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

Bill –
FYI
+ see me

May 10, 1982

LEGISLATIVE REFERRAL MEMORANDUM

SPECIAL

TO:
Department of Agriculture
Department of Commerce
Department of Education
Department of Defense
Department of Justice
Department of Labor
Department of Commerce
Department of Health and Human Services
Department of Housing and Urban Development
Department of State
Department of the Treasury
Department of Transportation
Department of the Interior
Department of Energy
Veterans Administration
Environmental Protection Agency
Small Business Administration
Securities and Exchange Commission
Office of Personnel Management
Federal Trade Commission
General Services Administration

SUBJECT: OMB draft bill, "The Limitation on Legal Fees Awards Act of 1981"

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than cob Friday, May 21, 1982.

Direct your questions to Rick Irby (395-5600), or Maurice White (395-3856), of this office.

Robert E Carlstrom

Robert E. Carlstrom, Chief
Economics-Science-General
Government Branch
Legislative Reference Division

cc:
M. Horowitz
J. Komoroske
M. Uhlmann
T. Lenard
M. Ramsey
R. Greene
C. DeMuth
P. Szervo

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." 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 laws authorize or require the Federal Government 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" 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 fee awards.

Federal fee awards are invariably at multiples of the cost of the Federal attorneys involved in the same cases. In many instances, awards are based upon time spent by attorneys on the case, and may exceed the amount recovered by the client in the case.

Except "core" recoveries to individuals and small business under the Equal Access to Justice Act, the proposed legislation will establish a maximum hourly rate for fee awards against the United States under all Federal fee-shifting statutes. The fee cap would be set at the lower amount of two calculations, as follows: (1) the actual direct cost to 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 unless the party seeking the award ultimately 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 costs 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 costs 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 in cases where a money award is part of the final judgment or agency order;

° disallows awards of attorney's fees or other costs against the United States 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 for the purpose of legal services;

- disallows or reduces awards of attorney's fees and costs against the United States where the prevailing party unduly protracted the final resolution of the controversy; and

- requires that the United States must be found to have been unreasonable in the position it took in court or before the agency in controversies concerning the payment of attorney's fees.

We believe that this legislation will eliminate the results reached in Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980), and Sierra Club v. Gorsuch, No. 79-1565 (D.C. Cir. Feb. 5, 1982), which placed unreasonable and excessive litigation expenses on the American taxpayer. The proposal will restrict contingency fee litigation against the Federal Government, 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 outlays and will help reduce the Federal civil case load, which has grown over 100% since 1975, while maintaining protections for individuals and small businesses who have been subjected to overreaching Federal actions.

Sincerely,

Enclosure

A BILL

To provide for the limitation on legal fees awarded against the United States.

<u>Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled</u>, That this Act may be cited as "The Limitation on Legal Fees Awards Act of 1981."

Sec. 2. Notwithstanding any other provision of law, no award of attorney's fees or other costs, including expert witness 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, in any litigation or adversary adjudication unless the party seeking the award ultimately prevailed on the merits of the controversy; provided that any such award may be made only for work performed on activities or issues upon which the party prevails, and only if such activities and issues were necessary to the resolution of the controversy; and further provided that no determination shall be made by a court or adjudicative officer of an agency of any right to payment of such attorney's fees or costs until entry of a

final judgment, or expiration of the time within which an appeal may be taken, whichever is later.

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, in any litigation or adversary adjudication shall exceed the lower of (a) an hourly rate calculated on the basis of 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) plus reasonable overhead expenses provided that such expenses do not exceed 50% of the total of the calculated hourly rate plus benefits; or (b) the actual, direct cost to the party of attorney's fees and other costs incurred.

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

Sec. 4. Notwithstanding any other provision of law--

(a) A party who has ultimately prevailed and who is seeking 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 shall, within thirty days of either the entry by a court of a final judgment, or the entry by an adjudicative officer of an agency of a final disposition of an adversary adjudication, submit to the court or agency a statement that sets forth and establishes to the satisfaction of the adjudicative officer or the Court the following:

(1) a description of the basis of the award sought indicating that it is proper under applicable law, and the amount sought. The submission shall also include 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;

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

(4) such other information as may be required by law.

(b) A party who intends to seek 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 shall provide to the United States, agency or official, and to the court or adjudicative officer of an agency, a report which shall include the information in subsection (a) of this Section within one year after the action was initiated and annually thereafter.

(c) 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 unless the party seeking the award has complied with the provisions of this Section.

Sec. 5. 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 unless the fee awarded bears a reasonable relation to the result achieved in the proceeding, or where the court or adjudicative 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. 6. Notwithstanding any other provision of law, in any litigation or adversary adjudication 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 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. 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 costs against the United States or any agency or any official of the United States acting in his or her official capacity shall be made in any litigation or adversary adjudication 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 adversary adjudication were funded in whole or in part by a grant or appropriation by the United States for the purpose of legal services.

Sec. 8. In awarding attorney's fees and costs 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 the court or adjudicative 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 adjudicative 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 costs in any litigation or adversary adjudication concerning the payment of attorney's fees or costs shall be made against the United States or any agency or any official of the United States acting in his or her official capacity unless the court or adjudicative officer of an agency finds that the United States was unreasonable in the position it took in court or before the adjudicative officer concerning such payment of attorney's fees or costs.

Sec. 10. 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 costs awarded against the United States, or agencies and officials of the United States acting in their official capacities awarded in litigation and adversary adjudications 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 costs made against the agency, an agency official acting in his or her official capacity, or the United States where the agency participated in the defense of the controversy.

Sec. 11. The provisions of this Act shall apply to any award of attorney's fees and costs made subsequent to the enactment of this Act including actions commenced and fees and costs incurred prior to such enactment.

Section by Section Analysis

Section 2 will preclude awards of attorney's fees against the United States unless the party seeking the award ultimately 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. Section 2 also provides that a court or adjudicative officer may not determine any right of payment of attorney's fees until a final judgment has been entered in the case or until the time in which to appeal the case has expired whichever is later.

Section 3 establishes a maximum hourly rate for attorney fee awards under certain fee shifting statutes. Awards will be limited to the lower of two amounts calculated as follows: (1) the actual direct cost to the party; or (2) an hourly rate calculated on the basis of the highest hourly pay rate plus benefits payable to government attorneys in the Civil Service, plus reasonable overhead expenses. Such overhead expenses, however, shall not exceed 50% of the total of the calculated hourly rate plus benefits. (Under the current pay scale the calculated hourly rate under this formula is $53.16.) Awards under the Equal Access to Justice Act are exempted from this fee cap.

Section 4 provides that certain showings must be made before any fee award can be made. Subsection (a) requires that a prevailing party who is seeking attorney's fees or costs against the United States do so within 30 days of entry of a final judgment by a court or a final disposition by an adjudicative officer of an agency. Subsection (a) also requires the party seeking such an award to submit a statement that establishes and includes 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.

- A statement under oath by the party that the attorney's fees and costs 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.

- Where the attorney's fees or costs had been previously paid or assumed and the party seeks reimbursement the statement under oath must establish that the fees or costs would not have been incurred but for the participation by the party in the subject litigation or adversary adjudication. This provision, intended to bar supplementation or subsidization of operating costs by applicant parties, will preclude awards of attorney's fees where the party cannot show in the specific case that the costs were incurred only because of the litigation or adversary adjudication. Thus, an organization that has employed staff attorneys prior to the onset of the specific case will not be eligible for fee awards 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.

Subsection 4(b) requires a party who intends to seek an award of attorney's fees or costs against the United States to provide a report within one year after the action was brought. The report will be required to contain all information required under Subsection 4(a) and must be updated annually.

Subsection 4(c) disallows the award of attorney's fees and costs against the United States if the party seeking the award has not established the showings required by, and met the procedural requirements of, Section 4.

Section 5 requires that any award of attorney's fees or costs against the United States must bear a reasonable relation to the result achieved in the proceeding. Section 5 also directs a court or adjudicative officer not to award attorney's fees and costs if the court or adjudicative officer determines that special circumstances make such an award unjust.

Section 6 provides that in any litigation or adversary adjudication in which money is part of the final judgment or final agency order the United States 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.

Section 7 disallows awards of attorney's fees or other costs against the United States 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 for the purpose of legal services.

Section 8 directs a court or adjudicative officer to reduce awards of attorney's fees and costs against the United States or to deny such awards in instances in which the court or adjudicative officer finds that the prevailing party unduly protracted the final resolution of the controversy.

Section 9 provides that in any litigation or adversary adjudication concerning the payment of attorney's fees a court or adjudicative officer may award attorney's fees to a prevailing party only if the court or adjudicative officer finds that United States was unreasonable in the position it took in court or before the adjudicative officer concerning the payment of the attorney's fees.

Section 10 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 costs awarded against the United States in litigation and in adversary adjudications. 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 11 applies the provisions of the Act to any award of attorney's fees and costs made subsequent to the enactment of the Act, including actions commenced and fees and costs incurred prior to enactment.

→ Bill, FYI

United States of America
Office of Personnel Management

Office of the General Counsel
Washington, D.C. 20415

In Reply Refer To:

Your Reference:

NOV 5 1982

The Honorable Michael J. Horowitz
Counsel to the Director
Office of Management and Budget
Executive Office Building
Washington, D.C. 20503

Dear Mike:

In connection with the Administration's submission to the Congress of proposed legislation restricting attorneys' fee awards against the United States, I recommend that you incorporate therein principles set out in the recent case of Cooper v. Singer, 51 U.S.L.W. 2210 (10th Cir., September 30, 1982). This case relates to the fixing of attorneys' fees under the Civil Rights Attorney's Fees Awards Act when there is a contingent fee contract between the attorney and the plaintiff-client. The Court held that --

> "if the plaintiff and his or her attorney have agreed on a figure for fees, or a percentage, this should constitute the maximum allowable fee. If the agreed fee is above what is reasonable under § 1988 [of Title 42, United States Code] as determined by the court, only the reasonable portion may be the awarded amount."

In addition, Judge Holloway, while dissenting in part, stated that --

> "if the reasonable fee award is less than the contracted amount, and that agreed fee is found to be unethically excessive or unreasonable, the court may, by judicious exercise of its equitable and supervisory powers over the bar, limit the amount that the attorney may actually receive."

I suggest that these sound principles be incorporated in any attorneys' fees legislation proposed to the Congress or at least that they be reflected in the legislative history of the proposal.

Sincerely yours,

Joe

Joseph A. Morris
General Counsel

cc: Michael M. Uhlmann
Special Assistant to the President
for Policy Development

The Honorable Jonathan Rose
Assistant Attorney General
Office of Legal Policy
Department of Justice

The Deputy Attorney General

Washington, D.C. 20530

June 1, 1983

MEMORANDUM

TO: Michael Horowitz
Counsel to the Director
Office of Management and Budget

FROM: Edward C. Schmults
Deputy Attorney General

SUBJECT: Attorney Fee Cap Bill

As you know, I have reviewed and discussed the latest draft of your "fee cap" bill with the heads of the litigating divisions and the Office of Legal Policy. Attached is a redraft of your bill reflecting changes which we think should be made to give this legislation its best chance for success.

The most important change reflected in this redraft is an increase in the fee cap to the Equal Access level of $75. I believe that this is a better legislative approach than an attempt to link the fee cap to any government salary level. Our most important legislative goal is, of course, to eliminate use of "multipliers." It will be difficult to argue that multipliers are not appropriate where the hourly fee is pegged to a government salary. We can expect our opponents to argue that, if the private attorney general's salary is to be pegged to the salary of a government attorney, the court should be allowed to use a multiplier or grant some other type of bonus to take into account the risk factor that is assumed by the private attorney but not the public, salaried attorney. A $75 cap will undercut this argument, since we can contend plausibly that it allows a possible bonus factor above a reasonable salary rate.

More importantly, of course, a $75 cap can be readily defended as the limit that Congress decided to impose in the Equal Access to Justice Act. You have raised the concern that if a $75 limit is adopted for attorney's fees against the government generally, Congress might conclude that the cap should be raised for EAJA cases in which the government's position was found not to be "substantially justified." We do not, however, believe that this follows logically, since fees for EAJA cases were obviously not intended by Congress to exceed fees charged against the government in other cases (this was, of course, the point of the fee cap in the EAJA). I agree with you that we would have a little more bargaining space if we began at a number below $75, but I think our legislative success will depend more heavily on our ability to appear reasonable and convince the Congress that some hourly limit which cannot be further inflated by multipliers and bonuses is appropriate.

A second major difference between our draft and your last draft is that we have eliminated the provision of the bill that required courts to reduce awards of attorney's fees to organizations with in-house lawyers to levels not "significantly greater" than the hourly salary actually paid the organization's attorneys. Aside from the problems of administration and circumvention presented by this provision, with which you are familiar, we believe this provision may be seen as an attempt to "de-fund the left" and generate excessive opposition and controversy. This "salary plus overhead" method of calculating a fee limit might be viewed as unreasonable, particularly as applied to "public interests" groups, and might invite discussion of appropriate multipliers to reflect risk factors.

Other changes we would suggest are largely technical and are explained more fully in the attached memorandum from Jonathan Rose. I have asked Jon Rose and his staff to work closely with you to finalize as soon as possible a draft of this bill which we can all enthusiastically support.

Attachment

U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

May 25, 1983

TO: Edward C. Schmults
Deputy Attorney General

J. Paul McGrath
Assistant Attorney General
Civil Division

FROM: Jonathan C. Rose JCR
Assistant Attorney General
Office of Legal Policy

SUBJECT: Proposed OMB Fee Cap Bill

I attach a revised copy of OMB's proposed fee cap bill, which we have changed to reflect the comments and suggestions made by the litigating divisions. With the exception of one major change -- the level of the fee cap -- I do not believe that these alterations in the bill should be controversial with OMB. Nevertheless, I think that we first should agree among ourselves on these changes before contacting OMB.

1. Level of the Fee Cap. In response to a general concern about the reasonableness of the fee cap level, we have replaced OMB's complex formula for determining the level of the fee cap with a flat rate of $75 per hour. This change would raise the fee cap from about $53.85 per hour to the $75.00 rate Congress recently set in certain provisions of the Equal Access to Justice Act ("EAJA"). 1/ Besides eliminating the need to defend treating the EAJA differently from other federal fee-shifting statutes, this change would insulate us from attack on the issue of the fee cap level, since we can justifiably point out that Congress itself determined recently (and even today agrees) that $75 per hour is a fair and reasonable level of attorney compensation. In addition, raising the minimum fee cap from $53.85 to $75 per hour would not impair the bill's central purpose, which is to eliminate the use of "multipliers" and bonuses to inflate attorneys' fees to unreasonably high levels.

1/ See 28 U.S.C. § 2412(d) (2)(A)(ii), 5 U.S.C. § 504(b) (setting a fee cap of $75 per hour on recoveries of attorneys' fees by individuals and small businesses under the EAJA).

2. Money Damages Cases. We have left largely intact the provisions of the draft bill that require a party who has won money damages from the government to deduct from any attorneys' fee award an amount equal to one-quarter of the money damages judgment. However, we have exempted from this requirement any recoveries under Internal Revenue Code Section 7430. This exemption is designed to eliminate the possibility of inconsistent adjudications in cases where taxpayers protest the government's assessment of taxes. 2/

3. Government Bad Faith. We have modified the draft bill to make it clear that the exceptions to the fee cap and the 25% deduction rule are limited to the statutes that are specifically identified in those provisions. We made this change in response to the concern that courts might find a general exception to the fee cap and to the 25% deduction rule when "bad faith" on the part of the government is shown; we expect that if there were such a general "bad faith" exception, allegations of governmental bad faith -- and protracted litigation over the government's motivations in the suit -- would become routine.

4. Fee Awards to Salaried Attorneys. We also have eliminated the provision of the bill that required courts to reduce awards of attorney's fees to organizations with in-house lawyers to levels not "significantly greater" than the hourly salary actually paid the organization's attorneys. Although we support this measure in principle, we fear that it could not be readily administered and that it would needlessly jeopardize the bill's prospects of passage. This provision easily could be circumvented by organizations that restructured their relationships with their attorneys to characterize them as outside counsel. In addition, various litigating divisions criticized the provision as a potential source of wasteful litigation over the issue of what would constitute an award "significantly greater" than the salary of a staff attorney. Finally, in view of the fact that many organizations -- from General Motors to the Sierra Club -- conduct much of their litigation in-house, we believe that elimination of this provision would prevent needless political controversy and litigation.

2/ Inconsistent adjudications could result because under the Internal Revenue Code a taxpayer has two choices when protesting tax claims: (1) to pay the contested taxes and sue for a refund in district court or in the Claims Court or (2) to refuse to pay the tax and bring suit in the Tax Court. In the first case, the successful taxpayer would receive a monetary award -- from which 25% would be deducted for attorneys' fees -- while in the second case there would be no monetary award, and thus no 25% deduction.

5. Offers of Settlement. The bill has been changed to clarify the circumstances under which a party may recover attorneys' fees when it previously has rejected a settlement offer, only to do no better after taking the case to trial. Because the original language of the bill was unduly vague, we have changed it to conform with the language of Rule 68 of the Federal Rules of Civil Procedure.

6. Impact on Federal Rules and Common Law. The litigating divisions have questioned whether the fee cap bill would apply to awards of attorneys' fees under the Federal Rules of Civil and Appellate Procedure. It is our view that they should not, because the problem the bill is designed to address -- the use of multipliers and bonuses to inflate awards of attorneys' fees -- has not arisen in awards of fees under the federal rules. Moreover, the fee-shifting provisions of the federal rules generally embody no more than the courts' inherent power to impose sanctions upon parties to protect the integrity of the courts' own processes, and we are reluctant to intrude upon this important element of judicial authority. Accordingly, we have changed the bill to apply only to "statutes," (the federal rules are generally regarded as "laws" but not as "statutes"), and we plan to include language in the bill's legislative history to make it clear that the Federal Rules should not be affected by the bill.

In addition, we have amended the bill to make it clear that in cases where attorneys' fees are awardable both under a federal statute and under a common law theory, the federal statute will take precedence and the award of attorneys' fees will be subject to the provisions of the bill. This will prevent parties' from circumventing the fee cap by relying on common law theories in cases where federal statutes also apply.

7. Criminal Justice Act Compensation Levels. The litigating divisions agreed that, while the rate of hourly compensation to attorneys under the Criminal Justice Act ("CJA") should be increased from present levels, an increase of the CJA rate to a level of $75 per hour would be unduly generous. Accordingly, we have left unchanged the draft bill's provisions for compensation of private attorneys under the CJA. At present the OMB formula would provide compensation under the CJA of $53.85 per hour for time in court, and $35.90 per hour for time out of court. 3/ We believe that the difference in compensation under the general fee cap and under the CJA is justified because CJA attorneys, unlike those in fee-shifting cases, recover whether they win or not. Perhaps an even better justification is that the rate of compensation presently established by the bill

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3/ OMB derived this rate from the annual compensation of senior government litigators at General Schedule Grade 15, Step 5. To account for inflation, the bill provides for annual adjustment based on increases in the compensation of government attorneys.

would compensate CJA lawyers at a level equivalent to that of their government counterparts, thus assuring an indigent criminal defendant that his court-appointed attorney is as well-paid as the federal prosecutor opposing him. 4/

8. Technical Revisions. Numerous technical and clarifying revisions to the OMB bill were proposed by the litigating divisions and have, for the most part, been incorporated into the attached draft. We are preparing a marked-up copy of the original bill to indicate where these changes have been made.

4/ It should be noted that the proposed level of compensation to CJA attorneys, while substantial, does not fully offset the 150% increase in the cost of living since the CJA rates were last set in 1970. If indexed for inflation, the CJA rates of $20 and $30 per hour (for out-of-court and in-court time, respectively), should now be about $50 and $75.

A BILL

To ensure equity in, and to provide standards for, awards of legal fees against the United States, and against state and local governments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congressional Assembly, that this Act may be cited as "The Legal Fees Equity Act."

Sec. 2. Findings and Purposes: (a) Congress hereby finds and declares that:

Many Federal statutes authorize awards of attorneys' fees to be made to parties who prevail against the United States, or against state or local governments, in civil judicial and administrative proceedings. Most of these fee-shifting statutes provide for an award of "reasonable attorneys' fees," but do not provide any standards to guide courts and administrative bodies in awarding such fees. Courts and agencies have inconsistently interpreted these federal civil fee-shifting statutes, and in many instances have made excessive awards of attorneys' fees under them. As a result, federal fee-shifting statutes have often operated to oversubsidize attorneys at the expense of federal, state, and local government taxpayers.

2. It is inappropriate for the federal government to impose on state and local governments statutory requirements to pay awards of attorneys' fees when it has provided no standards by which to make such awards. It is particularly inappropriate to impose such statutory requirements when the result is to oversubsidize attorneys.

3. Accordingly, it is necessary for Congress to define standards for awards of attorneys' fees or related expenses or costs under federal fee-shifting statutes.

4. It is appropriate to establish a maximum hourly compensation rate for attorneys who litigate against the United States, or against state or local governments, in civil judicial or administrative proceedings to which any federal fee-shifting statute applies.

5. The attorneys' fee cap recently prescribed by Congress for civil judicial and administrative proceedings under the Equal Access to Justice Act provides a reasonable and appropriate maximum hourly rate for attorneys' fees in civil judicial or administrative proceedings to which any federal fee-shifting statute applies.

6. It is inappropriate for awards of attorneys' fees to be made to parties who have not prevailed on the merits of their complaint

against the United States, or against state or local governments, in civil judicial or administrative proceedings.

7. It is inappropriate for attorneys in civil judicial or administrative proceedings against the United States, or against state or local governments, to recover fee awards that significantly exceed the monetary awards recovered by their clients.

8. It is appropriate that clients in such proceedings pay a reasonable portion of their attorneys' fees when monetary awards are recovered against the United States, or against state or local governments.

9. Statutory provisions are necessary to control the circumstances and conditions under which awards of attorneys' fees or related expenses or costs may be made against the United States, or against state or local governments, in civil judicial or administrative proceedings to which any federal fee-shifting statute applies.

10. There is a need to increase the hourly rate of compensation paid to attorneys who defend indigent defendants in federal criminal proceedings under the Criminal Justice Act. The present hourly compensation rate of attorneys under the Criminal Justice Act is fixed well below that of government litigators in federal criminal proceedings, and is significantly less than the hourly

compensation typically awarded to attorneys in civil judicial or administrative proceedings to which any federal fee-shifting statute applies.

(b) It is the purpose of this Act--

1. To establish a uniform hourly rate that shall be the maximum compensation authorized to be awarded against the United States, or against state or local governments, in civil judicial or administrative proceedings to which any federal fee-shifting statute applies.

2. To require that awards of attorneys' fees against the United States, or against state or local governments, in civil judicial or administrative proceedings to which any federal fee-shifting statute applies be made only to parties who have prevailed in the proceedings.

3. To prescribe standards for the awarding of attorney's fees and related expenses and costs against the United States, or against state or local governments, in civil judicial or administrative proceedings to which any federal fee-shifting statute applies.

4. To increase the maximum hourly rate of compensation payable to attorneys in federal criminal proceedings under the Criminal Justice Act.

Sec. 3 Disclaimer:

(a) Nothing in this Act shall be interpreted (1) to create any right to an award of attorneys' fees or related expenses or costs against the United States, or against state or local governments, or (2) to provide authority for any court or administrative body to make such an award of attorneys' fees or related expenses or costs.

(b) No award of attorneys' fees or related expenses or costs may be made against the United States, or against state or local governments, in any civil judicial or administrative proceeding to which any federal fee-shifting statute applies, except as expressly provided for by federal statute, and in accordance with this Act.

Sec. 4. Scope. Notwithstanding any other provision of law, no award of attorneys' fees or related expenses or costs may be made against the United States, or against state or local governments, in any civil judicial or administrative proceeding to which any federal fee-shifting statute applies unless the court or the administrative officer of the agency determines that the party seeking attorneys' fees or related expenses or costs has established that:

(a) The party has prevailed on the merits of its complaint;

(b) The attorneys' fees or related expenses or costs for which the award is sought (1) resulted from work performed in connection with issues upon which the party prevailed and (2) that such work was necessary to resolve the controversy;

(c) The application for attorneys' fees or related expenses or costs is made in accordance with Section 7 of this Act;

(d) The attorneys' fees sought are not in excess of the amounts authorized under Section 5 of this Act; and

(e) The attorneys' fees sought are for services that are not duplicative of, or unnecessary because of, services performed by other attorneys, or their employees, in the proceeding.

Sec. 5 Attorneys' Fee Cap:

(a) No award of attorneys' fees made against the United States, or against state or local governments, in any civil judicial or administrative proceedings to which any federal fee-shifting statute applies shall exceed the hourly rate of compensation set forth in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A). Moreover, no increase in the cost of living or "special factor," as that term used in 28 U.S.C. § 2412(d)(2)(A) shall be considered as justification for a higher fee, except in cases under 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A) and (d)(3).

(b) "Related expenses and costs," as defined in this Act, shall not be a part of the determination of "attorneys' fees."

Sec. 6. <u>Money Damages Cases</u>:

(a) Notwithstanding any other provision of law, in any civil judicial or administrative proceeding to which any federal fee-shifting statute applies, in which an award of money is part of the final judgment or final agency order, the court or administrative officer of the agency shall reduce any award of attorneys' fees, as computed in accordance with Section 5 of this Act, to be made against the United States, or against state or local governments, by an amount equal to 25% of the monetary award.

(b) This Section shall not apply to fees awarded under Section 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A) and (d)(3), and 5 U.S.C. § 7430.

Sec. 7 <u>Timely Applications and Procedures</u>:

(a) Notwithstanding any other provision of law, a party may seek an award of attorneys' fees or related expenses or costs against the United States, or against state or local governments, in any civil judicial or administrative proceeding to which any federal fee-shifting statute applies only within thirty days after either a final judgment by the court or the entry by an administrative officer of an agency of a final decision of an administrative proceeding. The party seeking an award of attorneys' fees shall submit to the court or agency such information as may be required by the court or administrative officer of the agency.

(b) Courts and agencies shall develop procedures, not inconsistent with this Act, for filing of applications for awards of attorneys' fees, which shall provide guidance as to what information should be required to be submitted pursuant to subsection (a) of this section, when such information should be submitted, and when determinations should be made concerning awards of attorneys' fees or related expenses or costs. In no event shall an award of attorneys' fees, related expenses, or costs be made prior to entry of a decision on the merits by the court or entry by an administrative officer of a final disposition of an administrative proceeding.

Sec. 8 Reduction of Awards:

(a) In awarding attorneys' fees or related expenses or costs against the United States, or against state or local governments, in any civil or judicial or administrative proceeding to which any federal fee-shifting statute applies, the court or administrative officer of an agency

(1) shall reduce or deny the amount that otherwise would be awarded based on the following factors: (A) a finding that the prevailing party, during the course of the proceeding, engaged in conduct that unreasonably protracted the final resolution of the controversy; or (B) a finding that there is no bona fide attorney-client relationship with an identified client; and

(2) shall reduce the amount that otherwise would be awarded under the provisions of this Act based on the following factors: (A) a finding that time and legal services provided were excessive with regard to the nature of the controversy; or (B) a finding that the attorneys' fee award determined pursuant to section 5 of this Act unreasonably exceeds the monetary result achieved in the proceeding.

(3) The amount of any reduction of an award shall be determined in the discretion of the court or administrative officer.

(b) Paragraph (2) of subsection (a) of this section shall not apply to attorneys' fees, related expenses, or costs awarded under 5 U.S.C. § 504(A)(1) or 28 U.S.C. § 2412(d)(1)(A) and (d)(3).

Sec. 9. Mootness and Settlement Defenses:

Notwithstanding any other provision of law, no award of attorneys' fees or related expenses or costs may be made against the United States, states, or local governments in any civil judicial or administrative proceeding to which any federal fee-shifting statute applies

(a) Where a court or an administrative officer finds (1) that the claims have become moot due to a change in government policy and (2) that the pendency of the judicial or administrative proceeding was not a material factor in such change in policy; or

(b) For services performed subsequent to the failure of an offeree to accept a written offer of settlement if a court or administrative officer finds (1) that the relief finally obtained by the offeree is not more favorable to the offeree than the offer of settlement, and (2) that the offeree had a reasonable amount of time in which to consider the settlement offer.

Sec. 10. Comptroller General Report:

The Comptroller General of the United States shall submit on April 1 of each year a report to the President and the Congress on the amount of attorneys' fees, related expenses, and costs awarded against the United States, or against state or local governments, in civil judicial and administrative proceedings to which federal fee-shifting statutes apply during the preceding fiscal year. 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.

Sec. 11. Criminal Justice Act Amendments:

Subsections (d)(1) and (d)(2) of section 3006A of Title 18, United States Code, are amended to read as follows:

"(d) Payment for representation--

"(1) Hourly rate.--Any attorney appointed pursuant to this section or any bar association, legal aid agency, or community defender organization that has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding the following:

"(A) For time expended in court or before a United States magistrate, an hourly rate which is the sum of (1) the hourly pay rate plus benefits payable to federal government attorneys in the Civil Service at Grade 15 of the General Schedule, Step 5, determined by the Director of the Office of Personnel Management under enactment of this Act, and thereafter, at the beginning of each fiscal year, and (2) 50% of the total of the hourly rate plus benefits calculated under clause (1) above, which shall be compensation for overhead expenses; and

"(B) For time reasonably expended out of court, an hourly rate which is two-thirds of the sum calculated under paragraph (A) above.

"Such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court."

"(2) Maximum amounts.--

"(A) Upon enactment of this Act --

"(i) The Director of the Office of Personnel Management shall determine the percentage increase attributable to the difference between $30 and the hourly rate determined pursuant to paragraph (a) of subsection (d)(1) of this section, as amended.

"(ii) The maximum amounts authorized shall be as follows: For representation of a defendant before the United States magistrate or the District Court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $1,000, plus [1,000 x the percentage determined pursuant to subparagraph (i)], for each attorney in a case in which in a case in which one or more felonies are charged, and $400, plus [$400 x the percentage determined pursuant to subparagraph (i)] for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $1,000, plus [$1,000 x the percentage determined pursuant to subparagraph (i)], for each attorney in each court. For representation in connection with a post-trial motion made after the entry of judgment or in a probation revocation proceeding or for representation provided under subsection (g) the compensation shall not exceed $250, plus [$250 x the percentage determined pursuant to subparagraph (i)] for each attorney in each proceeding in each court.

"(B) At the beginning of each fiscal year --

"(i) The Director shall determine the percentage increase or decrease, if any, attributable to any change in the hourly rate determined pursuant to paragraph (A) of subsection (d)(1) of this section, as amended.

"(ii) The maximum amounts determined pursuant to subparagraph (A)(ii) of subsection (d)(2) of this section shall be changed by the percentage increase or decrease determined by the director pursuant to subparagraph (i) of this paragraph.

"(C) The Director shall publish in the Federal Register the determinations made regarding the percentage increase or decrease, and the maximum amounts, pursuant to this subsection."

Sec. 12. Effective Date:

The provisions of this Act shall apply to any award of attorneys' fees or related expenses or costs made subsequent to the enactment of this Act including awards in actions commenced prior to such enactment, or for attorneys' fees, expenses, or costs incurred prior to such enactment.

Sec. 13. Relationship to Other Laws:

(a) The provisions of this Act establish minimum criteria and requirements for the award of attorneys' fees and related expenses and costs against the United States, or against state or local governments, in civil judicial and administrative proceedings to which any federal fee-shifting statute applies. The provisions of any applicable federal fee-shifting statute which establishes additional criteria or requirements beyond those established in this Act for the award of attorneys' fees or related expenses or costs in such proceedings, or which otherwise limit awards of attorneys' fees in such proceedings, shall apply in addition to the provisions of this Act, to the extent that such additional provisions are not inconsistent with this Act.

(b) In any civil judicial or administrative proceeding against the United States, or against a state or local governments, where an award of attorneys' fees is authorized both under a federal fee-shifting statute and under the common law, such award shall be made in accordance with the provisions of the applicable federal fee-shifting statute and with the provisions of this Act.

Sec. 14. Definitions: For the purpose of this Act--

(a) "Attorneys' fees" means fees attributable to professional legal services performed by a person, or persons, licensed to practice law, plus "overhead expenses," as defined in this Act. Attorneys' fees" does not include "related expenses or costs" as defined in this Act.

(b) "Overhead expenses", except in extraordinary circumstances, shall include, but not be limited to, the following: rent or mortgage payments; maintenance, including heating and cooling equipment; furniture and supplies; reporters, treatises, and other books; secretarial and other clerical and librarian time, including computer word processing expenses; telephone services and calls; mailing expenses; LEXIS expenses; and computer litigation support expenses.

(c) "Related expenses or costs" means those expenses and costs which may be awarded pursuant to a federal law, and are not "overhead expenses," and which are actually incurred by the attorney in connection with judicial or administrative proceedings.

"Related expenses or costs" does not include "attorneys' fees", as defined in this Act.

(d) "Party" means, for purposes of judicial proceedings, a party as defined by Rule 17 of the Federal Rules of Civil Procedure, or, for purposes of administrative proceedings, a party as defined in section 551(3) of Title 5 of the United States Code, which is an individual, partnership, corporation, association, unincorporated business, estate or public or private organization other than an agency. "Party" does not include the United States, or any state or local government, except when a state or local government opposes the United States in a civil judicial or administrative proceeding.

(e) "Judicial proceeding" means a proceeding in any court or under the jurisdiction of a judicial officer, in which a party may under federal statute be awarded attorneys' fees or related expenses or costs.

(f) "Administrative proceeding" means any proceeding, other than a judicial proceeding, in which a party may under statute or regulation be awarded attorneys' fees or related expenses or costs.

(g) "Administrative officer" means the official[s] or person[s] authorized by statute or regulation to decide the substantive issues being considered in an administrative proceeding, or the official[s] or person[s] designated by the head of the agency as the administrative officer[s] for the purpose of this Act.

(h) "Decision on the merits" means a final decision by the Court on the claim or claims brought in the proceeding.

(i) "United States" means the United States, or any agency of the United States, or any official of the United States acting in his or her official capacity.

(j) "State" means any state government, or any agency of the state government, or any official of the state government acting in his or her official capacity, and includes territories and the District of Columbia.

(k) "Local government" means any county, city, town, municipality, municipal corporation or other political subdivision of a state government, or any agency of such entity or any official of such entity acting in his or her official capacity.

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

July 25, 1983

MEMORANDUM

TO: Edwin Meese, III

FROM: Joseph R. Wright, Jr.

SUBJECT: Attorney Fee Reform Legislation

A. Background

1. Justice and OMB have developed an attorney's fee bill which comprehensively reforms statutory compensation of attorneys who litigate against the government in both civil and criminal proceedings. The bill sets standards for civil litigation awards, including a $75 per hour cap in response to current judicial abuses which often have resulted in awards to attorneys of $100 to $200 per hour and higher. (Other abuses -- e.g., current fee awards disproportionate to actual recoveries -- are also dealt with.) Further, the bill also doubles the hourly compensation rates (to $60 per hour for in court work) and the per case ceilings (e.g., to $2000 for felonies) paid to attorneys who represent indigent criminal defendants under the Criminal Justice Act (CJA). The CJA rates have not been amended since 1970.

2. Congressman Kastenmeier has recently held hearings and his subcommittee may be moving quickly on a Judicial Conference proposal to amend the CJA. The Kastenmeier bill grants authority to the Conference to determine hourly rates, and substantially increases the per case ceilings; e.g., for felony cases the current $1000 ceiling will be raised to $10,000.

3. Justice, Interior, OMB and OPD agree on the following:

- The Administration bill is moderate in its terms, and a needed reform.

- The Kastenmeier bill should be opposed since it only amends CJA rates and, if enacted, could foreclose the comprehensive fee reform we believe to be necessary. (The Kastenmeier bill is also objectionable as to CJA fees alone; it fixes unduly generous fee standards and provides blanket authority to the Judicial Conference to fix them.)

- A strong public case can be made for comprehensive fee reform by citing current abuses and the growing industry of attorneys capitalizing on civil fee awards.

- A broad range of groups are likely to support the Administration bill: Republican and Democratic State Attorneys General, business and taxpayer groups. All agree that consultation with potential supporters should begin immediately.

- Following such consultation, all agree we should consult with bar and "public interest" groups to explain our position and possibly reduce the level of opposition.

B. Issue for Resolution

The sole issue for resolution is one of strategy. The options are to send up a bill and seek legislative hearings, or send no bill and seek oversight hearings.

C. Decision Options

Advantages of Administration bill/legislative hearings option:

- Justice believes our bill can clear the Senate Judiciary Committee and reach the floor.

- Will be a strong statement that legislation is needed and will provide specific mechanisms with which to deal with abuses and present our position.

- Will avoid misrepresentation of Administration position, a real concern if no bill is sent up; the present bill is more generous than prior, well-circulated drafts.

- Will provide a specific alternative to the Kastenmeier bill.

Advantages of no bill/oversight hearings option:

- Will allow opportunity to focus on abuses without the possible burden of defending specific provisions of a bill.

- o Could increase flexibility to change the bill in light of unanticipated circumstances.
- o If no bill is sent up, may be seen as signal that Administration not serious about matter or no need to worry about bill this session; hence, lesser degree of opposition from "public interest", civil rights groups.

D. <u>Decisions</u>

<u>Preliminary Action</u>

Move forward by contacting potential supporters, followed by consultation with bar and "public interest" groups. [All parties agree.]

__________ Yes   __________ No

<u>Action re Bill</u>

Submit Administration bill and seek legislative hearings. [Justice, Interior, OMB and OPD recommendation.]; <u>or</u> __________

Do not submit bill at this time seek oversight hearings. [Legislative Affairs recommendation.] __________

cc: William French Smith
James Watt
Ed Harper
Nancy Risque
Jim Cicconi

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

MEMORANDUM

August 8, 1983

To: Ken Cribb

From: Mike Horowitz MH

Subject: Attorney Fee Reform Bill

Attached is a copy of a resolution recently passed by the Southern Legislative Conference which was forwarded to me by the National Association of Attorneys General ["NAAG"]. As you know, NAAG supports our proposal and hopes that we will get moving with it.

As you may remember, there is a Wright to Meese decision memo setting forth a fairly complete consensus to send up the current draft bill. We, and Justice, await Ed's decision. If the OMB-OPD-Justice-Interior recommendation is endorsed, Justice can begin lining up support during the recess for the bill.

10. FISCAL IMPACT OF ATTORNEYS FEES.

WHEREAS, the present law allowing the award of attorney fees in suits against the States has encouraged and propagated such lawsuits; and

WHEREAS, such awards have resulted in a significant fiscal impact on these States; and

WHEREAS, awards of a similar nature in suits against Federal agencies are limited by Federal statutes;

NOW, THEREFORE, BE IT RESOLVED THAT the Southern Legislative Conference urges the United States Congress to carefully review present affected statutes and adopt limitations as to awards against States comparable to those against Federal agencies.

Submitted by: Speaker John Hainkel, Louisiana
Speaker A. L. Philpott, Virginia