 3] OA 127657			3/1/96

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

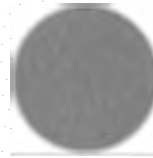
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statute [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

THE WHITE HOUSE
WASHINGTON



~~John~~
DIJK -

3/16

AS WE DISCUSSED, IN
CONNECTION WITH THE A.B.A.
MEETING TOMORROW.

~~John~~
DIJK

Thanks for your help



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

MEMORANDUM

JUL 2 2 1982

TO: David A. Stockman
Edwin Harper

FROM: Michael J. Horowitz *MJH*

SUBJECT: Legal Fee Cap Bill

Attached is the speaker letter (Tab A), the bill (Tab B) and a section-by-section analysis (Tab C) regarding our legal fee cap initiative. It follows along the lines described in our FY '83 major themes book (Tab D), and has been sharpened and supplemented following extensive efforts by an interagency working group and meetings with business community representatives and the National Association of Attorneys General. The bill establishes comprehensive limitations on awards of attorney's fees against the United States and State and local governments under various federal fee-shifting statutes. In its main features, the bill does the following:

- For statutes other than the Equal Access to Justice Act "the Act", limits the awards of fees to the lower of:
 - (1) the hourly rates payable to the highest paid government attorneys, plus benefits and a 50% overhead allowance (for awards against the federal government the calculated maximum fee will be \$53.16); or
 - (2) the actual cost of attorney's fees incurred by or on behalf of the party.
- For statutes other than the Act, limits the amount of fees awarded against the government where a money award is part of the final judgment, by permitting payment only of that portion of an otherwise allowable fee which exceeds 25% of the money judgment.
- Requires that a party must prevail in the lawsuit before fees may be awarded, and that fees may be awarded only for work performed on issues upon which the party prevails and only if the issues were necessary to the resolution of the controversy. (Recent D.C. Circuit decisions have interpreted the Clean Air Act and other environmental statutes, to allow attorney fee awards to non-prevailing parties if they "substantially contribute to the goals [the law in question]".)

- Provides that awards are to be made to clients and not attorneys, and requires that the client certify that the fees are owed to the attorney, were determined on an arms length basis and will be paid to the extent not covered by the fee award. (This is a critical provision, designed to assure that fee awards are for the benefit of clients only, in order to make them whole after they have obligated themselves to pay for lawyers to defend themselves against overreaching government action. It is designed in part to bar fee awards to entrepreneurial attorneys who now engage in contingency litigation against the government on ideological, public policy grounds.)
- Disallows fee awards to organizations that employ staff attorneys, except when an attorney was hired for the express purpose of handling the specific case.
- Bars attorney's fee awards to intervenors in agency proceedings except where specifically authorized by statute and limits any such awards to the fee caps established by the bill.
- Prevents double dipping by legal services organizations who receive government funds for providing legal services.
- Requires that the fee award bear a reasonable relation to the result achieved in the controversy.

A draft proposed bill was circulated to all cabinet departments, VA, EPA, SBA, SEC, OPM, FTC, and GSA. Fourteen agencies provided comments which were supportive of the bill. SBA stated that it highly favored curbing unreasonable awards of attorney's fees against the government, but that the Chief Counsel for Advocacy objected to certain modifications of the Act. (Some of the objections were based on the Chief Counsel's misinterpretations of the bill's provisions)*. The objections have been largely resolved.

* Agency comments

Justice.....	strongly supports
Treasury.....	strongly supports
Transportation.....	strongly supports
Interior.....	strongly supports
Defense.....	supports
State.....	concur
Labor.....	strongly supports
HHS.....	supports some sections (misunder- stood focus of other sections)
HUD.....	concur
DOE.....	technical comments only
USDA.....	supports and defers to Justice
OPM.....	strongly supports
VA.....	supports
SEC.....	oral technical comments only
SBA.....	favored policy; Chief Counsel for Advocacy did not favor certain aspects of the draft bill

The comments were of significant benefit in clarifying the bill, and making necessary technical amendments. A working group of attorneys from Justice, Treasury, Interior, and Transportation has assisted us in refining further drafts and resolving all legal and technical issues.

Justice strongly supports the bill, but raised two policy considerations. First, Justice believes that the fee cap of \$53.16 is too low and may risk "credibility" problems. Justice suggests that the bill conform to the \$75.00 fee cap contained in the Equal Access to Justice Act. Secondly, Justice questions the need for the requirement of section 5(a)(2) of the bill that the party seeking the award certify that he owes a legitimate fee, which will be paid to the extent uncompensated by a statutory fee award.

With respect to Justice's first concern, I believe that our \$53.16 fee cap is logical and entirely supportable. Unlike the arbitrarily selected \$75.00 fee cap in the Act, the \$53.16 fee cap is based on the highest salary payable to government attorneys, plus benefits (pursuant to OMB Circular A-76), plus a fifty-percent overhead add-on. Since many of the fee-shifting statutes which will be amended by the bill are premised on the theory that individuals and public interest groups who sue the government for public benefit purposes are acting as so called "private attorneys general", it is entirely appropriate that attorney's fees awarded to them be consistent with the salary of the "public attorneys general" of the Federal, State and local governments.

With respect to the requirement for a real fee relationship between attorney and client as a predicate for fee awards, I believe that the provision is absolutely necessary to reduce subsidies to "public interest" lawyers of the right and left who advocate their ideologies at public expense, in effect on a contingency basis. This position is in sync with our initiative to depoliticize the grant process.

What remains are decisions and actions regarding the introduction and support of the bill. As these matters go, prospects are good for a remarkable coalition in active

support. State and local governments have been strained under the provisions of 42 USC §1988, which award attorney's fees in broadly defined "civil rights" actions. A bill addressed specifically to their concerns has been introduced by Hatch and is going nowhere, largely because the focus of the bill is on cutting back on "civil rights" activities. In this regard, the National Association of Attorneys General recently passed a resolution supporting our initiative "in principle." The business community is deeply concerned about such matters as intervenor reimbursement, public financing of "public interest" litigation, etc. and is committed to active support of the initiative. The small business community -- which has not as yet cleared on the specifics of our bill -- has been concerned about the use of the Equal Access to Justice Act as a financing mechanism for the "public interest" bar; it properly believes the Act may not be renewed after it sunsets in FY 85 unless it is narrowed to its "core" purpose of providing attorney's fees to small businesses that are subjected to overreaching action by federal agencies. However, we have met with representatives of the National Federation of Independent Business whose reactions have been clearly positive. The conservative community has been deeply concerned about federal financing of political advocacy; the fee cap initiative deals directly with its concerns. There has been considerable interest on the Hill about the proposal, particularly since the recent D.C. Circuit decisions allowing fee awards to "public interest" groups in environmental cases even when the government prevails in litigation. Both the business and conservative communities are confident of their ability to line up high-level and broad support and sponsorship, in Congress and elsewhere.

The magnitude of federal fee awards is difficult to determine in part because many such awards are paid out of the judgment fund, a permanent indefinite appropriation, and are not broken down as between legal fees and money judgments. Perhaps the best index of the size of the fee award industry is the federal fee award treatises that are now beginning to appear -- the big ones have been published within the last year. In addition, there is a bi-monthly Harcourt Brace report service, "Federal Attorney Fee Awards Reporter." (Tab E).

A recent mailing campaign by a local law firm to public interest firms confirms our view of the scope of the problem. The mailing (Tab F) touts the firm's expertise in obtaining high awards of attorney's fees against the government, and offers their services either to counsel "public interest" groups on attorney fee recovery tactics or to

handle the fee award litigations on behalf of the groups. It is so striking and offensive that I propose to attach it to the Speaker letter. Also attached is a formal announcement of the recent opening of a law firm entitled "Trial Lawyers for Public Justice, P.C.", (Tab G) which noted that it was

"especially indebted to Joan Claybrook for her help in raising funds and organizing the firm, and to Ralph Nader for inspiration and guidance; their involvement has been vital to the founding of the firm."

The firm expects to stay in business largely through fee awards.

The bill will of course be opposed, and vigorously, by the "public interest" crowd which is now highly active in lining up opposition. An ABA committee has already proposed a resolution against our initiative and civil rights and public interest groups are asserting that the initiative will undercut the purposes for which attorney's fees provisions were enacted -- assurance of adequate legal representation for the poor and for public issues which would otherwise not be litigated.

Our counter to this opposition and the cornerstone of the coalition that we can put together is that taxpayers should not be required to subsidize attorneys or ideological advocacy. A literal industry of public interest law firms has developed as a result of the legal fee awards with such groups regarding attorney's fees as a permanent financing mechanism. The point here is not adequate representation of the poor; rather it is public oversubsidization of middle class lawyers.

One index of the bill's prospects is the exceedingly favorable press thus far received on our initiative. The attached recent pieces have appeared in the National Journal, Regulation Magazine (Nino Scalia) and the Times, WS Journal and Louis Rukeyser's column (see Tab H).

Hatch has indicated that, if pressed, he will hold hearings on the bill before the end of September. The groups with whom we have spoken believe that hearings in this session providing a strong showing of fee award "horror stories" and active and diverse support for the bill will be an important first step toward passage in the next Congress.

We need to move quickly. I believe we need to show West Wing support for the proposal, and need to devise a strategy for sponsorship, hearings and coordination. (I have discussed the matter with Bob Thompson and Bob Kabel, who are interested and who are enthusiastic, and awaiting basic guidance decisions.)

One of you, or perhaps Ed Meese, can call a brief meeting, with someone from Ken Duberstein's office present, for the initiative to be set on course.

cc: Ken Cribb
Bob Kabel
Alan Holmer



EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed for your consideration and appropriate reference is a legislative proposal, "To provide for the limitation on legal fees awarded against the United States, State and local governments." The proposal is one of the initiatives contained in the Administration's "Major Themes and Additional Budget Details for Fiscal Year 1983" to reduce unwarranted subsidies.

Many Federal statutes authorize or require Federal, State and local governments to pay attorney's fees to prevailing parties in court or agency proceedings. This reverses the standard "American rule" under which parties bear their legal costs, win or lose. Some environmental laws have recently been determined by the courts to authorize awards of attorney's fees even to parties who do not prevail in court proceedings. Most of these fee-shifting statutes provide for an award of a "reasonable attorney's fee" which are being granted by the courts based on a "prevailing market rate"; the latter is now largely pegged to private, commercial bar rates and often substantially exceeds \$100 per hour even where the cost of representation to applicants is far lower than the fee awards. In many instances, attorney's fees are awarded to applicants who have no obligation to pay for their representation.

A literal industry has arisen for attorneys dependent on Federal, State and local government fee awards. An index of the size of the fee award industry is the federal fee award treatises that are now beginning to appear and a bi-monthly Harcourt Brace publication, "Federal Attorney Fee Awards Reporter." Of particular note is a recent letter by a local law firm to public interest groups explaining the firm's expertise in obtaining high awards of attorney's fees against the government, and offering their services to counsel public interest groups on attorney fee litigation practices or to actually handle the fee award litigation on behalf of the public interest groups. The letter states that such an "arrangement offers the possibility of substantial financial rewards for your organization." (A copy of this letter is enclosed.)

The attorney's fee awards are invariably at multiples of the cost of the government attorneys involved in the same cases. Moreover, since awards are based in large part upon the length of time spent by attorneys on the case, they often exceed the amount recovered by the client in the case.

Other than for "core" recoveries to individuals and small business who are subject to the \$75 per hour limitation under the Equal Access to Justice Act, the proposed legislation will establish a maximum hourly rate for fee awards against the United States and State and local governments under all Federal fee-shifting statutes. The fee cap would be set at the lower of (1) the actual direct cost of attorney's fees incurred by or on behalf of the party; or (2) a fee calculated on the basis of the highest hourly rate, plus benefits, paid to government attorneys plus a constant factor to pay for overhead costs. As mentioned, "core" recoveries under the Act would be exempt from the fee cap provision.

The proposed legislation will preclude awards of attorney's fees against the United States or State or local governments unless the party seeking the award prevailed on the merits of the controversy. Parties seeking such awards must file with the court or agency certain information including a statement under oath that the attorney's fees and expenses are owed to the attorney, were determined on an arm's length basis and will be paid to the extent not covered by the fee award. In all cases, the fee awarded must bear a reasonable relation to the result achieved in the proceeding and may not exceed actual incremental fees and expenses incurred by the party by reason of his participation in the proceeding in question.

The proposal also:

- ° limits the amount of attorney's fees and costs awarded against the United States or State or local governments in cases where a money award is part of the final judgment or agency order ("Core" recoveries to individuals and small business under the Equal Access to Justice Act and awards in cases where government "bad faith" is proven under the Act will be exempt from this provision);
- ° bars agencies from awarding attorney's fees to intervenors and participants in agency proceedings except as expressly authorized by law and limits any such awards to the maximum rates established by the bill;

° disallows awards of attorney's fees or other costs against the United States or State or local governments:

- to any corporation, association, or organization or their grantees, or to any party represented by such an entity, whose primary purpose is to provide legal services and whose legal services in the controversy were funded in whole or part by a grant or appropriation by the United States, State or local government for the purpose of providing legal services;
- where the prevailing party unduly protracted the final resolution of the controversy;
- where the United States, State or local government was not unreasonable in the legal position it took in court or before the agency in controversies concerning the payment of attorney's fees;
- where the party declined an offer of settlement which was substantially as favorable as the relief ultimately awarded to him; or
- where the claims are found to be moot due to a change in government policy.

We believe that this legislation will eliminate the results reached in cases such as Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (en banc), and Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir. 1982), which placed unreasonable and excessive litigation expenses on the American taxpayer.

In Copeland, in litigation under Title VII of the Civil Rights Act the court awarded attorney's fees of \$160,000 based on the rate "prevailing in the community for similar work" and without any real relation either to the value of the recovery to the client or to the salary of the "public attorney general." In Sierra Club, the court awarded attorney's fees even though the plaintiff did not prevail on any issues in the litigation. The court interpreted the Clean Air Act, which authorizes attorney's fees where "appropriate," to allow the award of fees to unsuccessful litigants if they "substantially contributed to the goals of the Clean Air Act."

The proposal will restrict contingency fee litigation against Federal, State and local governments, brought by and on behalf

of attorneys whose "notational" clients bear no litigation risks or costs, and who are merely the means by which attorneys satisfy nominal standing requirements. Finally, by restricting attorney's fees the proposal will decrease Federal, State, and local government outlays and will reduce their civil case load, while maintaining protections for individuals and small businesses who have been subjected to overreaching government actions.

The Administration strongly urges prompt and favorable consideration of this proposed legislation, enactment of which would be in accord with the program of the President.

Sincerely,

David A. Stockman
Director

Enclosure

B

A BILL

To provide for the limitation on legal fees awarded against the United States, States and local governments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That this Act may be cited as "The Limitation on Legal Fees Awards Act of 1982."

Sec. 2. Notwithstanding any other provision of law, no award of attorney's fees or other expenses may be made against the United States or any agency or any official of the United States acting in his or her official capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof, in any litigation or administrative proceeding unless the party seeking the award clearly and substantially prevailed on the merits of the controversy. If a party has clearly and substantially prevailed on the merits of the controversy, any such award may be made only for work performed on activities or issues upon which the party prevails against the United States, a State or local government or an agency or official of the United States, State or local government, and only if such activities and issues were necessary to the disposition of the controversy.

Sec. 3.(a) Notwithstanding any other provision of law, no award of attorney's fees made against the United States or any agency or any official of the United States acting in his or her official capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof, in any litigation or administrative proceeding shall exceed the lower of

(1) an hourly rate which is the sum of (A) the highest hourly pay rate plus benefits payable to Government attorneys in the Civil Service (said rate to be annually determined at the beginning of each Fiscal Year by the Director of the Office of Personnel Management), or for awards against State or local governments or agencies or officials thereof, the highest hourly rate plus benefits payable to State or local government attorneys of the State or local government involved in the litigation, plus (B) reasonable overhead expenses provided that such expenses do not exceed 50% of the total of the calculated hourly rate plus benefits calculated under paragraph (A) above; or

(2) the actual, direct cost of attorney's fees incurred by or on behalf of the party.

(b) (1) Where awards of attorney's fees are made pursuant to subsection (a)(1) above, no hourly rates for awards of fees for paralegals or law clerks shall exceed one-third of the hourly rate awarded for attorney's fees.

(2) Where awards of attorney's fees are made pursuant to subsection (a)(2) above, costs for paralegals and law clerks shall be included in the actual direct costs incurred by or on behalf of the party.

(c) This Section shall not apply to fees awarded under section 504(a)(1) of Title 5 of the United States Code or Sections 2412(d)(1)(A) and (d)(3) of Title 28 of the United States Code.

Sec. 4.(a) Notwithstanding any other provision of law, in any litigation or administrative proceeding in which an award of money is part of the final judgment or final agency order, no attorney's fees against the United States or an agency or an official of the United States acting in his or her official capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof, shall be payable except to the extent that the attorney's fees (computed in accordance with Section 3 of this Act) exceed 25% of such money award as part of the judgment or final agency order. Only the portion of attorney's fees which exceed 25% of such money award shall be payable under this section. In no event shall the fee awarded exceed the fee established pursuant to Section 3 of this Act.

(b) This Section shall not apply to fees awarded under section 504(a)(1) of Title 5 of the United States Code, Sections 2412(d)(1)(A) and (d)(3) of Title 28 of the United States Code, or in cases where government "bad faith" is proven under section 2412(b) of Title 28 of the United States Code.

Sec. 5. Notwithstanding any other provision of law--

(a) A party who is seeking an award of attorney's fees or other expenses against the United States or any agency or any official of the United States acting in his or her official

capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof, shall, within thirty days of either a decision on the merits by the court or the entry by an administrative officer of an agency of a final disposition of an administrative proceeding, submit to the court or agency an application for such award. Such application shall include a statement that sets forth and establishes to the satisfaction of the Court or the administrative officer the following:

- (1) a description of the basis of the award sought indicating that it is proper under applicable law, and the amount sought. Where the party and the attorney have entered into a written fee agreement, the application shall include a copy of the fee agreement. The application shall also include (A) an itemized statement under oath from the attorney representing or appearing in behalf of the party, setting forth and establishing the actual hours expended per day by each attorney, and the specific tasks performed during that time in behalf of the party; and (B) such information as the court or administrative officer may require in order to determine the actual, direct cost of attorney's fees and other expenses incurred by or on behalf of the party;

(2) where the attorney's fees or other expenses sought have not been paid or assumed, a statement under oath by the party establishing that the attorney's fees or other expenses sought are owed to the attorney, were determined on an arm's length basis and will be paid by the party to the extent not covered by the fee award;

(3) where the attorney's fees or other expenses have been previously paid or assumed and the party seeks reimbursement of such attorney's fees or other expenses, a statement under oath by the party establishing that the attorney's fees or other expenses would not have been incurred but for the participation by the party in the litigation or administrative proceeding for which the award is sought; and

(4) such other information as may be required by law or the court or the administrative officer.

(b) A party who seeks an award of attorney's fees or costs against the United States or any agency or any official of the United States acting in his or her official capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof, shall, within one year after the action was initiated and annually thereafter, provide to the United States, federal, State, or local government agency or federal, State, or local government official, and to the court or administrative officer of an agency, a report which shall include such information required by subsection (a) of this Section as is available or ascertainable.

(c)(1) No award of attorney's fees, or other costs, may be made against the United States or any agency or any official of the United States acting in his or her official capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof, unless the party seeking the award has complied with the provisions of this Section.

(2) This subsection shall not apply to a party who for good cause determined by the court or administrative officer failed to file an annual report, or filed an incomplete annual report, as required by subsection 5(b).

(d)(1) A party who seeks an award of attorney's fees or costs against the United States or any agency or any official of the United States acting in his or her official capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof, shall have the burden of proof with respect to establishing entitlement and the amount of any award of attorney's fees and other expenses, and with respect to meeting the other requirements of this section.

(2) This subsection shall not apply to determinations of "substantial justification" in applications for fee awards under section 504(a)(1) of Title 5 of the United States Code or Sections 2412(d)(1)(A) and (d)(3) of Title 28 of the United States Code.

(e) A Court or administrative officer may in its discretion hear and determine any right to payment of attorney's fees or other expenses against the United States or any agency or any official of the United States acting in his or her official capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof, following a decision on the merits by the Court or the entry by the administrative officer of an agency of a final disposition of an administrative proceeding, or may delay such hearing and determination until completion of all appeals and entry of a final judgment. In no event shall a court or administrative office hear or determine such a right

prior to entry of a decision on the merits by the court or entry of a final disposition of an administrative proceeding by an administrative officer. Payment of attorney's fees or other expenses awarded against the United States or any agency or any official of the United States acting in his or her official capacity, or against any State or local government or agency or official acting in his or her official capacity thereof, shall be stayed until completion of all appeals and entry of a final judgment.

(f) A party that has employed salaried staff attorneys prior to the onset of the specific case shall not be eligible for fee awards for the work of such staff attorneys except upon a showing that the staff attorney had been retained in express anticipation of the specific case and that staff employee levels would have been lower but for the anticipated need to deal with the specific litigation or administrative proceeding. The provisions of this subsection apply to prepaid legal services, including dues paying structures which provide for the use of attorneys in return for dues.

Sec. 6. Notwithstanding any other provision of law, no award of attorney's fees may be made against the United States or any agency or any official of the United States acting in his or her official capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof, unless the fee awarded bears a reasonable relation to the result achieved in the proceeding; nor may such an award be made where the Court or administrative officer of an agency determines that special circumstances make such an award unjust. In no event shall the fee awarded exceed the fee established pursuant to Section 3 of this Act.

Sec. 7. Notwithstanding any other provision of law, no award of attorney's fees or other expenses against the United States or any agency or any official of the United States acting in his or her official capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof, shall be made in any litigation or administrative proceeding to any corporation, association or organization or their grantees, or to a party represented by any such corporation, association or organization or their grantees, whose primary purpose is to provide legal services and whose legal services in the litigation or administrative proceeding were funded in whole or in part by a grant or appropriation by the United States, State or local government for the purpose of legal services. (For the purposes of this section, the term "grantees" includes recipients of grants, contracts or other agreements, and the term "grant" includes a grant, contract or other agreement.)

Sec. 8. In awarding attorney's fees and other expenses under any provision of law against the United States or any agency or any official of the United States acting in his or her official capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof, the court or administrative officer of an agency shall reduce the amount that otherwise would be awarded under the provisions of this Act or deny an award, in whole or in part in the discretion of the court or administrative

officer, if the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the controversy.

Sec. 9. Notwithstanding any other provision of law, no award of attorney's fees or other expenses in any litigation or administrative proceeding concerning the payment of attorney's fees or other expenses shall be made against the United States or any agency or any official of the United States acting in his or her official capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof, unless the court or administrative officer of an agency finds that the United States, State or local government was unreasonable in the position it took in court or before the agency concerning such payment of attorney's fees or other expenses. The party seeking such attorney's fees or other expenses shall have the burden of proof with respect to whether such position was unreasonable.

Sec. 10. Notwithstanding any other provision of law, no award of attorney's fees or other expenses may be made against the United States or any agency or any official of the United States acting in his or her official capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof

- (a) as compensation for that part of litigation or an administrative proceeding subsequent to a declined offer of settlement when such offer was as substantially favorable to

the prevailing party as the relief ultimately awarded by the Court or administrative officer, unless the Court, or administrative officer finds that the prevailing party had substantial justification for declining the offer and continuing the litigation; or

- (b) where a Court or an administrative officer finds the claims to be moot due to a change in government policy and that the pendency of the litigation or administrative proceeding was not a material factor for such change.

Sec. 11. In any litigation or adjudication against the United States or any agency or any official of the United States acting in his or her official capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof, if the Court or administrative officer of an agency finds that the plaintiff's claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate or pursue the adjudication after it clearly became so, even though there was no subjective bad faith, attorney's fees and other expenses should be awarded to the prevailing defendant at the amount established pursuant to Section 3 of this Act. (For the purpose of this Section the term "adjudication" means an adjudication under Section 554 of Title 5 of the United States Code, and the term "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adjudication.)

Sec. 12. Except as expressly authorized by law, no award of attorney's fees or other expenses may be made by an agency to any party who intervenes or participates in an agency proceeding. Notwithstanding any other provision by law, no such award of attorney's fees shall exceed the amount authorized pursuant to Section 3 of this Act.

Sec. 13. Notwithstanding any other provision of law, no award of attorney's fees or other expenses may be made against the United States or any agency or any official of the United States acting in his or her official capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof, to any intervenor in any litigation, adjudication or licensing unless the intervenor seeking the award clearly and substantially prevailed on the merits of the controversy. If an intervenor has clearly and substantially prevailed on the merits of the controversy, any such award may be made only pursuant to the rates established by section 3 of this Act, and only for work performed on issues which are significantly new and different from those previously pending in the litigation, adjudication or licensing, and only if the intervenor prevails against the United States, a State or local government or an agency or official of the United States, State or local government on such significantly new and different issues, and such activities and issues were necessary to the disposition of the controversy. Except for Section 2 of this Act, an intervenor in any litigation, adjudication or licensing shall be considered a party for the purposes of this Act.

Sec. 14. In addition to the other provisions of this Act, section 722 of the Revised Statutes (42 U.S.C. 1988) is further amended by adding the following:

"Where a party has prevailed on a pendent claim or Federal statutory claim not covered under section 722 (42 U.S.C. 1988) but which is joined under the Federal Rules of Civil Procedure to a claim that is under such section, a Court may only award attorney's fees if it finds that the claim covered under section 722 of the Revised Statutes (42 U.S.C. 1988) has sufficient merit to have justified a reasonable person to have brought such claim as a separate suit."

Sec. 15. The Comptroller General of the United States shall submit annually on April 1 of each year a report to the President and the Congress on the amount of attorney's fees and other expenses awarded against the United States, or agencies and officials of the United States acting in their official capacities, awarded in litigation and administrative proceedings during the preceding fiscal year. The reports shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress and the President in evaluating the scope and impact of such awards. Copies of the reports shall be provided to the Attorney General of the United States, the Director of the Administrative Office of the United States Courts, the Chairman of the Administrative Conference of the United States and the Director of the Office of Management and Budget. The Courts and each agency shall provide the Comptroller General with such information as is necessary for him to comply with the requirements of this

Section. Each agency shall record every award of attorney's fees and other expenses made against the agency, an agency official acting in his or her official capacity, or in the event of an award against the United States, by the agency on behalf of which the litigation or administrative proceeding was brought or defended.

Sec. 16. (a) The provisions of this Act shall apply to any award of attorney's fees and other expenses made subsequent to the enactment of this Act including, except as provided in subsection (b) of this section, actions commenced and fees and expenses incurred prior to such enactment.

(b) The annual reports required by Section 5(b) of this Act shall be required only subsequent to enactment of this Act.

Sec. 17. The provisions of this Act establish minimum criteria and requirements for the award of attorney's fees or other expenses against the United States or an agency or any official of the United States acting in his or her official capacity, or under Federal law against any State or local government or agency or official acting in his or her official capacity thereof. The provisions of other statutes which establish additional criteria or requirements beyond those established in this Act limiting entitlement to such awards of attorney's fees or other expenses, or otherwise limiting such awards, shall apply in addition to the provisions of this Act to the extent that such additional statutory provisions are not inconsistent with this Act.

Sec. 18. Nothing in this Act shall be interpreted to create any right to an award of attorney's fees or other expenses.

Sec. 19. Definitions - For the purposes of this Act --

(A) "other expenses" includes the reasonable expense of expert witnesses and the reasonable cost of any study, analysis engineering report, test, or project which is found by the agency or court to be necessary for the preparation of the party's case.

(B) "party" means a party, as defined in section 551(3) of this title, which is an individual, partnership, corporation, association, unincorporated business, estate or public or private organization other than an agency.

(C) "Administrative proceeding" means any agency proceeding, as defined in subsection 12 of section 551 of Title 5 of the United States Code, in which a party may under statute or regulation be awarded attorney's fees or other expenses.

(D) "Administrative officer" means the official or person who by statute or regulation has the authority to decide the substantive issues being considered in the administrative proceeding. Where the official within an agency who pursuant to statute or regulation has authority to decide matters pertaining to the award of attorney's fees or other expenses is not the official or person who by statute or regulation has the authority to decide the substantive issues being considered in the administrative proceeding, the head of the agency shall establish regulations to prescribe the official[s] or person[s] who shall be designated "administrative officer[s]" for the purposes of, and consistent with, each section of this Act which contains such term.

(E) "decision on the merits" means a decision by the Court on all of the substantive issues raised in the litigation.

"(F) Except as otherwise provided in this section, the definitions provided in section 551 of Title 5 of the United States Code apply to this Act.

C

Section by Section Analysis

Section 2

Section 2 will preclude awards of attorney's fees against the United States or State or local government unless the party seeking the award clearly and substantially prevailed on the merits of the controversy. Section 2 further provides that awards of attorney's fees may be made only for work performed on activities or issues upon which the party prevails and only if the activities and issues were necessary to the resolution of the controversy. The provisions of Section 2 requiring that a party clearly and substantially prevail amend the Clean Air Act and other statutes in which the award of attorney's fees is not expressly limited to prevailing parties. Section 2 will disallow awards of attorney's fees, such as the award in Sierra Club v. Gorsuch, 672 F.2d 33 (D.C.Cir. 1982), to a non-prevailing party. (In Sierra Club, the court awarded attorney's fees on the basis that the plaintiffs had "substantially contributed to the goals of the Clean Air Act.")

Section 2 also establishes a uniform standard for determining a "prevailing party." The words "clearly and substantially" are meant to limit recovery of attorney's fees to parties who without question prevail on all significant aspects of the merits of the controversy. A party who fails to definitively prevail on the issues would not meet the section's threshold requirement that the party "clearly" prevail. Although the prevailing party need not prevail on every issue, he must prevail on the significant issues of the case and obtain virtually all the relief sought in the complaint. Attorney's fees may be awarded only after a decision on the merits by a Court or entry of a final disposition by an agency in an administrative proceeding; or, at the discretion of the Court or administrative officer, until completion of all appeals and entry of a final judgment [See Section 5(e)]. If there is a decision on the merits, or a final disposition, on less than all the claims in the lawsuit or administrative proceeding, the court or administrative officer may, in its discretion, award attorney's fees and expenses with regard to those claims definitively resolved prior to reaching the merits of all the claims in the lawsuit or administrative proceeding. If a party clearly and substantially prevails on the merits of the controversy, the Court or administrative officer may award attorney's fees only for work performed on activities or issues upon which the party prevails against the United States or State or local government, and only if the activities and issues were necessary to the resolution of the controversy.

Section 2 does not modify existing case law providing that settlements may justify the award of attorney's fees. As the court stressed in Parker v. Mathews, 411 F. Supp. 1059 (D.D.C. 1976), the facts and circumstances surrounding a particular settlement must be carefully evaluated:

...whether to award attorney's fees where there has been a settlement of a Title VII lawsuit must be determined by a close scrutiny of the totality of the circumstances surrounding the settlement, focusing particularly on the necessity for bringing the action and whether the party is the successful party with respect to the central issue -- discrimination.

Id., at 1062-64.

The provisions of Section 2 do not preclude discussions between the parties of attorney's fees, or the waiver thereof, prior to the decision on the merits by a Court or the final disposition of an administrative proceeding. Nor does Section 2 prevent the government from discussing attorney's fees liability together with liability on the merits as part of a settlement agreement, or from including provisions for attorney's fees and other expenses in a settlement agreement.

Section 3

Section 3 establishes a maximum hourly rate for attorney fee awards against the United States and State and local governments under certain so called fee shifting statutes which authorize awards of attorney's fees. Awards will be limited to the lower of two amounts calculated as follows: (1) the actual direct cost of attorney's fees incurred by or on behalf of the party; or (2) an hourly rate which is the sum of (a) the highest hourly pay rate plus benefits payable to Federal government attorneys in the Civil Service, or, in controversies involving State or local governments, to State or local government attorneys, plus (b) reasonable overhead expenses. Such overhead expenses, however, shall not exceed 50% of the total of the calculated hourly rate

plus benefits.* There shall be no multipliers. Where awards of attorney's fees are made on an hourly rate basis pursuant to subsection 3(a)(1), any award of fees for paralegals or law clerks must not exceed one-third of the hourly rate awarded for attorney's fees. Where attorney's fees are awarded on an actual cost basis pursuant to subsection 3(a)(2), awards to paralegals and law clerks will be on the basis of their actual direct costs. Awards under 5 U.S.C. 504(a)(1) and 28 U.S.C. 2412(d)(1)(A) and (d)(3) as provided by the Equal Access to Justice Act are exempted from this fee cap.

Section 4

Section 4 provides that in any litigation or administrative proceeding in which money is part of the final judgment or final agency order the United States, State or local government will be required to pay attorney's fees only to the extent that such attorney's fees (computed in accordance with Section 3) exceed 25% of the judgment or final agency order. Only the portion of attorney's fees which exceed 25% of such money award shall be payable under this section. The principle of this provision is that a prevailing party should pay his legal expenses from any monetary award he receives in the litigation or agency proceeding. Awards under 5 U.S.C. 504(a)(1) and 28 U.S.C. 2412(d)(1)(A) and (d)(3) as provided in the Equal Access to Justice Act are exempted from this provision, as are awards in cases where government "bad faith" is proven under 28 U.S.C. 2412(b).

* Under the current pay scale for Federal government attorneys in the Civil Service, the calculated hourly rate plus 50% overhead under this formula is \$53.16. This rate of \$53.16 is calculated as follows:

<u>Facts</u>	° Highest annual salary payable to an attorney in the Senior Executive Service	= \$58,500
	° Benefits to government employees pursuant to OMB Circular No. A-76, Cost Comparison Handbook:	
	Retirement and Disability Benefits	20.4%
	Health and life insurance	3.7%
	Other benefits	1.9%
	Total	26.0%
	° Number of hours in one work year	= 2080

Calculation

$$\$58,500 + [\$58,500 \text{ (annual salary)} \times 26\% \text{ (benefits)}] = \$73,710 \text{ per year}$$

$$\$73,710 + [\$73,710 \times 50\% \text{ (overhead)}] = \$110,565 \text{ per year}$$

$$\$110,565/\text{year} \div 2080 \text{ hours/year} = \$53.16 \text{ per hour}$$

Section 5

Subsection 5(a) establishes a jurisdictional requirement that a party seeking an award of attorney's fees and other expenses must file an application for such an award within 30 days of the decision on the merits by a Court or the entry of a final disposition by an agency in an administrative proceeding. Parties may not file an application for such award prior to a decision on the merits or entry of a final disposition or after the 30 day time limit. This requirement is responsive to the Supreme Court's recent recommendation that courts adopt procedural rules setting reasonable time limits for applications for attorney's fees awards. White v. New Hampshire Department of Employment Security, 50 U.S.L.W. 4255. Subsection 5(b) requires a party who seeks attorney's fees to file annual reports which must include all of the information required by subsection 5(a). Such annual reports shall not be considered "applications" for the purposes of subsection 5(a), and shall not be construed as a basis to permit discovery against the government. Rather, the annual reports are for the purpose of assuring orderly accounting, and recordkeeping which could be especially useful in multi-year litigation. A party may resubmit the annual reports as part of his "application" and need not prepare new documents to indicate the same information otherwise provided in the previously filed annual reports.

The application required under Subsection 5(a) must establish and include the following:

- ° The basis on which the award is sought, and the amount sought and an itemized statement under oath from the attorney or law firm representing the party setting forth the actual hours expended per day by each attorney and the specific tasks performed in behalf of the party. The application must also include a copy of any written fee agreement. The Court or administrative officer may require whatever information is necessary for the party to prove the actual direct cost of attorney's fees incurred by or on behalf of the party.
- ° A statement under oath by the party that the attorney's fees or other expenses sought are owed to the attorney, were determined on an arms length basis, and will be paid by the party to the extent not covered by the fee award. (This provision assures that there is a real fee arrangement. The problem here is that fee awards statutes create contingency fee funds for entrepreneurial attorneys. The only justification for fee awards is to compensate clients who had to bear the expense of litigation. Of course a contingency fee which is owed to the attorney by the client is an arms length arrangement for the purposes of this section; it should be understood that any fee award is subject to the requirements of section 4 of the bill which, except for certain sections of the Equal Access to Justice Act, limits fee awards in money judgment cases to the portion of the fee which exceeds 25% of the judgment.)
- ° Where the attorney's fees or other expenses had been previously paid or assumed and the party seeks reimbursement the statement under oath must establish that the fees or other expenses would

5

The party seeking the award has the burden of proof with respect to establishing entitlement and the amount of awards of attorney's fees and other expenses, and with respect to meeting the other requirements of section 5. However, for applications of awards of attorney's fees submitted under 5 U.S.C. 504(a)(1) or 28 U.S.C. 2412(d)(1)(A) or (d)(3), the burden of proof regarding "substantial justification" rests with the government.

Subsection 5(e) authorizes courts and administrative officers to hear and determine awards of attorney's fees or other expenses following a decision on the merits or final disposition of an agency administrative proceeding. This provision permits courts and administrative officers to decide attorney's fees questions within a reasonable time after a decision on the merits or entry of a final disposition of an agency administrative proceeding, so that there could be a simultaneous appeal of the merits and of the fee award. A quick decision on the fee award would be particularly appropriate where there was no disagreement over the calculation of the award or where the determination required complete familiarity with the record. This provision also avoids having cases go through the appellate process twice -- once on the merits, and later on the question of attorney's fees. The Supreme Court in White indicated its dislike of this result, stating that "district courts generally can avoid piecemeal appeals by promptly hearing and deciding claims for attorney's fees." Id. at 4258. This provision further avoids requiring courts of appeal to review the question of attorney's fees after the facts surrounding the fee award are relatively stale. On the other hand, subsection 5(e) permits courts and administrative officers in their discretion to defer determination of fee awards in appropriate cases, such as cases where the determination of attorney's fees would consume a great deal of time and the case was to be appealed. In no event, however, may a Court or administrative officer make such determinations prior to a decision on the merits by the Court or entry of a final disposition by the administrative officer. Subsection 5(e) requires the court or agency to stay the payment of any fee award until the final decision on appeal.

Subsection 5(f) specifically precludes awards of attorney's fees and expenses to a party that has employed salaried staff attorneys prior to the onset of a specific case except upon a showing that the staff attorney had been retained in express anticipation of the specific case and that staff employee levels would have been lower but for the anticipated need to deal with the specific case. This provision and subsection 5(a)(3) are intended to bar subsidization of the ordinary operating expenses of applicant parties. These provisions will preclude awards of attorney's fees and expenses

where the party cannot show in the specific case that the expenses were incurred only because of the litigation or administrative proceeding.

Except for the annual report required under subsection 5(b), subsection 5(c) disallows the award of attorney's fees and other expenses against the United States or State or local government if the party seeking the award has not made the factual showings required by, and met the procedural requirements of, Section 5. The provision of subsection 5(c) does not apply to a party who for good cause determined by the court or administrative officer failed to file an annual report or filed an incomplete annual report, as required by subsection 5(b). "Good cause" includes a party who could not reasonably be expected to be aware of the requirement to file an annual report.

Section 6

Section 6 requires that any award of attorney's fees or other expenses against the United States or State or local government must bear a reasonable relation to the result achieved in the proceeding. This provision is primarily directed to preventing an anomalous result such as one where a court could award attorney's fees of \$100,000 for a \$30,000 judgment. This provision directs courts and agencies in considering whether to award the maximum award authorized under Section 3 of the bill or a lower amount, to consider the result achieved in the proceeding even though the attorneys had spent, in good faith, a great number of hours on the case.

In addition to preventing attorneys from receiving fee awards in multiples of the monetary relief granted to the client, this provision also directs courts and agencies to consider lower fee awards where equity relief granted to the party is nominal or of very little precedential value. On the other hand, if the monetary or equitable relief granted to the party is substantial, or if the result of the case has substantial precedential value, courts and agencies may award attorneys fees and other expenses at the maximum amounts authorized under Section 3 of the bill. This provision does not authorize in any way attorney's fees and other expenses to be awarded in excess of the amounts authorized in Section 3 of the bill.

Section 6 also directs a court or administrative officer not to award attorney's fees or other expenses if the court or administrative officer determines that special circumstances make such an award unjust. The provision gives courts and administrative officers broad discretion to deny awards where equitable considerations dictate awards should not be.

made. The concept of "special circumstances" includes both equitable considerations relating to the factual */ context of the case and equitable considerations relating to the legal position of the government. Such equitable considerations include factors which make a plaintiff undeserving of receipt of fees, or which make requiring the government to pay fees unjust.

Section 7

Section 7 disallows awards of attorney's fees or other expenses against the United States or State or local government to any corporation, association, or organization or their grantees, or to any party represented by such an entity, whose primary purpose is to provide legal services and whose legal services in the controversy were funded in whole or part by a grant or appropriation by the United States, a State or municipality for the purpose of legal services. This provision prevents having taxpayers pay twice for the legal services provided by such entities. It also bars subsidization of operating expenses of such entities beyond the amounts provided in the grants or appropriations. Such entities may be awarded attorney's fees and other expenses against the United States or State or local government if the entity proves that the funds for the legal services provided in the controversy came entirely from funds other than funds from grants or appropriations by the United States, a State or local government which were provided for the purposes of legal services.

*/ For examples of special circumstances in which courts in civil rights suits have denied successful plaintiffs attorney fees, see Chastang v. Flynn & Emrich Co., 541 F.2d 1040 , 1045 (4th Cir. 1976) (awarding attorney fees against the retirement fund would penalize innocent participants in the plan); Naprstek v. City of Norwich, 433 F.Supp. 1369, 1370-71 (N.D.N.Y. 1977) (case brought principally as vehicle to generate fee award); Skehan v. Board of Trustees, 436 F. Supp. 657, 667 (M.D. PA. 1977) (award considered unjust because plaintiff in violation of "clean hands" doctrine); Bacica v. Board of Education, 451 F. Supp. 882, 889 (W.D. Pa. 1978) (court critical of plaintiff's counsel for failing to marshal evidence and make clear presentation of the facts).

Section 8

Section 8 directs a court or administrative officer to reduce awards of attorney's fees or other expenses against the United States or State or local government, or to deny such awards in instances in which the court or administrative officer finds that the prevailing party unduly protracted the final resolution of the controversy.

Section 9

Section 9 provides that in any litigation or administrative proceeding concerning the issue of payment of attorney's fees or other expenses a court or administrative officer may not award attorney's fees or other expenses to a prevailing party for activities associated with the issue of attorney's fees or other expenses unless the court or administrative officer finds that the United States, State or local government was unreasonable in the position it took in court or before the administrative officer concerning the issue of attorney's fees. This provision concerns awards of attorney's fees or other expenses for the activities and time spent by a party's counsel in preparation for, and presentation of evidence in, hearings and preparation of papers filed with the court or agency concerning the issue of whether the party is entitled to an award of attorney's fees or other expenses and if so the amount of such awards. Such "fees on fees" may not be awarded by a court or administrative officer unless the party proves that the legal position taken by the United States, a State or local government in hearings and in other papers filed concerning the issue of attorney's fees awards was unreasonable. "Unreasonable" legal positions are limited to those which are captious, frivolous, indefensible, filed in bad faith, or filed where no genuine dispute exists.

Section 10

Subsection 10(a) would deny attorney's fees or other expenses to a party that has rejected a settlement offer which was as favorable to the party as the relief ultimately granted by the court or administrative officer. This provision would be beneficial to both parties in litigation or administrative proceedings. The provision would provide great incentive to the defendant United States, State or local government to offer reasonable settlements to the plaintiffs, resulting in a quick and fair resolution of the dispute

and a reduction of the backlog of cases in our courts. As mentioned in the analysis of section 2, the provisions of the bill are not intended to impede settlement, including settlement agreements which include provisions for attorney's fees and other expenses. The United States, States and local governments could also benefit if they offered a reasonable settlement because they could protect themselves against large fee awards which could result from lengthy litigation.

Currently a plaintiff will be held to be a prevailing party and entitled to recover fees even if the claim has been mooted if the Court finds that the suit was a "catalyst" for the change of policy which rendered the claim moot. Subsection 10(b) would clarify that the pendency of the litigation had to be a material factor in the government's decision to change its policy which moots the suit. This standard is in fact being applied currently by most courts. See e.g., Morrison v. Ayooob, 627 F.2d 669 (3d Cir. 1980), cert. denied, 449 U.S. 1102 (1981). Subsection 10(b) will insure that courts do not place strong emphasis on chronology -- that is, the fact that the plaintiffs case was pending when the government changed the policy which mooted the litigation -- as establishing that the suit was a catalyst for the government's action. Subsection 10(b) will allow governments to make planned changes and improvements in policy without fear that they will become liable for fees in a pending suit. Where suits do act as "catalysts" in pointing out policies which need to be changed and which the government does subsequently change as a result of the pendency of the litigation, awards of attorneys' fees may be made. Subsection 10(b) is needed to insure that planned improvements are not delayed in order to prevent an adverse judgment.

Section 11

Section 11 encourages, and will authorize, courts and agencies in adjudication to award attorney's fees against a plaintiff if the plaintiff's claim is frivolous, unreasonable, or groundless, or if the plaintiff continued to litigate or pursue the adjudication after it clearly became so, even though there was no subjective bad faith. Section 11 is intended to reduce frivolous lawsuits and adjudication and reduce court and agency time and money expended on groundless matters. Section 11 is intended to clarify that the standard enunciated by the Supreme Court in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978), is to apply to prevailing defendants in claims against the

United States, States and local governments. The Christiansburg Garment standard will provide some deterrent to frivolous cases by forcing the plaintiffs to pay the government's attorney's fees if the suit was frivolous or groundless. The standard has been applied in civil rights fee statutes, and has been cited in some cases under 42 U.S.C. 1988; those who would file frivolous suits at taxpayers' expense do so at the risk of paying the government's attorney's fees.

Section 12

Section 12 will apply the maximum hourly rate provisions of section 3 to attorney's fees authorized to be awarded by statute to parties who intervene or participate in agency proceedings. [The term "agency proceeding" is defined in 5 U.S.C. 551(12).] Section 12 of the bill does not create any right to such an award other than as provided by existing statutes.

Section 12 also precludes awards of attorney's fees or other expenses to intervenors or participants in agency proceedings unless such awards are expressly authorized by statute. This prohibition follows and adopts the Fourth Circuit's ruling in Pacific Legal Foundation v. Goyan, 664 F.2d 1221 (4th Cir. 1981), which found that agencies have no implied or general authority to award attorney's fees in agency proceedings.

Section 13

Section 13 will preclude awards of attorney's fees or other expenses against the United States or State or local government to intervenors in litigation, adjudication or licensing unless the intervenor seeking the award clearly and substantially prevailed on the merits of the controversy. Furthermore, Section 13 provides that awards of attorney's fees or other expenses may be made only for work performed on issues which are significantly new and different from those previously pending and only if the intervenor prevails and if the issues were necessary to the resolution of the controversy. Section 13 requires that awards of attorney's fees to intervenors be made only pursuant to the rates established by section 3 of the bill. Except for Section 2 of the bill, an intervenor in litigation, adjudication or licensing shall be considered a party for the purposes of the bill.

Section 14

Section 14 contains provisions directed to resolving a problem States and local governments have experienced under 42 U.S.C. 1988. Section 14 modifies the awarding of fees where the plaintiff prevails on a claim not covered under section 1988 but there is a pendent claim covered under section 1988 which the court does not decide.

Currently, when a plaintiff prevails on the basis of a claim which does not provide for attorney's fees but is joined to a claim which is covered under section 1988, the plaintiff often will recover fees for the entire suit despite the fact that the court did not reach the claim covered by section 1988 and despite the fact that the claim may have no merit. In these situations, the standard used to determine whether the section 1988 claim may be joined to a valid State claim, for example, is that it is not "obviously frivolous" or "wholly insubstantial". In these situations the courts, following the sound judicial rule that constitutional questions should not be decided if the case can be resolved on other grounds, will decide the case on the valid State claim.

Section 14 is intended to clarify that, despite a footnote in the House Report to the contrary, the Fees Act does not provide attorney's fees from the public treasury to creative attorneys in any suit against State or local governments regardless of whether it pertains to civil rights or not. One alternative for correcting this problem is to provide that no fees may be awarded unless the plaintiff specifically prevails on the claim covered by section 1988. But this approach would hamper judicial economy in situations in which there was in fact a valid State or Federal claim not covered under section 1988 and a valid section 1988 claim, because the plaintiff would be likely to bring two separate actions to insure he recovered fees he was entitled to, or the court would have to decide a constitutional claim which was not necessary for it to decide.

The change proposed in section 14 will direct the judge, in these situations, to make a determination as to whether it would have been rational to have brought the section 1988 claim as a separate suit. One court has denied fees in this situation, stating that, "this court sees no basis for awarding fees when the fee triggering statute plays no role but that allowing attorney fees." Tatro v. State of Texas, 516 F. Supp. 968, 984 (N.D. Tex. 1981). If the court determined that the claim covered under section 1988 had sufficient merit to have been reasonably brought as a separate suit, attorney's fees could be awarded even though the plaintiff prevailed on a non-1988 claim. The judge would not have to determine whether the plaintiff prevailed on the section 1988 claim, and the decision would not require extensive analysis in the vast majority of cases. While this amendment would require an additional determination by the court, it is more than justified by the two alternatives -- leaving the situation as it exists now or not allowing fees unless the court makes a final determination on the claim covered under section 1988. The latter course would

probably severely hamper judicial economy, while the former is too burdensome on State and local governments. This proposal should not burden the plaintiff since he simply has to determine whether he is joining the section 1988 claim because it has merit or because he is trying to use it to collect fees.

Section 15

Section 15 requires the Comptroller General of the United States to submit an annual report to the President and the Congress on the amount of fees and other expenses awarded against the United States in litigation and in administrative proceedings. Copies of these reports must be provided to the Attorney General of the United States and the Director of the Administrative Office of the United States Courts, the Chairman of the Administrative Conference of the United States and the Director of the Office of Management and Budget. Agencies will be required to keep records on attorney's fees awards. The Courts and agencies must provide to the Comptroller General information for the preparation of his report.

Section 16

Section 16 applies the provisions of the bill to any award of attorney's fees and other expenses made subsequent to the enactment of the bill. Except for the requirement for annual reports required by section 5(b) of the bill, the provisions of the bill apply to actions commenced and fees and expenses incurred prior to enactment. In litigation pending at the time of enactment of the bill, the annual reports must be filed within one year of such enactment.

Section 17

Section 17 provides that the criteria for the awards of attorney's fees and other expenses established by this bill do not supercede more restrictive criteria contained in other statutes for making such awards. The provisions of this bill establish minimum criteria to be applied for determining and awarding attorney's fees and other expenses in litigation and administrative proceedings against the United States or State or local government. For example, 5 U.S.C. 7701(g)(1) provides that attorney's fees may be awarded if two criteria are met: (1) the party must have prevailed; and (2) the award of attorney's fee must be determined to be "warranted in the interest of Justice..." While the prevailing party criterion in 5 U.S.C. 7701(g)(1) is controlled by section 2 of the bill, the bill does not contain a provision modifying or controlling the second criterion in 5 U.S.C. 7701(g)(1) concerning "warranted in the interest of Justice." Under section 17, the second criterion

would remain in effect. Thus, awards of attorney's fees under 5 U.S.C. 7701(g)(1) must be made in compliance with provisions of this bill and the more restrictive provision "warranted in the interest of Justice."

Another example is found under the Equal Access to Justice Act. Under the newly enacted 28 U.S.C. 2412(d)(1), an otherwise eligible prevailing party is entitled to attorney fees and expenses from the United States "unless the Court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A). While section 6 of the bill contains the "special circumstances" provision, the bill does not contain the "substantially justified" provision. The "substantially justified" provision under 28 U.S.C. 2412(d)(1)(A) is one of the additional "criteria or requirements...limiting entitlement to...awards of attorney's fees or other expenses" within the meaning of section 17 of the bill and as such remains in effect.

Section 18

Section 18 provides that nothing in this bill shall be interpreted to create any right to an award of attorney's fees or other expenses. Any right to such awards is created solely by the provisions of other laws. This bill, however, does apply to, and modify, all fee shifting statutes, including the Equal Access to Justice Act, Public Law 96-481, except that (1) the provisions of section 3 which establishes a fee cap do not apply to awards made under 5 U.S.C. 504(a)(1) and 28 U.S.C. 2412(d)(1)(A) and (d)(3); (2) the provisions of section 4 which establishes a 25% trigger in monetary awards do not apply to awards made under 5 U.S.C. 504(a)(1), and 28 U.S.C. 2412(d)(1)(A) and (d)(3), or in cases where government "bad faith" is proven under 28 U.S.C. 2412(b); and (3) the government has the burden of proof regarding determinations of "substantial justification" under 5 U.S.C. 504(a)(1) and 28 U.S.C. 2412(d)(1)(A) and (d)(3).

Furthermore, it is emphasized that the bill affects only litigation or administrative proceedings in which the award of attorney's fees is entered against the United States or State or local government, as opposed to cases in which an award is authorized to be paid out of proceeds or damages assessed against the United States. For example, the bill does not authorize award of fees directly against the Government in cases under the Federal Tort Claims Act, 28 U.S.C. § 2671-2680, or in cases involving National Service Life Insurance or United States Government Life Insurance, under 38 U.S.C. § 784. In those cases attorney's fees are paid from the prevailing party's total award of damages or proceeds and are not a separate judgment or award entered against the Government.

Section 19

Section 19 provides for definitions.