No Ceremony to be scheduled
per B. Nicholson

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Kenneth A. Lazarus
Associate Counsel to the President

DATE: September 28, 1976

FROM : Michael M. Uhlmann
Assistant Attorney General
Office of Legislative Affairs

SUBJECT: H.R. 15552 - Signing Ceremony

Pursuant to your request, I am enclosing a brief summary of H.R. 15552, "The Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons." Also included is a list of possible invitees to a signing ceremony.

If space is limited I would suggest that the invitations be limited to the members of the Senate and the House whose names are at the top of the list.

You might want to independently contact the State Department for their suggestions as well.

Senator James O. Eastland
Senator Roman L. Hruska (sponsor)
Senator John L. McClellan

Congressman Peter W. Rodino, Jr.)
Congressman Charles E. Wiggins)
Congressman James R. Mann) (sponsors)
Congressman William L. Hungate)
Congressman Henry J. Hyde)

Senate Judiciary Committee

Paul Summitt
J. C. Argetsinger

House Judiciary Committee

Tom Hutchison
Ray Smietanka

Justice Department

Office of Legislative Affairs

Michael M. Uhlmann, Assistant Attorney General
James H. Wentzel

Criminal Division

Richard L. Thornburgh, Assistant Attorney General
Jay Waldman
Roger Pauley
James Robinson
David Kline

The PRESIDING OFFICER. Is there objection to the present consideration of the bill?

Without objection, the committee is discharged and the Senate will proceed with the immediate consideration of the bill.

Mr. HRUSKA. Mr. President, this bill amends title 18 of the Criminal Code of the United States. The purpose of this bill is to implement two conventions. Both conventions have been ratified and agreed to by the Senate.

One convention is to prevent and punish the acts of terrorism taking the forms of crimes against persons and relating to extortion that are of international significance.

The other convention is on the prevention and punishment of crimes against internationally protected persons including diplomatic agents.

Mr. President, even though the Senate has given its advice and consent to ratify both conventions, the instruments of ratification have not been deposited. It is the policy of the State Department not to deposit an instrument of ratification until and unless it is assured that Federal law will permit the United States fully to discharge its treaty obligations.

This bill if enacted will permit the United States to deposit the instruments of ratification for both treaties and to become a party to them.

Mr. President, the pending bill, H.R. 15552, has a counterpart in the bill S. 3646, which was reported favorably by the Committee on the Judiciary earlier this week and which is on the Senate Calendar.

The purpose of the legislation is to implement the "Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance" and the "Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents."

BACKGROUND

Both the Organization of American States and the United Nations have begun concerted international efforts to deal with terrorist acts directed at diplomats. The OAS has drafted the "Convention To Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance"—known as the OAS Convention—and the U.N. has drafted the "Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons"—known as the U.N. Convention. These conventions are based upon a recognition that criminal acts directed at diplomatic agents seriously threaten the maintenance of normal international relations.

The United States has signed both conventions—the OAS Convention on February 2, 1971, and the U.N. Convention on December 28, 1973. The Senate has given its advice and consent to the ratification of both Conventions—the OAS Convention on June 12, 1972, and the U.N. Convention on October 28, 1975. The United States will become a party to each convention upon deposit of an instrument of ratification with the appropriate international agency.

TREATY OBLIGATIONS

The OAS and U.N. Conventions seek to safeguard "internationally protected persons" from certain crimes. "Internationally protected persons" include:

(a) a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him;

(b) any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.

The crimes from which these conventions seek to protect such persons include murder; kidnaping and assault; threats or attempts to commit murder, kidnaping or assault; and extortion in connection with murder, kidnaping, or assault.

Both conventions obligate a party to them to take certain action when it finds within its territory someone who has committed one of the enumerated offenses against an internationally protected person. The party must either extradite the offender to another party or try him under its own criminal laws. For example, country A is a party to the conventions. A citizen of country A kills the American Ambassador to his country. The offender then flees from country A to the United States, where he is apprehended. If the United States were a party to the conventions, it would be obligated either to extradite the offender to country A or to try him under U.S. law. The United States would have unrestricted discretion to decide which course of action to take.

Both conventions, therefore, may result in the United States exercising extraterritorial criminal jurisdiction. This would occur in the above example if the United States were to choose to try the citizen of country A for the crime of murder, since the offense occured within the territory of another country. Extraterritorial criminal jurisdiction was authorized last Congress in Public Law 93–366, which deals with aircraft hijacking.

NEED FOR LEGISLATION

Even though the Senate has given its advice and consent to ratify both conventions, the instruments of ratification have not been deposited and the United States is not yet a party to either. It is the policy of the State Department not to deposit an instrument of ratification unless it is assured that Federal law will permit the United States fully to discharge its treaty obligations. Unless this legislation is enacted, the United States would not be able fully to discharge its obligations under the Conventions.

The OAS Convention is presently in force, and the State Department expects the U.N. Convention to enter into force very shortly—only six more ratifications are needed. It is in the best interests of the United States to become a party to both. This legislation, if enacted, will permit the United States to deposit the instruments of ratification for both treaties and become a party to them.

The bill is open to amendment. If there be no amendment to be proposed, the question is on the third reading of the bill.

The bill was ordered to a third reading, was read the third time, and passed.

Mr. McCLELLAN. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. ALLEN. I move to lay that motion on the table.

The PRESIDING OFFICER. The question is on agreeing to the motion to lay on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. Does the Senator wish a companion Senate bill indefinitely postponed?

Mr. HRUSKA. Mr. President, I ask unanimous consent that S. 3646, the companion bill, be indefinitely postponed.

The PRESIDING OFFICER. Without objection, it is so ordered.

The PRESIDING OFFICER. Is there objection to the present consideration of the bill?

Without objection, the committee is discharged and the Senate will proceed with the immediate consideration of the bill.

Mr. HRUSKA. Mr. President, this bill amends title 18 of the Criminal Code of the United States. The purpose of this bill is to implement two conventions. Both conventions have been ratified and agreed to by the Senate.

One convention is to prevent and punish the acts of terrorism taking the forms of crimes against persons and relating to extortion that are of international significance.

The other convention is on the prevention and punishment of crimes against internationally protected persons including diplomatic agents.

Mr. President, even though the Senate has given its advice and consent to ratify both conventions, the instruments of ratification have not been deposited. It is the policy of the State Department not to deposit an instrument of ratification until and unless it is assured that Federal law will permit the United States fully to discharge its treaty obligations.

This bill if enacted will permit the United States to deposit the instruments of ratification for both treaties and to become a party to them.

Mr. President, the pending bill, H.R. 15552, has a counterpart in the bill S. 3646, which was reported favorably by the Committee on the Judiciary earlier this week and which is on the Senate Calendar.

The purpose of the legislation is to implement the "Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance" and the "Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents."

BACKGROUND

Both the Organization of American States and the United Nations have begun concerted international efforts to deal with terrorist acts directed at diplomats. The OAS has drafted the "Convention To Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance"—known as the OAS Convention—and the U.N. has drafted the "Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons"—known as the U.N. Convention. These conventions are based upon a recognition that criminal acts directed at diplomatic agents seriously threaten the maintenance of normal international relations.

The United States has signed both conventions—the OAS Convention on February 2, 1971, and the U.N. Convention on December 28, 1973. The Senate has given its advice and consent to the ratification of both Conventions—the OAS Convention on June 12, 1972, and the U.N. Convention on October 28, 1975. The United States will become a party to each convention upon deposit of an instrument of ratification with the appropriate international agency.

TREATY OBLIGATIONS

The OAS and U.N. Conventions seek to safeguard "internationally protected persons" from certain crimes. "Internationally protected persons" include:

(a) a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him;

(b) any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.

The crimes from which these conventions seek to protect such persons include murder; kidnaping and assault; threats or attempts to commit murder, kidnaping or assault; and extortion in connection with murder, kidnaping, or assault.

Both conventions obligate a party to them to take certain action when it finds within its territory someone who has committed one of the enumerated offenses against an internationally protected person. The party must either extradite the offender to another party or try him under its own criminal laws. For example, country A is a party to the conventions. A citizen of country A kills the American Ambassador to his country. The offender then flees from country A to the United States, where he is apprehended. If the United States were a party to the conventions, it would be obligated either to extradite the offender to country A or to try him under U.S. law. The United States would have unrestricted discretion to decide which course of action to take.

Both conventions, therefore, may result in the United States exercising extraterritorial criminal jurisdiction. This would occur in the above example if the United States were to choose to try the citizen of country A for the crime of murder, since the offense occured within the territory of another country. Extraterritorial criminal jurisdiction was authorized last Congress in Public Law 93-366, which deals with aircraft hijacking.

NEED FOR LEGISLATION

Even though the Senate has given its advice and consent to ratify both conventions, the instruments of ratification have not been deposited and the United States is not yet a party to either. It is the policy of the State Department not to deposit an instrument of ratification unless it is assured that Federal law will permit the United States fully to discharge its treaty obligations. Unless this legislation is enacted, the United States would not be able fully to discharge its obligations under the Conventions.

The OAS Convention is presently in force, and the State Department expects the U.N. Convention to enter into force very shortly—only six more ratifications are needed. It is in the best interests of the United States to become a party to both. This legislation, if enacted, will permit the United States to deposit the instruments of ratification for both treaties and become a party to them.

The PRESIDING OFFICER. The bill is open to amendment. If there be no amendment to be proposed, the question is on the third reading of the bill.

The bill was ordered to a third reading, was read the third time, and passed.

Mr. McCLELLAN. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. ALLEN. I move to lay that motion on the table.

The PRESIDING OFFICER. The question is on agreeing to the motion to lay on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. Does the Senator wish a companion Senate bill indefinitely postponed?

Mr. HRUSKA. Mr. President, I ask unanimous consent that S. 3646, the companion bill, be indefinitely postponed.

The PRESIDING OFFICER. Without objection, it is so ordered.

Monday 10/4/76

2:30 I checked with Robert Anthony's office to see if his call was urgent -- since you have been so busy.

Mr. Anthony spoke with me. Said he heard that S. 800, Judiciary Bill on Sovereign Immunity, was passed on Friday. He would like to know the President's position on it, or any other information you might be able to give him. Is asking if the President would have a ceremony on signing bills of this nature. It is a bill they sponsored and he's very anxious to know how it's coming along.

Anthony interested in foreign immunity bill

Tell Ken to check into this bill & then prepare memo for me to send in to suggest signing ceremony. Monroe Leigh also would like such a ceremony. He says ABA

(over)

15 very interested & should be asked to participate. Ken should work with M. Leigh & Bob Anthony on suggested list of invitees.

P.

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: October 15 Time: 700pm

FOR ACTION: Dick Parsons
Max Friedersdorf
Bobbie Kilberg
Bill Seidman
Alan Greenspan

cc (for information): Robert Hartmann
Jeanne Holm
David Lissy
Paul Leach
Jack Marsh
Ed Schmults
Mike Duval
Steve McConahey

FROM THE STAFF SECRETARY

DUE: Date: October 16 Time: noon

SUBJECT:

S.2278-The Civil Rights Attorneys Act

ACTION REQUESTED:

____ For Necessary Action
____ For Your Recommendations
____ Prepare Agenda and Brief
____ Draft Reply
_x_ For Your Comments
____ Draft Remarks

REMARKS:

please return to judy johnston,ground floor west wing

Recommend approval. Treasury's comments regarding the tax amendment included in this bill would appear to be substantially overdrawn. In this regard, it should be borne in mind that the tax amendment (1) applies only to civil actions and proceedings -- a very small percentage of the contact between the U. S. and taxpayers concerning the Internal Revenue Code; and (2) as the legislative history makes clear, in awarding fees to prevailing defendant taxpayers, courts must apply the same standard for awards under other statutes covered by the bill -- i.e., the action must have been frivolous and vexatious and brought for harrassment purposes. Our information is that virtually no pending or future lawsuit could result in any fees award whatsoever.

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James M. Cannon
For the President

(over)

As a technical matter, would suggest a deletion of the word "considerable" from the fifth line of the second page of the draft signing statement.

Ken Lazarus 10/18/76

United States Senate

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
(PURSUANT TO S. RES. 375, SEC. 6, 94TH CONGRESS)
WASHINGTON, D.C. 20510

October 15, 1976

Kenneth Lazarus, Esq.
Counsel to the President
The White House
Washington, D.C.

Dear Ken:

Per your request, here are some brief materials about S. 2278, the Civil Rights Attorney's Fees Awards Act. Things to keep in mind about the tax amendment included in the bill are: (1) it applies only to civil actions and proceedings -- a very small percentage of the contact between the United States and taxpayers concerning the Internal Revenue Code; (2) as the legislative history makes crystal clear, in awarding fees to prevailing defendant taxpayers, courts must apply the same standard for awards under other statutes covered by the bill -- i.e., the action must have been frivolous and vexatious and brought for harrassment purposes. Our information is that virtually no pending or future lawsuit could result in any fees award whatsoever.

More generally, however, why shouldn't the United States pay the defense costs for taxpayers when a court finds it brought a harrassing civil action against them?

As you are well aware, the civil rights provisions are unanimously and vigorously supported by numerous significant groups -- the Leadership Conference, the Urban League, the N.A.A.C.P., Chicano groups, labor groups, etc. They all feel that the tax amendment is acceptable, and that it would be risky at best to try next year to pass a bill without the tax language in it. My own guess is that it will be harder, not easier, next year given the expected change in the membership of the Senate Judiciary Committee.

Hope this information is of some help.

Regards.

Sincerely,

Jane L. Frank

94th 2d CONGRESS SESSION S. 2278

AN ACT

The Civil Rights Attorney's Fees Awards Act of 1976.

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 Civil Rights Attorney's Fees Awards Act of 1976".

SEC. 2. That the Revised Statutes section 722 (42 U.S.C. 1988) is amended by adding the following: "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.".

Passed the Senate September 29 (legislative day, September 24), 1976.

Attest:

Secretary.

The PRESIDING OFFICER. The Senator is correct.

Mr. ABOUREZK. It does not amend the original bill?

The PRESIDING OFFICER. That is correct.

Mr. ABOUREZK. I would like to say, speaking as manager of this bill, this amendment is acceptable to the committee, and we will be willing to accept it.

I understand the Senator from Alabama would like a rollcall vote on it, which we would be very happy to take part in.

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. HELMS. Mr. President, I yield myself 1 minute. I am delighted to cosponsor this amendment with the distinguished Senator from Alabama. It will provide a measure of equity and fairness to the taxpayers of this country who, in many instances, are being harassed and intimidated by the Internal Revenue Service.

I am pleased that the able Senator from South Dakota and his associates are willing to accept it.

Mr. ALLEN. Mr. President, I call for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. ALLEN. Mr. President, I ask unanimous consent that the name of the distinguished Senator from Florida, now presiding, be shown as a cosponsor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. TUNNEY. Mr. President, as initial sponsor of S. 2278, I would like to make clear my understanding of the intent of this amendment, which I support.

Essentially, it would apply to a situation where a taxpayer is harrassed by the IRS. In such a case, a court has discretion to award reasonable attorneys' fees to the defendant. The standard to be applied is the one the courts have adopted with respect to prevailing defendants, as decribed in the Senate report.

The purpose of this amendment is not to discourage meritorious lawsuits by the IRS, but to discourage frivolous or harrassing lawsuits.

The amendment would not apply to a situation where the Government is plaintiff on appeal since the Government did not bring the action in the first instance.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Alabama. The yeas and nays have been ordered, and the clerk will call the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Texas (Mr. BENTSEN), the Senator from Nevada (Mr. CANNON), the Senator from Florida (Mr. CHILES), the Senator from Idaho (Mr. CHURCH), the Senator from California (Mr. CRANSTON), the Senator from Michigan (Mr. PHILIP A. HART), the Senator from Indiana (Mr. HARTKE), the Senator from Minnesota (Mr. HUMPHREY), the Senator from Wyoming (Mr. MCGEE), the Senator from Minnesota (Mr. MONDALE), the Senator from New Mexico (Mr. MONTOYA), the Senator from West Virginia (Mr. RANDOLPH), the Senator from Connecticut (Mr. RIBICOFF), and the Senator from Georgia (Mr. TALMADGE) are necessarily absent.

I further announce that the Senator from Ohio (Mr. GLENN), the Senator from Montana (Mr. MANSFIELD), the Senator from Hawaii (Mr. INOUYE), and the Senator from South Dakota (Mr. MCGOVERN) are absent on official business.

I further announce that, if present and voting, the Senator from Minnesota (Mr. HUMPHREY), and the Senator from West Virginia (Mr. RANDOLPH) would vote "yea."

Mr. GRIFFIN. I announce that the Senator from Maryland (Mr. BEALL), the Senator from Oklahoma (Mr. BELLMON), the Senator from Tennessee (Mr. BROCK), the Senator from New York (Mr. BUCKLEY), the Senator from Kansas (Mr. DOLE), the Senator from Arizona (Mr. GOLDWATER), the Senator from Vermont (Mr. STAFFORD), the Senator from South Carolina (Mr. THURMOND), and the Senator from Texas (Mr. TOWER) are necessarily absent.

I also announce that the Senator from Virginia (Mr. WILLIAM L. SCOTT) is absent on official business.

I further announce that, if present and voting, the Senator from South Carolina (Mr. THURMOND) would vote "yea."

The result was announced—yeas 72, nays 0, as follows:

[Rollcall Vote No. 676 Leg.]

YEAS—72

Abourezk	Griffin	Muskie
Allen	Hansen	Nelson
Baker	Hart, Gary	Nunn
Bartlett	Haskell	Packwood
Bayh	Hatfield	Pastore
Biden	Hathaway	Pearson
Brooke	Helms	Pell
Bumpers	Hollings	Percy
Burdick	Hruska	Proxmire
Byrd, Harry F., Jr.	Huddleston	Roth
Byrd, Robert C.	Jackson	Schweiker
Case	Javits	Scott, Hugh
Clark	Johnston	Sparkman
Culver	Kennedy	Stennis
Curtis	Laxalt	Stevens
Domenici	Leahy	Stevenson
Durkin	Long	Stone
Eagleton	Magnuson	Symington
Eastland	Mathias	Taft
Fannin	McClellan	Tunney
Fong	McClure	Weicker
Ford	McIntyre	Williams
Garn	Metcalf	Young
Gravel	Morgan	
	Moss	

NAYS—0

NOT VOTING—28

Beall	Glenn	Montoya
Bellmon	Goldwater	Randolph
Bentsen	Hart, Philip A.	Ribicoff
Brock	Hartke	Scott, William L.
Buckley	Humphrey	Stafford
Cannon	Inouye	Talmadge
Chiles	Mansfield	Thurmond
Church	McGee	Tower
Cranston	McGovern	
Dole	Mondale	

So the amendment, as modified, was agreed to.

CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT

The Senate continued with the consideration of the bill (S. 2278) relating to the Civil Rights Attorneys' Fees Awards Act of 1975.

Mr. KENNEDY. Mr. President, I understand the parliamentary situation now is that——

Mr. STENNIS. Mr. President, may we have it quiet, so the Senator can be heard?

The PRESIDING OFFICER. The Senate will be in order.

Mr. KENNEDY (continuing). That my amendment, is now the business before the Senate. Is that correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. KENNEDY. I yield myself 1 minute, Mr. President, to say that I welcome the Allen amendment. While the original purpose of this bill was to authorize awards of fees in court actions brought to enforce our civil rights laws, there is no question that there are numerous other situations where recoveries of such fees are justified.

One such situation is indeed where taxpayers suffer harassment from the Internal Revenue Service. As I understand the provisions of the Allen amendment, a court would be authorized to award attorneys' fees to a taxpayer who is a defendant in a civil action brought by the U.S. Government to enforce the provisions of the Internal Revenue Code. The usual standard applied in cases where fees are awarded to prevailing defendants would apply here as well—that is, awards are appropriate where the action initiated by the plaintiff, the Government, acted in a frivolous or vexatious manner or brought the suit for purposes of harassment.

All of us in Congress have heard, I am sure, of instances where taxpayers have been unjustifiably harassed by lawsuits which had little or no merit, but which forced them to expend enormous resources to defend themselves. Their victories are often illusory, however, as the law does not permit them to recover their legal fees in defending these suits, however unwarranted they may be. Adoption of this amendment would provide needed financial relief to such taxpayers.

Since the amendment is intended to apply solely to prevailing defendants in tax cases, the courts would be guided by well-settled judicial standards in the exercise of their discretionary authority to make fee awards to defendants. These standards are discussed in the Senate report on S. 2278. They are discussed with greater detail in the House report on its companion bill. In general, the taxpayer would have to show bad faith on the part of the Government in bringing suit against him in order for fees to be allowed.

The courts have articulated the policy reasons for utilizing a stricter test in awarding fees to prevailing defendants

than to prevailing plaintiffs, and these apply equally in tax cases and in actions brought to enforce the civil rights laws. Awarding fees to prevailing defendants is intended to protect parties from being harassed by unjustifiable lawsuits. It is not, however, intended to deter plaintiffs from seeking to enforce the protections afforded by our civil rights laws, or in this instance to deter the Government from instituting legitimate tax cases by threatening it with the prospect of having to pay the defendant's counsel fees should it lose. Were Congress or the courts to provide otherwise, it would have a substantial chilling effect on the bringing of genuinely meritorious actions. I am sure that none of us would want to inhibit responsible lawsuits brought by the United States to enforce the tax laws of our country.

It should be clear, then, that a provision authorizing fee awards in tax cases has a fundamentally different purpose from one authorizing awards in lawsuits brought by private citizens to enforce the protections of our civil rights laws. In enacting the basic civil rights attorneys fees awards bill, Congress clearly intends to facilitate and to encourage the bringing of actions to enforce the protections of the civil rights laws. By authorizing awards of fees to prevailing defendants in cases brought under the Internal Revenue Code, however, Congress merely intends to protect citizens from becoming victims of frivilous or otherwise unwarranted lawsuits. Enactment of this amendment should in no way be understood as implying that Congress intends to discourage the Government from initiating legitimate lawsuits under the tax laws.

That Congress must act to provide means for citizens to enforce laws that are enacted for their protection can no longer be disputed. It has already included provisions for awards of attorneys fees in over 50 statutes. I was pleased to see that on Tuesday the Senate adopted the conference report on the Toxic Substances Act, which contains several attorneys fees provisions. The debate on the Senate floor during the past week has underscored the importance of including attorneys' fees provisions in all of our civil rights laws. I think the adoption of Senator ALLEN's amendment complements the legislation we are now considering, and I would very much hope that we would move to its immediate passage.

Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. KENNEDY. I believe that the yeas and nays have been ordered on the amendment. Am I correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. KENNEDY. It seems to me that we have voted basically on this principle when we voted on the Allen amendment, and I would be glad to have a voice vote so we could get to passage of the measure, unless there will be objection.

I ask unanimous consent that the order for the yeas and nays be vitiated, so that we can go to third reading and passage.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. ABOUREZK. Mr. President, I ask unanimous consent that the vote on passage be limited to 10 minutes.

Mr. ROBERT C. BYRD. Mr. President, I hope the Senator, in this instance, will not ask for a 10-minute rollcall. There are certain Senators who are attending a reception for PHIL HART, and I am afraid they would miss that vote.

Mr. ABOUREZK. I withdraw the request.

Mr. STENNIS. What was the announcement, Mr. President?

Mr. ABOUREZK. I withdraw my request for a 10-minute vote.

Mr. ROBERT C. BYRD. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Massachusetts, as amended.

The amendment, as amended, was agreed to.

Mr. KENNEDY. I move to reconsider the vote by which the amendment was agreed to.

Mr. ABOUREZK. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. ALLEN. Mr. President, will the Senator now accept my amendment designating this bill the Kennedy-Tunney-Abourezk lawyers relief bill?

Mr. ABOUREZK. Mr. President, may I be recognized on that?

The PRESIDING OFFICER. No.

[Laughter.]

Mr. ABOUREZK. What if I said please?

Several Senators addressed the Chair.

The PRESIDING OFFICER. The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading, and was read the third time.

Mr. ABOUREZK. If I said please, could I be recognized?

I just want to make a response to the question of Senator ALLEN as to whether we would accept a name change.

I think, in view of the fact that the Senate has accepted his amendment on it, it ought to be called the Kennedy-Tunney- Abourezk- Allen- Thurmond-Helms-Scott amendment.

[Laughter.]

The PRESIDING OFFICER. The question is, Shall the bill pass?

Mr. TUNNEY. Mr. President, before we vote, I would like to say to my colleagues how deeply I appreciate the Senator from South Dakota's (Mr. ABOUREZK) floor management of the bill, which was my legislation, and also how much I appreciate the very hard work of the majority whip in making sure this legislation stays on track, and the work of Senator KENNEDY and the others who played a part. I, unfortunately, was not able to be present during the major part of the consideration of this legislation, but it was in extraordinarily good hands in the hands of Senator ABOUREZK. I thank him personally for having floor-managed the bill.

Mr. President, the Senate is nearing enactment of S. 2278—legislation that is vitally important to the enforcement of our Nation's civil rights laws.

As we all know, the last 7 days have been difficult—the bill's fate unclear during much of the time.

It is clear to me that without the determination and care shown by the junior Senator from South Dakota, and ample help from a bipartisan group of Senators and the Acting Majority Leader, this bill would have died.

Instead, it survived and we can be very hopeful that it will be enacted into law this session.

I am proud to have been its initial sponsor.

I see it as a cornerstone of legislation developed by the Subcommittee on Constitutional Rights, which I chair, on the subject of access to justice.

The problem of unequal access to the courts in order to vindicate congressional policies and enforce the law is not simply a problem for lawyers and courts. Encouraging adequate representation is essential if the laws of this Nation are to be enforced. Congress passes a great deal of lofty legislation promising equal rights to all.

Although some of these laws can be enforced by the Justice Department or other Federal agencies, most of the responsibility for enforcement has to rest upon private citizens, who must go to court to prove a violation of the law. This fact has been recognized in statutes specifically giving private citizens the right to go to court to redress grievances, and by court decisions which have broadly expanded the concepts of private causes of action and standing to sue. But without the availability of counsel fees, these rights exist only on paper. Private citizens must be given not only the rights to go to court, but also the legal resources. If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.

Unless effective ways are found to provide equal legal resources, the Nation must expect its most basic and fundamental laws to be objectively repealed by the economic fact of life that the people these laws are meant to benefit and protect cannot take advantage of them. Attorneys' fees have proved one extremely effective way to provide these equal legal resources, and are, in fact, an obvious and logical complement to citizen suit provisions.

When Congress calls upon citizens—either explicitly or by construction of its statutes—to go to court to vindicate its policies and benefit the entire Nation, Congress must also ensure that they have the means to go to court, and to be effective once they get there. No one expects a policeman, or an officeholder, to pay for the privilege of enforcing the law. It should be no different for a private citizen, as the first circuit realized in the 1972 case of Knight against Auciello:

The SPEAKER pro tempore. The bill is read by title.

Mr. BAUMAN. I thank the Speaker.

The SPEAKER pro tempore. The gentleman from Massachusetts has been recognized for 1 hour.

Mr. DRINAN. Mr. Speaker, this bill is identical to H.R. 15460, which was reported out of the Judiciary Committee by voice vote on September 9, 1976—27 members of the committee were present. The only difference between the two bills is the Allen amendment, adopted by the Senate unanimously—79 to 0—on Tuesday, which I will discuss later. With the approval of the minority, the House bill had been placed on the suspension calendar for consideration on Tuesday, September 21. Unfortunately the House did not reach the bill because a number of suspensions had been carried over from the previous day.

Regarding the substance of the bill, let me begin by noting that the United States Code presently contains over 50 provisions which allow the awarding of attorney fees to prevailing parties. They span a wide range of subjects: perishable agricultural commodities, securities transactions, copyright—which we approved once again yesterday—antitrust, corporate reorganizations, and many other topics. I have a list of those statutory provisions which I am inserting in the RECORD at the conclusion of these remarks.

With respect to civil rights, Congress has provided for the award of a reasonable attorney's fee in recent statutes, such as the Federal Fair Housing Act of 1968 and the Voting Rights Act Amendments of 1975. In addition this week the House approved two conference reports on bills which have attorney fee provisions in their nondiscrimination sections: the LEAA authorization bill and the measure to extend the general revenue sharing program.

The purpose of S. 2278—and its House counterpart, H.R. 15460—is to authorize the award of a reasonable attorney's fee in actions brought in State or Federal courts, under certain civil rights statutes, which are presently contained in title 42 and title 20 of the United States Code. By permitting fees to be recovered under those statutes, we seek to make uniform the rule that a prevailing party, in a civil rights case, may, in the discretion of the court, recover counsel fees.

The Civil Rights Attorney's Fees Awards Act of 1976, S. 2278 (H.R. 15460) is intended to restore to the courts the authority to award reasonable counsel fees to the prevailing party in cases initiated under certain civil rights acts. The legislation is necessitated by the decision of the Supreme Court in Alyeska Pipeline Service Corp against Wilderness Society, 421 U.S. 240 (1975). In Alyeska, the Court held that attorney fees should not ordinarily be awarded to a prevailing party unless expressly authorized by Act of Congress.

Prior to the Alyeska decision, the lower Federal courts had regularly awarded counsel fees to the prevailing party in a variety of cases instituted under the sections of the United States Code covered by S. 2278. Even though no express provision of law authorized such awards, the courts reasoned that, in these civil rights cases, the private plaintiff, in effect, acted as a "private attorney general" advancing the rights of the public at large, and not merely some narrow parochial interest. The Alyeska decision ended that practice, which this bill seeks to restore.

This bill would authorize State and Federal courts to award counsel fees in actions brought under specified sections of the United States Code relating to civil and constitutional rights. As I indicated earlier, over 50 Federal statutes presently provide for the awarding of fees in a wide variety of circumstances. In the past few years, Congress has approved such allowances in the areas of antitrust, equal credit, freedom of information, voting rights, and consumer product safety.

The attorney fee provision of this bill would apply to actions instituted under sections 1981, 1982, 1983, 1985, 1986, and 2000d of title 42, sections 1681–1686 of title 20, and the Internal Revenue Code. These sections generally prohibit the denial of civil and constitutional rights in a variety of areas, including contractual relationships, property transactions, and federally assisted programs and activities. It should be emphasized that S. 2278 would not make any substantive changes in these statutory provisions. Whatever is presently allowed or forbidden under them would continue to be permitted or proscribed.

Let me describe briefly the scope of the covered statutes. Section 1981 is frequently used to challenge discrimination in employment and recreational facilities. Under that section, the Supreme Court recently held that whites as well as non-whites could bring suit alleging discriminatory employment practices. Section 1982 prohibits discrimination in property transactions, including the purchase of a home. Both these sections afford victims of housing and employment discrimination remedies supplementary to title VII—employment—of the 1964 Civil Rights Act, and title VIII—housing—of the 1968 Civil Rights Act.

Section 1933 protects civil and constitutional rights from abridgement by state and local officials. The landmark case of Brown against Board of Education was initiated under this provision. Ironically, because that section does not authorize counsel fees, the plaintiffs in Brown could not have recovered their attorney fees, despite the importance of the decision in eliminating officially imposed racial segregation. Under applicable judicial decisions, Section 1983 authorizes suits against State and local officials based upon Federal statutory as well as constitutional rights. For example, Blue against Craig, 505 F.2d 830 (4th Cir. 1974). The closely related Sections 1985 and 1986 are employed to challenge conspiracies, both public and private, to deprive individuals of the equal protection of the laws:

The bill also covers any action, including suits by individuals, instituted under title IX of the Education Amendments of 1972, and title VI of the Civil Rights Act of 1964. These titles forbid the discriminatory use of Federal funds, and requires recipients to use such monies in a nondiscriminatory fashion. Title VI is a general prohibition which applies to all federally assisted programs or activities, but is limited to discrimination on account of race, color, or national origin. Title IX covers certain education programs and proscribes discrimination based on sex, blindness, or visual impairment.

The only difference between S. 2278 and H.R. 15460 is the result of an amendment offered by Senator ALLEN and adopted unanimously by the Senate. Because the bills are identical, with the limited exception of the Allen amendment, it is intended that the courts will interpret S. 2278 in accordance with House Report No. 94–1558, together with the Senate report and the debates in both Houses.

The Allen amendment would allow the prevailing party to recover its counsel fees in any civil action brought by the United States to enforce the Internal Revenue Code. It would not apply to actions instituted against the Government by the taxpayer. Since S. 2278 does not allow the U.S. Government to recover its fees under any circumstances, the effect of the Allen amendment is to permit prevailing defendants in such cases to recover their attorney fees if they satisfy the criteria generally applicable under the bill to prevailing defendants, which I will discuss later at greater length.

Briefly, under settled judicial standards, prevailing defendants would recover their attorney fees only if they could prove that the United States brought the action to harass them, or if the suit is frivolous and vexatious. During the hearings last fall conducted by the Kastenmeier subcommittee on various attorney fee bills, the representative of the Justice Department testified that these were the only circumstances when he believed prevailing defendants should recover their fees in Government initiated suits.

I should note that the Allen amendment might involve an expense to the United States. However since awards of counsel fees under that amendment would occur only in the special circumstances I have described, it is fair to say that the total costs to the Government for fiscal year 1977 would be negligible.

The language of S. 2278 tracks the wording of attorney fee provisions in other civil rights statutes, such as section 706(k) of title VII—employment—of the Civil Rights Act of 1964. The phraseology employed has been reviewed, examined, and interpreted by the courts, which have developed standards for its application. The language contains three key features: first that it applies to any "prevailing party," whether a plaintiff or defendant; second, that it gives the court discretion to award fees; and third, that it permits only a "reasonable" fee to be imposed.

First, I wish to discuss the scope of the phrase "prevailing party." Under S. 2278, either the plaintiff or the defendant is eligible to receive attorney fees. Congress is not always that generous. About two-thirds of the statutes which provide

94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 94–1558

THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

SEPTEMBER 15, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. DRINAN, from the Committee on the Judiciary, submitted the following

REPORT

[Including cost estimate of the Congressional Budget Office]

[To accompany H.R. 15460]

The Committee on the Judiciary, to whom was referred the bill (H.R. 15460) to allow the awarding of attorney's fees in certain civil rights cases, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

H.R. 15460, the Civil Rights Attorney's Fees Awards Act of 1976, authorizes the courts to award reasonable attorney fees to the prevailing party in suits instituted under certain civil rights acts. Under existing law, some civil rights statutes contain counsel fee provisions, while others do not. In order to achieve uniformity in the remedies provided by Federal laws guaranteeing civil and constitutional rights, it is necessary to add an attorney fee authorization to those civil rights acts which do not presently contain such a provision.

The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, H.R. 15460 is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.

STATEMENT

A. NEED FOR THE LEGISLATION

In *Alyeska Pipeline Service Corp* v. *Wilderness Society*, 421 U.S. 240 (1975), the Supreme Court held that federal courts do not have the power to award attorney's fees to a prevailing party unless an Act of Congress expressly authorizes it.[1] In the *Alyeska* case, the plaintiffs sought to prevent the construction of the Alaskan pipeline because of the damage it would cause to the environment. Although the plaintiffs succeeded in the early stages of the litigation, Congress later overturned that result by legislation permitting the construction of the pipeline. Nonetheless the lower federal courts awarded the plaintiffs their attorney's fees because of the service they had performed in the public interest. The Supreme Court reversed that award on the basis of the "American Rule": that each litigant, victorious or otherwise, must pay for its own attorney.

Although the *Alyeska* case involved only environmental concerns, the decision barred attorney fee awards in a wide range of cases, including civil rights. In fact the Supreme Court, in footnote 46 of the *Alyeska* opinion, expressly disapproved a number of lower court decisions involving civil rights which had awarded fees without statutory authorization. Prior to *Alyeska*, such courts had allowed fees on the theory that civil rights plaintiffs act as "private attorneys general" in eliminating discriminatory practices adversely affecting all citizens, white and non-white. In 1968, the Supreme Court had approved the "private attorney general" theory when it gave a generous construction to the attorney fee provision in Title II of the Civil Rights Act of 1964. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).[2] The Court stated:

> If (the plaintiff) obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest importance. *Id.* at 402.

However, the Court in *Alyeska* rejected the application of that theory to the award of counsel fees in the absence of statutory authorization. It expressly reaffirmed, however, its holding in *Newman* that, in civil rights cases where counsel fees are allowed by Congress, "the award should be made to the successful plaintiff absent exceptional circumstances." *Alyeska* case, *supra* at 262.

In the hearings conducted by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, the testimony indicated that civil rights litigants were suffering very severe hardships because of the *Alyeska* decision. Thousands of dollars in fees were automatically lost in the immediate wake of the decision. Representatives of the Lawyers Committee for Civil Rights Under Law, the Council

[1] The Court in *Alyeska* recognized three very narrow exceptions to the rule: (1) where a "common fund" is involved; (2) where the litigant's conduct is vexatious, harassing, or in bad faith; and (3) where a court order is willfully disobeyed.

[2] In *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), the Supreme Court applied the "private attorney general" theory in according broad "standing" to persons injured by discriminatory housing practices under the Federal Fair Housing Act, 42 U.S.C. 3601–3619.

for Public Interest Law, the American Bar Association Special Committee on Public Interest Practice, and witnesses practicing in the field testified to the devastating impact of the case on litigation in the civil rights area. Surveys disclosed that such plaintiffs were the hardest hit by the decision.[3] The Committee also received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so. Because of the compelling need demonstrated by the testimony, the Committee decided to report a bill allowing fees to prevailing parties in certain civil rights cases.

It should be noted that the United States Code presently contains over fifty provisions for attorney fees in a wide variety of statutes. See Appendix A. In the past few years, the Congress has approved such allowances in the areas of antitrust, equal credit, freedom of information, voting rights, and consumer product safety. Although the recently enacted civil rights statutes contain provisions permitting the award of counsel fees, a number of the older statutes do not. It is to these provisions that much of the testimony was directed.

B. HISTORY OF H.R. 15460

At the time of the Subcomittee hearings on October 6 and 8, and Dec. 3, 1975, three bills were pending which dealt expressly with counsel fees in civil rights cases: H.R. 7828 (same as H.R. 8220); H.R. 7969 (same as H.R. 8742); and H.R. 9552. H.R. 7828 and H.R. 9552 would allow attorney fees to be awarded in cases brought under specific provisions of the United States Code, while H.R. 7969 would permit such awards in any case involving civil or constitutional rights, no matter what the source of the claim. H.R. 7828 was stated in mandatory terms; H.R. 9552 and H.R. 7969 allowed discretionary awards. The Justice Department, through its representative, Assistant Attorney General Rex Lee of the Civil Division, expressed its support of H.R. 9552. Hearings held in 1973 by the Senate Judiciary Subcommittee on the Representation of Citizen Interests also highlighted the need of the public for legal assistance in this and other areas.

In August, 1976, the Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice concluded that a bill to allow counsel fees in certain civil rights cases should be reported favorably in view of the pressing need. On August 26, 1976, the Subcommittee approved H.R. 9552 with an amendment in the nature of a substitute because it was similar to S. 2278, which had cleared the Senate Judiciary Committee and was awaiting action by the full Senate. The amendment in the nature of a substitute sought to conform H.R. 9552 technically to S. 2278; no substantive changes were made. It was then reported unanimously by the Subcommittee.

On September 2, 1976, the full Committee approved H.R. 9552, as amended, with an amendment offered by Congresswoman Holtzman and accepted by the Committee. That amendment added title IX of Public Law 92–318 to the substantive provisions under which successful litigants could be awarded counsel fees. The Committee then

[3] See, *Balancing the Scales of Justice: Financing Public Interest Law in America* (Council for Public Interest Law, 1976), pp. 238, 364, D–2).

ordered that a clean bill be reported to the House. H.R. 15460, the clean bill, was introduced on September 8 and approved pro forma by the Committee on September 9, 1976.[4]

C. SCOPE OF THE BILL

H.R. 15460, the Civil Rights Attorney's Fees Awards Act of 1976, would amend Section 722 (42 U.S.C. 1988) of the Revised Statutes to allow the award of fees in certain civil rights cases.[5] It would apply to actions brought under seven specific sections of the United States Code.[6] Those provisions are: Section 1981, 1982, 1983, 1985, 1986, and 2000d et seq. of Title 42; and Section 1681 et seq. of Title 20. See Appendix B for full texts. The affected sections of Title 42 generally prohibit denial of civil and constitutional rights in a variety of areas, while the referenced sections of Title 20 deal with discrimination on account of sex, blindness, or visual impairment in certain education programs and activities.[7]

More specifically, Section 1981 is frequently used to challenge employment discrimination based on race or color. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975).[8] Under that section the Supreme Court recently held that whites as well as blacks could bring suit alleging racially discriminatory employment practices. *McDonald* v. *Santa Fe Trail Transportation Co.*, ——— U.S. ———, 96 S. Ct. 2574 (1976). Section 1981 has also been cited to attack exclusionary admissions policies at recreational facilities. *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431 (1973). Section 1982 is regularly used to attack discrimination in property transactions, such as the purchase of a home. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968).[9]

Section 1983 is utilized to challenge official discrimination, such as racial segregation imposed by law. *Brown* v. *Board of Education*, 347 U.S. 483 (1954). It is ironic that, in the landmark *Brown* case challenging school segregation, the plaintiffs could not recover their attorney's fees, despite the significance of the ruling to eliminate officially

[4] Apart from the addition of Title IX of Public Law 92–318, the only difference between H.R. 9552 and the clean bill (H.R. 15460) are technical, not affecting the substance, made on advice of the House Parliamentarian and staff and legislative counsel.

[5] The bill amends the Revised Statutes rather than the United States Code because Title 42 is not codified, and thus is not "the law of the United States."

[6] In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974).

[7] To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales* v. *Haines*, 486 F. 2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constittuional claim is dispositive. *Hagans* v. *Lavine*, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the "substantiality" test, *see Hagans* v. *Lavine, supra; United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." *United Mine Workers* v. *Gibbs*, *supra* at 725.

[8] With respect to the relationship between Section 1981 and Title VII of the Civil Rights Act of 1964, the House Committee on Education and Labor has noted that "the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive." H.R. Rept. No. 92–238, p. 19 (92nd Cong. 1st Sess. 1971). That view was adopted by the Supreme Court in *Johnson* v. *Railway Express Agency, supra.*

[9] As with Section 1981 and Title VII, Section 1982 and Title VIII of the Civil Rights Act of 1968 are complementary remedies, with similarities and differences in coverage and enforcement mechanism. See *Jones* v. *Mayer Co., supra.*

imposed segregation. Section 1983 has also been employed to challenge unlawful official action in non-racial matters. For example, in *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966), indigent plaintiffs successfully challenged as unconstitutional the imposition of a poll tax in state and local elections. In *Monroe* v. *Pape*, 365 U.S. 167 (1961), a private citizen sought damages against local officials for an unconstitutional search of a private residence. See also *Elrod* v. *Burns*, —— U.S. ——, 96 S. Ct. 2673 (June 28, 1976) (discrimination on account of political affiliation in public employment); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) (terms and conditions of institutional confinement).

Section 1985 and 1986 are used to challenge conspiracies, either public or private, to deprive individuals of the equal protection of the laws. See *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). The bill also covers suits brought under Title IX of Public Law 92–318, the Education Amendments of 1972, 20 U.S.C. 1681–1686. Title IX forbids specific kinds of discrimination on account of sex, blindness, or visual impairment in certain federally assisted programs and activities relating to education. Finally H.R. 15460 would also apply to actions arising under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d–2000d–6.[10]

Title VI prohibits the discriminatory use of Federal funds, requiring recipients to administer such assistance without regard to race, color, or national origin. *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Hills* v. *Gautreaux*, —— U.S. ——, 96 S. Ct. 1538 (April 20, 1976); *Adams* v. *Richardson*, 480 F. 2d 1159 (D.C. Cir. 1973); *Bossier Parish School Board* v. *Lemon*, 370 F. 2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); *Laufman* v. *Oakley Building and Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976).

D. DESCRIPTION OF H.R. 15460

As noted earlier, the United States Code presently contains over fifty provisions for the awarding of attorney fees in particular cases. They may be placed generally into four categories: (1) mandatory awards only for a prevailing plaintiff; (2) mandatory awards for any prevailing party; (3) discretionary awards for a prevailing plaintiff; and (4) discretionary awards for any prevailing party. Existing statutes allowing fees in certain civil rights cases generally fall into the fourth category. Keeping with that pattern, H.R. 15460 tracks the language of the counsel fee provisions of Titles II and VII of the Civil Rights Act of 1964,[11] and Section 402 of the Voting Rights Act Amendments of 1975.[12] The substantive section of H.R. 15460 reads as follows:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92–318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[10] Title VI of the Civil Rights Act of 1964 is the only substantive title of that Act which does not contain a provision for attorney fees.

[11] 42 U.S.C. 2000a–3(b) (Title II); 42 U.S.C. 2000e–5(k) (Title VII).

[12] 42 U.S.C. 1973(e) (Section 402).

The three key features of this attorney's fee provision are: (1) that awards may be made to any "prevailing party"; (2) that fees are to be allowed in the discretion of the court; and (3) that awards are to be "reasonable". Because other statutes follow this approach, the courts are familiar with these terms and in fact have reviewed, examined, and interpreted them at some length.

1. Prevailing party

Under H.R. 15460, either a prevailing plaintiff or a prevailing defendant is eligible to receive an award of fees. Congress has not always been that generous. In about two-thirds of the existing statutes, such as the Clayton Act and the Packers and Stockyards Act, only prevailing plaintiffs may recover their counsel fees.[13] This bill follows the more modest approach of other civil rights acts.

It should be noted that when the Justice Department testified in support of H.R. 9552, the precedessor to H.R. 15460, it suggested an amendment to allow recovery only to prevailing plaintiffs. Assistant Attorney General Lee thought the phrase "prevailing party" might have a "chilling effect" on civil rights plaintiffs, discouraging them from initiating law suits. The Committee was very concerned with the potential impact such a phrase might have on persons seeking to vindicate these important rights under Federal law. In light of existing case law under similar provisions, however, the Committee concluded that the application of current standards to this bill will significantly reduce the potentially adverse affect on the victims of unlawful conduct who seek to assert their federal claims.

On two occasions, the Supreme Court has addressed the question of the proper standard for allowing fees in civil rights cases. In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam), a case involving racial discrimination in a place of public accommodation, the Court held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

Five years later, the Court applied the same standard to the attorney's fee provision contained in Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. 1617. *Northcross* v. *Memphis Board of Education*, 412 U.S. 427 (1973) (per curiam). The rationale of the rule rests upon the recognition that nearly all plaintiffs in these suits are disadvantaged persons who are the victims of unlawful discrimination or unconstitutional conduct. It would be unfair to impose upon them the additional burden of counsel fees when they seek to invoke the jurisdiction of the federal courts. "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Newman* v. *Piggie Park Enterprises, Inc., supra* at 402.

Consistent with this rationale, the courts have developed a different standard for awarding fees to prevailing defendants because they do "not appear before the court cloaked in a mantle of public interest." *United States Steel Corp.* v. *United States*, 519 F.2d 359, 364 (3rd Cir. 1975). As noted earlier such litigants may, in proper circumstances, recover their counsel fees under H.R. 15460. To avoid the potential "chilling effect" noted by the Justice Department and to advance the public interest articulated by the Supreme Court, however, the courts have developed another test for awarding fees to prevailing defendants. Under the case law, such an award may be made only if the action is vexatious and frivolous, or if the plaintiff has instituted it solely "to harass or embarrass" the defendant. *United States Steel Corp.* v. *United States*, *supra* at 364. If the plaintiff is "motivated by malice and vindictiveness," then the court may award counsel fees to the prevailing defendant. *Carrion* v. *Yeshiva University*, 535 F.2d 722 (2d Cir. 1976). Thus if the action is not brought in bad faith, such fees should not be allowed. See, *Wright* v. *Stone Container Corp.* 524 F.2d 1058 (8th Cir. 1975); see also *Richardson* v. *Hotel Corp of America*, 332 F. Supp. 519 (E.D.La. 1971), *aff'd without published opinion*, 468 F.24 951 (5th Cir. 1972). This standard will not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes.

With respect to the awarding of fees to prevailing defendants, it should further be noted that governmental officials are frequently the defendants in cases brought under the statutes covered by H.R. 15460. See, *e.g.*, *Brown* v. *Board of Education*, *supra*; *Gautreaux* v. *Hills*, *supra*; *O'Connor* v. *Donaldson*, *supra*. Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves. Applying the same standard of recovery to such defendants would further widen the gap between citizens and government officials and would exacerbate the inequality of litigating strength. The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.[14]

The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. *Incarcerated Men of Allen County* v. *Fair*, 507 F.2d 281 (6th Cir. 1974); *Parker* v. *Matthews*, 411 F. Supp. 1059 (D.D.C. 1976); *Aspira of New York, Inc.*, v. *Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975). A "prevailing" party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed. *E.g.*, *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), *cert denied*, 409 U.S. 982 (1972): see also *Lea* v. *Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971); *Evers* v. *Dwyer*, 358 U.S. 202 (1958).

A prevailing defendant may also recover its fees when the plaintiff seeks and obtains a voluntary dismissal of a groundess complaint,

[13] 15 U.S.C. 15 (Clayton Act); 7 U.S.C. 210(f) (Packers and Stockyards Act).

[14] Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. *Fitzpatrick* v. *Bitzer*, ——U.S.——, 96 S.Ct. 2666 (June 28, 1976).

Corcoran v. *Columbia Broadcasting System*, 121 F.2d 575 (9th Cir. 1941), as long as the other factors, noted earlier, governing awards to defendants are met. Finally the courts have also awarded counsel fees to a plaintiff who successfully concludes a class action suit even though that individual was not granted any relief. *Parham* v. *Southwestern Bell Telephone Co.*, *supra*; *Reed* v. *Arlington Hotel Co., Inc.*, 476 F.2d 721 (8th Cir. 1973).

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

2. Judicial discretion

The second key feature of the bill is its mandate that fees are only to be allowed in the discretion of the court. Congress has passed many statutes *requiring* that fees be awarded to a prevailing party.[15] Again the Committee adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fee provisions. This approach was supported by the Justice Department on Dec. 31, 1975. The Committee intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing H.R. 15460.

3. Reasonable fees

The third principal element of the bill is that the prevailing party is entitled to "reasonable" counsel fees. The courts have enumerated a number of factors in determining the reasonableness of awards under similarly worded attorney's fee provisions. In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), for example, the court listed twelve factors to be considered, including the time and labor required, the novelty and difficulty of the questions involved, the skill needed to present the case, the customary fee for similar work, and the amount received in damages, if any. *Accord*: *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974); see also *United States Steel Corp.* v. *United States*, *supra*.

Of course, it should be noted that the mere recovery of damages should not preclude the awarding of counsel fees.[16] Under the anti-

[15] E.g., 7 U.S.C. 499g(b) (Perishable Agricultural Commodities Act); 15 U.S.C. 1640(a) (Truth-in-Lending Act); 46 U.S.C. 1277 (Merchant Marine Act of 1936); 47 U.S.C. 206 (Communications Act of 1934).

[16] Similarly, a prevailing party is entitled to counsel fees even if represented by an organization or if the party is itself an organization. *Incarcerated Men of Allen County* v. *Fair*, *supra*; *Torres* v. *Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975), aff'd. —— F.2d —— (2d Cir., June 25, 1976); *Fairley* v. *Patterson*, 493 F2d 598 (5th Cir. 1974).

trust laws, for example, a plaintiff may recover treble damages and still the court is required to award attorney fees. The same principle should apply here as civil rights plaintiffs should not be singled out for different and less favorable treatment. Furthermore, while damages are theoretically available under the statutes covered by H.R. 15460, it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by H.R. 15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees. *Newman* v. *Piggie Park Enterprises, Inc.*, *supra*; *Northcross* v. *Memphis Board of Education*, *supra*.

The application of these standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys. The effect of H.R. 15460 will be to promote the enforcement of the Federal civil rights acts, as Congress intended, and to achieve uniformity in those statutes and justice for all citizens.

Oversight

Oversight of the administration of justice in the federal court system is the responsibility of the Committee on the Judiciary. The hearings on October 6 and 8 and Dec. 3, 1975, focused on specific pending legislation. However, they did have an oversight purpose, as well, since the impact of the Supreme Court's *Alyeska* decision on the public and the related issue of equal access to the courts were subjects of the hearing.

Committe Vote

H.R. 15460 was reported favorably by a voice vote of the Committee on September 9, 1976. Twenty-seven members of the Committee were present.

Statement of the Committe on Government Operations

No statement has been received on the legislation from the House Committee on Government Operations.

Statement of the Congrssional Budget Office

Pursuant to clause 7, rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee estimates there will be no cost to the federal government.

[17] *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Pierson* v. *Ray*, 386 U.S. 547 (1967).

CONGRESS OF THE UNITED STATES,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., September 7, 1976.

Hon. PETER W. RODINO,
Chairman, Committee on the Judiciary, U.S. House of Represenatives, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed the Civil Rights Attorney's Fees Award Act of 1976, a bill to award attorney's fees to prevailing parties in civil rights suits to enforce Sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, Title IX of P.L. 92–318 or Title VI of the Civil Rights Act of 1964.

Based on this review, it appears that no additional cost to the government would be incurred as a result of enactment of this bill.

Sincerely,

ALICE M. RIVLIN,
Director.

INFLATIONARY IMPACT STATEMENT

The legislation will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

SECTION-BY-SECTION ANALYSIS

Section 1

Section 1 merely recites the short title of the legislation, "The Civil Rights Attorney's Fees Awards Act of 1976".

Section 2

Section 2 amends section 722 (42 U.S.C. 1988) of the Revised Statutes by adding at the end of that section the following language:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, 1981 of the Revised Statutes, title IX of Public Law 92–318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailig party, other than the United States, a reasonable attorney's fee as part of the costs.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 722 OF THE REVISED STATUTES

SEC. 722. The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindi-

cation, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. *In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92–318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.*

APPENDIX A[1]

FEDERAL STATUTES AUTHORIZING THE AWARD OF ATTORNEY FEES

1. Federal Contested Election Act, 2 U.S.C. 396.
2. Freedom of Information Act, 5 U.S.C. 552(a)(4)(E).
3. Privacy Act, 5 U.S.C. 552a(g)(3)(B).
4. Federal Employment Compensation For Work Injuries, 5 U.S.C. 8127.
5. Packers and Stockyards Act, 7 U.S.C. 210(f).
6. Perishable Agricultural Commodities Act, 7 U.S.C. 499g (b), (c).
7. Agricultural Unfair Trade Practices Act, 7 U.S.C. 2305 (a), (c).
8. Plant Variety Act, 7 U.S.C. 2565.
9. Bankruptcy Act, 11 U.S.C. 104(a)(1).
10. Railroad Reorganization Act of 1935, 11 U.S.C. 205(c)(12).
11. Corporate Reorganization Act, 11 U.S.C. 641, 642, 643, and 644.
12. Federal Credit Union Act, 12 U.S.C. 1786(O).
13. Bank Holding Company Act, 12 U.S.C. 1975.
14. Clayton Act, 15 U.S.C. 15.
15. Unfair Competition Act (FTC), 15 U.S.C. 72.
16. Securities Act of 1933, 15 U.S.C. 77k(e).
17. Trust Indenture Act, 15 U.S.C. 77www(a).
18. Securities Exchange Act of 1934, 15 U.S.C. 78i(e), 78r(a).
19. Jewelers Hall-Mark Act, 15 U.S.C. 298 (b), (c) and (d).
20. Truth-in-Lending Act (Fair Credit Billing Amendments), 15 U.S.C. 1640(a).
21. Fair Credit Reporting Act, 15 U.S.C. 1681(n).
22. Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1918(a), 1989(a)(2).
23. Consumer Product Safety Act, 15 U.S.C. 2072, 2073.
24. Federal Trade Improvements Act (Amendments), 15 U.S.C. 2310(a)(5)(d)(2).
25. Copyright Act, 17 U.S.C. 1116.
26. Organized Crime Control Act of 1970, 18 U.S.C. 1964(c).
27. Education Amendments of 1972, 20 U.S.C. 1617.
28. Mexican American Treaty Act of 1950, 22 U.S.C. 277d–21.
29. International Claim Settlement Act, 22 U.S.C. 1623(f).
30. Federal Tort Claim Act, 28 U.S.C. 2678.
31. Norris-LaGuardia Act, 29 U.S.C. 107.
32. Fair Labor Standards Act, 29 U.S.C. 216(b).
33. Employees Retirement Income Security Act, 29 U.S.C. 1132(g).
34. Labor Management Reporting and Disclosure Act, 29 U.S.C. 431(c), 501(b).
35. Longshoremen and Harbor Workers Compensation Act, 33 U.S.C. 928.

---

[1] This list is compiled from information submitted to the Subcommittee by the Council for Public Interest La wand the Attorneys' Fee Project of the Lawyers' Committee for Civil Rights Under Law.

36. Water Pollution Prevention and Control Act, 33 U.S.C. 1365(d).
37. Ocean Dumping Act, 33 U.S.C. 1415(g)(4).
38. Deepwater Ports Act of 1974, 33 U.S.C. 1515.
39. Patent Infringement Act, 35 U.S.C. 285.
40. Servicemen's Group Life Insurance Act, 38 U.S.C. 784(g).
41. Servicemen's Readjustment Act, 38 U.S.C. 1822(b).
42. Veterans Benefit Act, 38 U.S.C. 3404(c).
43. Safe Drinking Water Act, 42 U.S.C. 300j–8(d).
44. Social Security Act (Amendments of 1965), 42 U.S.C. 406(b).
45. Clean Air Act (Amendments of 1970), 42 U.S.C. 1857h–2.
46. Civil Rights Act of 1964, Title II, 42 U.S.C. 2000a–3(b).
47. Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e–5(k).
48. Legal Services Corporation Act, 42 U.S.C. 2996e(f).
49. Fair Housing Act of 1968, 42 U.S.C. 3612(c).
50. Noise Control Act of 1972, 42 U.S.C. 4911(d).
51. Railway Labor Act, 45 U.S.C. 153(p).
52. Merchant Marine Act of 1936, 46 U.S.C. 1227.
53. Communications Act of 1934, 47 U.S.C. 206.
54. Interstate Commerce Act, 49 U.S.C. 8, 16(2), 908(b), 908(e), and 1017(b)(2).

Appendix B

Statutes covered or amended by H.R. 15460

1. Revised Statutes § 1977 (42 U.S.C. § 1981).

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977.

2. Revised Statutes § 1978 (42 U.S.C. § 1982).

§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

R.S. § 1978.

3. Revised Statutes § 1979 (42 U.S.C. § 1983).

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

4. Revised Statutes § 1980 (42 U.S.C. § 1985).

§ 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two of more persons in any State of Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one of more of the conspirators.

R.S. § 1980.

5. Revised Statutes § 198 (42 U.S.C. § 1986).

§ 1986. Same; action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and

any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

R.S. § 1981.

6. Revised Statutes § 722 (42 U.S.C. § 1988).

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

R.S. § 722.

7. Title IX of Public Law 92-318 (20 U.S.C. § 1681-1686), as amended.

§ 1681. Sex—Prohibition against discrimination; exceptions

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

Classes of Educational Institutions Subject to Prohibition

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

Educational Institutions Commencing Planned Change in Admissions

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change

which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

Educational institutions of religious organizations with contrary religious tenets

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

Educational institutions training individuals for military services or merchant marine

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

Public educational institutions with traditional and continuing admissions policy

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex; and

Social fraternities or sororities; voluntary youth service organizations

(6) This section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.

Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison

with the total number or percentage of persons of that sex in any community. State, section, or other area: *Provided.* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

Educational Institution Defined

(c) For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such terms means each such school, college, or department.

§ 1682. Federal administrative enforcement; report to congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Public Law 92–318, Title IX, § 902, June 23, 1972, 86 Stat. 374.

§ 1683. Judicial review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that Title.

Public Law 92–318, Title IX, § 903, June 23, 1972, 86 Stat. 374.

§ 1684. Blindness or visual impairment; prohibition against discriminaton

No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

Public Law 92–318, Title IX, § 904, June 23, 1972, 86 Stat. 375.

§ 1685. Authorty under other laws unaffected

Nothing in this chapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

Public Law 92–318, Title IX, § 905, June 23, 1972, 86 Stat. 375.

§ 1686. Interpretation with respect to living facilities

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

Public Law 92–318, Title IX, § 907, June 23, 1972, 86 Stat. 375.

8. Title VI of the Civil Rights Act of 1964 (Publ. L. 88–352, as amended), (42 U.S.C. 2000d through d–6).

SUBCHAPTER V.—FEDERALLY ASSISTED PROGRAMS

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (Pub. L. 88–352, title VI, § 601, July 2, 1964, 78 Stat. 252.)

§ 2000d–1. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to congressional committees; effective date of administrative action

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report. (Pub. L. 88–352, title VI, § 602, July 2, 1964, 78 Stat. 252.)

§ 2000d–2. Judicial review; Administrative Procedure Act.

Any department or agency action taken pursuant to section 2000d–1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d–1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 1009 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section. (Pub. L. 88–352, title VI, § 603, July 2, 1964, 78 Stat. 253.)

§ 2000d–3. Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency or labor organization except where a primary objective of the Federal financial assistance is to provide employment. (Pub. L. 88–352, title VI, § 604, July 2, 1964, 78 Stat. 253.)

§ 2000d–4. Federal authority and financial assistance to programs or activities by way of contract of insurance or guaranty

Nothing in this subchapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty. (Pub. L. 88–352, title VI, § 605, July 2, 1964, 78 Stat. 253.)

§ 2000–5. Prohibited deferral of action on applications by local educational agencies seeking federal funds for alleged noncompliance with Civil Rights Act.

The Commissioner of Education shall not defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated by this Act, by the Elementary and Secondary Education Act of 1965, by the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), by the Act of September 23, 1950 (Public Law 815, Eighty-first Congress), or by the Cooperative Research Act, on the basis of alleged noncompliance with the provisions of this subchapter for more than sixty days after notice is given to such local agency of such deferral unless such local agency is given the opportunity for a hearing as provided in section 2000d–1 of this title, such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such local agency and the commissioner, and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of this subchapter: *Provided*, That, for the purpose of determining whether a local educational agency is in compliance with this subchapter, compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be in compliance with this subchapter, insofar as the matters covered in the order or judgment are concerned. (Pub. L. 89–750, title I, § 182, Nov. 3, 1966, 80 Stat. 1209; Pub. L. 90–247, title I, § 112, Jan. 2, 1968, 81 Stat. 787).

§ 2000d–6. Policy of United States as to application of nondiscrimination provisions in schools of local educational agencies

(a) Declaration of uniform policy.

It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and

section 182 of the Elementary and Secondary Education Amendments of 1966 dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.

(b) Nature of uniformity

Such uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found.

(c) Prohibition of construction for diminution of obligation for enforcement or compliance with nondiscrimination requirements

Nothing in this section shall be construed to diminish the obligation of responsible officials to enforce or comply with such guidelines and criteria in order to eliminate discrimination in federally assisted programs and activities as required by title VI of the Civil Rights Act of 1964.

(d) Additional funds

It is the sense of the Congress that the Department of Justice and the Department of Health, Education, and Welfare should request such additional funds as may be necessary to apply the policy set forth in this section throughout the United States. (Pub. L. 91–230, § 2, Apr. 13, 1970, 84 Stat. 121.)

○

Calendar No. 955

94TH CONGRESS, 2d Session | SENATE | REPORT No. 94-1011

CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT

JUNE 29 (legislative day, JUNE 18), 1976.—Ordered to be printed

Mr. TUNNEY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2278]

The Committee on the Judiciary, to which was referred the bill (S. 2278) to amend Revised Statutes section 722 (42 U.S.C. § 1988) to allow a court, in its discretion, to award attorneys' fees to a prevailing party in suits brought to enforce certain civil rights acts, having considered the same, reports favorably thereon and recommends that the bill do pass.

The text of S. 2278 is as follows:

S. 2278

Revised Statutes section 722 (42 U.S.C. Sec. 1988) is amended by adding the following: "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.".

PURPOSE

This amendment to the Civil Rights Act of 1866, Revised Statutes Section 722, gives the Federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866. The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws.

History of the Legislation

The bill grows out of six days of hearings on legal fees held before the Subcommittee on the Representation of Citizen Interests of this Committee in 1973. There were more than thirty witnesses, including Federal and State public officials, scholars, practicing attorneys from many areas of expertise, and private citizens. Those who did not appear were given the opportunity to submit material for the record, and many did so, including the representatives of the American Bar Association and the Bar Associations of 22 States and the District of Columbia. The hearings, when published, included not only the testimony and exhibits, but numerous statutory provisions, proposed legislation, case reports and scholarly articles.

In 1975, the provisions of S. 2278 were incorporated in a proposed amendment to S. 1279, extending the Voting Rights Act of 1965.

The Subcommittee on Constitutional Rights specifically approved the amendment on June 11, 1975, by a vote of 8–2, and the full Committee favorably reported it on July 18, 1975, as part of S. 1279. Because of time pressure to pass the Voting Rights Amendments, the Senate took action on the House-passed version of the legislation. S. 1279 was not taken up on the Senate floor; hence, the attorneys' fees amendment was never considered.

On July 31, 1975, Senator Tunney introduced S. 2278, which is identical to the amendment to S. 1279 which was reported favorably by this Committee last summer.

Shortly thereafter, similar legislation was introduced in the House of Representatives, including H.R. 9552, which is identical to S. 2278 except for one minor technical difference. The Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee has conducted three days of hearings at which the witnesses have generally confirmed the record presented to this Committee in 1973. H.R. 9552, the counterpart of S. 2278, has received widespread support by the witnesses appearing before the House Subcommittee.

Statement

The purpose and effect of S. 2278 are simple—it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866. S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a–3(b) and 2000e–5(k), and section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973*l*(e). All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

Congress recognized this need when it made specific provision for such fee shifting in Titles II and VII of the Civil Rights Act of 1964:

> When a plaintiff brings an action under [Title II] he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts. Congress therefore enacted the provision for counsel fees—* * * to encourage individuals injured by racial discrimination to seek judicial relief under Title II." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

The idea of the "private attorney general" is not a new one, nor are attorneys' fees a new remedy. Congress has commonly authorized attorneys' fees in laws under which "private attorneys general" play a significant role in enforcing our policies. We have, since 1870, authorized fee shifting under more than 50 laws, including, among others, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(c) and 78r(a), the Servicemen's Readjustment Act of 1958, 38 U.S.C. § 1822(b), the Communications Act of 1934, 42 U.S.C. § 206, and the Organized Crime Control Act of 1970, 18 U.S.C. § 1964(c). In cases under these laws, fees are an integral part of the remedy necessary to achieve compliance with our statutory policies. As former Justice Tom Clark found, in a union democracy suit under the Labor-Management Reporting and Disclosure Act (Landrum-Griffin),

> Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. * * * Without counsel fees the grant of Federal jurisdiction is but an empty gesture * * *. *Hall* v. *Cole*, 412 U.S. 1 (1973), quoting 462 F. 2d 777, 780–81 (2d Cir. 1972).

The remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven. In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws.[1] The very first attorneys' fee statute was a civil rights law, the Enforcement Act of 1870, 16 Stat. 140, which provided for attorneys' fees in three separate provisions protecting voting rights.[2]

Modern civil rights legislation reflects a heavy reliance on attorneys' fees as well. In 1964, seeking to assure full compliance with the Civil Rights Act of that year, we authorized fee shifting for private suits establishing violations of the public accommodations and equal employment provisions. 42 U.S.C. §§ 2000a–3(b) and 2000e–5(k). Since 1964, every major civil rights law passed by the Congress has included, or has been amended to include, one or more fee provisions.

---

[1] For example, the Civil Rights Act of 1866 directed Federal courts to "use that combination of Federal law, common law and State law as will be best adapted to the object of the civil rights laws." *Brown* v. *City of Meridian, Mississippi*, 356 F. 2d 602, 605 (5th Cir. 1966). See 42 U.S.C. § 1988; *Lefton* v. *City of Hattiesburg, Mississippi*, 333 F. 2d 280 (5th Cir. 1964).

[2] The causes of action established by these provisions were eliminated in 1894. 28 Stat. 36.

E.g., Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612(c); the Emergency School Aid Act of 1972, 20 U.S.C. § 1617; the Equal Employment Amendments of 1972, 42 U.S.C. § 2000e–16(b); and the Voting Rights Act Extension of 1975, 42 U.S.C. § 1973*l*(e).

These fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy. Before May 12, 1975, when the Supreme Court handed down its decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), many lower Federal courts throughout the Nation had drawn the obvious analogy between the Reconstruction Civil Rights Acts and these modern civil rights acts, and, following Congressional recognition in the newer statutes of the "private attorney general" concept, were exercising their traditional equity powers to award attorneys' fees under early civil rights laws as well.[3]

These pre-*Alyeska* decisions remedied a gap in the specific statutory provisions and restored an important historic remedy for civil rights violations. However, in *Alyeska*, the United States Supreme Court, while referring to the desirability of fees in a variety of circumstances, ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the "private attorney general" theory. The Court expressed the view, in dictum, that the Reconstruction Acts did not contain the necessary congressional authorization. This decision and dictum created anomalous gaps in our civil rights laws whereby awards of fees are, according to *Alyeska*, suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. § 1982, a Reconstruction Act protecting the same rights. Likewise, fees are allowed in a suit under Title II of the 1964 Civil Rights Act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. § 1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws.

This bill, S. 2278, is an appropriate response to the *Alyeska* decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*, and makes our civil rights laws consistent.

It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).[4]

[3] These civil rights cases are too numerous to cite here. See, e.g., *Sims* v. *Amos* 340 F. Supp. 691 (M.D. Ala. 1972), aff'd, 409 U.S. 942 (1972); *Stanford Daily* v. *Zurcher*, 366 F. Supp. 18 (N.D. Cal. 1973); and cases cited in *Alyeska Pipeline*, *supra*, at n. 46. Many of the relevant cases are collected in "Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcom. on Representation of Citizen Interests of the Senate Comm. on the Judiciary," 93d Cong., 1st sess., pt. III, at pp. 888–1024, and 1060–62.

[4] In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases. the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors. See, e.g., *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

Such "private attorneys general" should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. *Richardson* v. *Hotel Corporation of America*, 332 F. Supp. 519 (E.D. La. 1971), aff'd, 468 F. 2d 951 (5th Cir. 1972). (A fee award to a defendant's employer, was held unjustified where a claim of racial discrimination, though meritless, was made in good faith.) Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. *United States Steel Corp.* v. *United States*, 385 F. Supp. 346 (W.D. Pa. 1974), aff'd, 9 E.P.D. ¶ 10,225 (3d Cir. 1975). This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith" under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278. Similar standards have been followed not only in the Civil Rights Act of 1964, but in other statutes providing for attorneys' fees. E.g., the Water Pollution Control Act, 1972 U.S. Code Cong. & Adm. News 3747; the Marine Protection Act, Id. at 4249–50; and the Clean Air Act, Senate Report No. 91–1196, 91st Cong., 2d Sess., p. 483 (1970). See also *Hutchinson* v. *William Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943) (Fair Labor Standards Act).

In appropriate circumstances, counsel fees under S. 2278 may be awarded pendente lite. See *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974). Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. See *Bradley*, *supra*; *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. *Kopet* v. *Esquire Realty Co.*, 523 F. 2d 1005 (2d Cir. 1975), and cases cited therein; *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969); *Thomas* v. *Honeybrook Mines, Inc.*, 428 F. 2d 981 (3d Cir. 1970); *Aspira of New York, Inc.* v. *Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975).

In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which S. 2278 applies are to be fully enforced.[5] We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance. Fee awards are therefore provided in cases covered by S. 2278 in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5. As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs,[6] will be collected either directly from the official, in his official capacity,[7] from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

[5] See, e.g., "Hearings on the Effect of Legal Fees," supra.

[6] *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 168 (1927).

[7] Proof that an official had acted in bad faith could also render him liable for fees in his individual capacity, under the traditional bad faith standard recognized by the Supreme Court in *Alyeska*. See *Class* v. *Norton*, 505 F. 2d 123 (2d Cir. 1974); *Doe* v. *Poelker*, 515 F. 2d 541 (8th Cir. 1975).

It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson* v. *Georgia Highway Express*, 488 F. 2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis* v. *County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter." *Davis*, *supra; Stanford Daily*, *supra*, at 684.

This bill creates no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's May decision. It does not change the statutory provisions regarding the protection of civil rights except as it provides the fee awards which are necessary if citizens are to be able to effectively secure compliance with these existing statutes. There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

Changes in Existing Law Made by the Bill Are Italicized

REVISED STATUTES § 722, 42 U.S.C. § 1988

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty." *In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.*

Cost of Legislation

The Congressional Budget Office, in a letter dated March 1, 1976, has advised the Judiciary Committee that: "Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 2278, a bill to award attorneys' fees to prevailing parties in civil rights suits.

"Based on this review, it appears that no additional costs to the government would be incurred as a result of the enactment of this bill."

○

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

October 14, 1976

Copy for Barry
Ken
Vfyi

Honorable Philip W. Buchen
Counsel to the President
The White House
Washington, D.C. 20500

Dear Phil:

Enclosed herewith are my comments on S. 2278, the Civil Rights Attorney's Fees Awards Act of 1976.

I feel that this bill should be signed into law by the President and any reservations by the Treasury Department are clearly unfounded. I believe even without the Allen amendment the courts would act the same way if there were a finding that the Treasury Department had harassed a taxpayer and brought a frivolous suit.

Sincerely,

Bill

William T. Coleman, Jr.

Enclosure

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

October 14, 1976

Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

This is to give you formally my views on S. 2278, an enrolled bill, "The Civil Rights Attorney's Fees Awards Act of 1976"

> To amend Revised Statutes section 722 (42 U.S.C. 1988) to provide for the award of counsel fees for the prevailing party, other than the United States, in the discretion of the Court in cases brought pursuant to certain statutory provisions.

The enrolled bill would amend the Civil Rights Act of 1866, Revised Statutes section 722, to provide for the award of counsel fees to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, Title IX of Public Law 92-318, the Internal Revenue Code and Title VI of the Civil Rights Act of 1964.

Actions Brought Pursuant to the Civil Rights Act of 1866

Section 2 of the bill would amend Revised Statutes section 722 (42 U.S.C. 1988) of the Civil Rights Act of 1866 to provide counsel fees for prevailing parties at the discretion of the Court for actions brought to enforce the provisions of the Act. Sections 1977, 1978, 1979, 1980, and 1981 of the 1866 Act respectively (1) provide for and protect equal rights by giving to all citizens the full and equal benefit of all laws, (2) guarantee the property rights of all citizens, (3) ensure legal redress and liability for deprivation of rights secured by the Constitution and laws, (4) vest jurisdiction to review all proceedings arising hereunder in the Supreme Court and (5) protect against conspiracies to interfere with civil rights.

As you know, these statutes were passed by Republican Administrations and still afford the basis for relief against unconstitutional action based upon race. See e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). These provisions have traditionally been used by Blacks, Mexican Americans, Puerto Ricans, American Indians, and other minority groups to bridge the equality gap by enforcing national policies favoring equality in housing, employment, public accommodations, quality of medical care and a host of other fundamental rights.

Traditionally, the parties seeking enforcement of these basic human rights vindicating policies that Congress have found to be of the highest priority are those least able financially to afford counsel. It has long been recognized by the Courts and the Congress that plaintiffs, who bring actions to enforce important Congressional policies such as those reflected in the civil rights laws, act not for themselves alone but act as "private attorneys general" enforcing the law through the Courts. Newman v. Piggie Park Enterprises, Inc. 390 U.S. 400, 402 (1968). (Also see list of attorney's fee provisions in Congressional enactments since 1870, 94th Congress, 2d Session, S.R. 94-1011 at p. 3.)

Attorney's fee provisions for prevailing parties in civil rights cases are not a new remedy. Both Congress and the Federal courts have traditionally recognized the appropriateness and effectiveness of this remedy in enabling private parties to enforce the civil rights laws. All major civil rights legislation enacted since 1964 now include an attorney's fee provision. The standard in this bill, S. 2278, is the same as in the post-1964 legislation: a party who seeks to enforce these rights who is successful "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust". Newman, supra, at 402.

Federal courts had bridged the gap between the post-1964 civil rights statutes with attorney's fee provisions and the 1866 Act with no attorney's fee remedy by using their inherent equity powers to award attorneys fees to prevailing parties at their discretion. Knight v. Anciello, 453 F.2d 852 (1st Cir. 1972), Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971), see list of cases in Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 270, Fn. 42 (1975).

However, on May 12, 1975 the Supreme Court in Alyeska, supra, held that only Congress could authorize the award of attorney's fees ("it is not for us to invade the legislature's province . . ." Alyeska, supra, at 271) and that although fees are desirable in a variety of circumstances, courts simply do not have the authority to fashion a rule. As a result of Alyeska, attorney's fees became unavailable in civil rights cases which seek to enforce fundamental rights similar to those protected by post-1964 statutes in which fees are available. Thus, the bill merely provides the same counsel fee provisions for pre-1964 civil rights legislation which is in all post-1964 civil rights legislation.

Minority groups, therefore, across the country welcomed the passage of S. 2278 because it filled a gap created by the Alyeska decision. Civil rights litigants have been hard-pressed for funds when they litigate against discriminators who are frequently financially affluent. The Committee reports in both Houses make an overwhelming case which demonstrates that existing legislation is not sufficient to enable the economically disadvantaged litigants, whose civil rights are often violated, legally to enforce and protect these rights. In order for this provision to be operative, the civil rights litigant must first win in order to prevail and, even then, his attorney's fee is fixed at the discretion of the judge.

The purpose and effect of this provision of S. 2278 is clear and laudable: to provide the remedy of reasonable attorney's fees to prevailing parties who are acting in the national interest as "private attorneys general" in enforcing the civil rights laws.

Attorney's Fees in Actions Brought Pursuant to Title IX of Public Law 92-318 and Title VI of the Civil Rights Act of 1964

Title IX of the Education Act of 1972 prohibits discrimination on the basis of sex and Title VI of the Civil Rights Act of 1964, on the basis of race and national origin "in any education program or activity receiving federal financial assistance." Their enforcement provision is found in Revised Statutes section 722, the provision amended by this bill.

These provisions are major civil rights provisions and the counsel fee remedy is not new in either Act. Other sections in each of these Acts have provisions similar to the one passed here. (Title VII, section 706 (k),Civil Rights Act of 1964, and Title VII, section 718, Educational Amendments of 1972.)

Internal Revenue Code Proceedings

This provision which allows the Court in its discretion to award attorney's fees to the prevailing party in a suit brought by the United States pursuant to the Internal Revenue Code imposes quite a different legal standard from the "private attorneys general" standard applicable to prevailing parties in civil rights litigation.

The amendment, in its effect on cases brought pursuant to the Internal Revenue Code, applies solely to prevailing defendants to provide protection against harassment. The sponsor of the bill, Mr. Tunney (D-Ca.) expressed the intent of the amendment as follows:

> Mr. TUNNEY. Mr. President, as initial sponsor of S. 2278, I would like to make clear my understanding of the intent of this amendment, which I support.
>
> Essentially, it would apply to a situation where a taxpayer is harrassed by the IRS. In such a case, a court has discretion to award reasonable attorneys' fees to the defendant. The standard to be applied is the one the courts have adopted with respect to prevailing defendants, as described in the Senate report.
>
> The purpose of this amendment is not to discourage meritorious lawsuits by the IRS, but to discourage frivolous or harrassing lawsuits.
>
> The amendment would not apply to a situation where the Government is plaintiff on appeal since the Government did not bring the action in the first instance.
> (Cong. Record, Senate, 94th Congress, 2d Session at S. 17050.)

The legislative history further reveals that after this expression of the intent of the amendment which was sponsored by Messrs. Allen (D-Ala.), Helms (D-N.C.), Thurmond (D-S.C.), Scott (D-Va.), and Stone (D-Fla.), the Senate voted its adoption by a vote of 72 to 0.

The courts would be guided by well-settled judicial principles made clear by the applicable case law that a stricter test is used in awarding fees to prevailing defendants than to prevailing plaintiffs. Specifically, the existing case law requires that the defendant, in

order to receive a counsel fee, must show bad faith on the part of the government. He must show that the suit was unreasonable, frivolous, meritless, vexatious and brought for purposes of harrassment. Carrion v. Yeshiva University, 397 F. Supp 852, (S.D.N.Y.), aff'd 535 F.2d 722 (2d Cir. 1976); United States Steel Corp. v. United States, 519 F.2d 359, 364 (3d Cir. 1975).

The fundamentally different Congressional purposes served by the counsel fee provision as it affects prevailing parties in civil rights cases and defendants in tax cases was articulated by Senator Kennedy (D-Mass.):

> It should be clear, then, that a provision authorizing fee awards in tax cases has a fundamentally different purpose from one authorizing awards in lawsuits brought by private citizens to enforce the protections of our civil rights laws. In enacting the basic civil rights attorneys fees awards bill, Congress clearly intends to facilitate and to encourage the bringing of actions to enforce the protections of the civil rights laws. By authorizing awards of fees to prevailing defendants in cases brought under the Internal Revenue Code, however, Congress merely intends to protect citizens from becoming victims of frivolous or otherwise unwarranted lawsuits. Enactment of this amendment should in no way be understood as implying that Congress intends to discourage the Government from initiating legitimate lawsuits under the tax laws.
> (Cong. Record, Senate, 94th Congress, 2d Session, at S. 17051.)

The counsel fee provisions for prevailing parties in civil rights laws clearly reflect the Congressional intent to facilitate the enforcement of those laws, whereas similar fee provisions in cases under the internal revenue code are intended to protect defendants from vexatious and frivolous lawsuits brought to harass. The standard for prevailing defendants to receive counsel fees is a tough one and remains so under this provision.

On the basis of my analysis of the intent of Congress, the legislative history and the applicable case law, I recommend that the enrolled bill be signed by the President. The amendment making possible the award of counsel fees to defendants in certain cases brought pursuant to the Internal Revenue Code is subject to the same strict test

in its application that the Courts have already applied in distinguishing prevailing plaintiffs from defendants: there must be a legal determination of harassment and bad faith on the part of the government in order for a "fee shifting" provision to apply to a prevailing defendant.

In fact, I am sure that the courts, even without such a statute, would impose counsel fees on the government if it were shown, as required by the statute, that the government acted in bad faith and only to harass the defendant. (See e.g., Rude v. Buchalter, 286 U.S. 451, 459-60 (1932); Local 149, I.U.A.A. & A.I.W. v. American Brake Shoe Co., 298 F.2d 212, 214-15 (4th Cir.), cert. den., 369 U.S. 873 (1962); Cleveland v. Second National Bank & Trust Co., 149 F.2d 466 (6th Cir.), cert. den., 326 U.S. 775 (1945); Guardian Trust Co. v. Kansas City Southern Ry., 28 F.2d 233 (8th Cir. 1928); Carrion v. Yeshiva University, supra; cf. United States Steel Corp., v. United States, supra (fee sought against plaintiff under civil rights statute); Paddison v. Fidelity Bank, 60 F.R.D. 695, 699 (E.D. Pa. 1973) (Title VII suit in which defendant's petition for attorneys' fees against plaintiff was denied on ground that "(s)uch an award would normally be made to prevailing defendants only if the case had been unreasonably brought . . ."); Richardson v. Hotel Corp., of America, 332 F. Supp. 519 (E.D. La. 1971), aff'd, 468 F.2d 951 (5th Cir. 1972). Since this provision, therefore, only enacts into a statute what is clearly the common law already, this does not afford any reason to disapprove the statute.

I strongly urge the President to sign the bill.

Sincerely,

William T. Coleman, Jr.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

OFFICE OF
THE CHAIRMAN

October 15, 1976

MEMORANDUM FOR: Kenneth A. Lazarus, Esq.
Associate Counsel to the President

FROM: Robert A. Anthony RAA
Chairman

SUBJECT: Signing of S. 800

The President may wish to consider a signing ceremony for S. 800.

S. 800 removes the defense of sovereign immunity and certain other technical obstacles to so-called nonstatutory judicial review of federal administrative action (summarized in Attachment A). Its provisions have long been favored by the American Bar Association, the Administrative Conference of the United States, and students of administrative law and federal jurisdiction generally.

This Act probably will not change outcomes in large numbers of cases. But it will simplify court review of agency action, by eliminating certain defenses and issues which have puzzled lawyers and judges, complicated and lengthened judicial proceedings, and occasionally worked hardship and injustice on private plaintiffs.

Thus, it will be easier for citizens to have courts decide the merits of their disputes with the Government. The bill is not expected to increase the caseload of the federal courts.

While the problems it deals with are somewhat technical, the bill is of interest to a knowledgeable and influential community. In addition, it has important symbolic value as representing a commitment by the Government to deal fairly with its citizens and to subject its actions to the test of the rule of law.

It should be especially noted that passage of the bill was achieved after the Department of Justice this year discontinued its opposition to the provision abolishing the sovereign immunity defense.

A list of persons who might be invited to a signing ceremony is enclosed (Attachment B).

ATTACHMENT A

SUMMARY OF S.800

S.800 implements three recommendations of the Administrative Conference, Nos. 68-7, 69-1 and 70-1. It removes certain technical obstacles to suits for judicial review of administrative action. Section 1 of the bill amends 5 U.S.C §702 to remove the defense of sovereign immunity in suits for nonstatutory review of agency action (other than suits for money damages) and amends 5 U.S.C §703 to permit the plaintiff to name as defendant in such a suit the officer, the agency, or the United States. Section 2 amends 28 U.S.C §1331 to eliminate, in suits against the United States, federal agencies, or officers, the $10,000 amount in controversy required to establish federal question jurisdiction. Section 3 permits a plaintiff to implead nonfederal defendants in a suit against the United States or a federal officer or agency without losing the benefit of the liberal venue and service of process provisions available under 28 U.S.C §1391(e).

ATTACHMENT B

POSSIBLE INVITEES TO SIGNING CEREMONY ON S. 800

Council of the Administrative Conference

List attached

The Chairman and all other members were appointed to their current terms by President Ford, except for Messrs. Gellhorn, Harrison and Russell, who were appointed by President Nixon.

The Council will be meeting in Washington October 22.

Former Chairmen of the Administrative Conference

Honorable Antonin Scalia
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C. 20530
(202) 739-2041

Dean Roger C. Cramton
Cornell Law School
Ithaca, New York 14853
(607) 256-3527

Professor Jerre S. Williams
University of Texas Law School
2500 Red River
Austin, Texas 78705
(512) 471-5151

Department of Justice

Attorney General Levi
Deputy Attorney General Tyler (listed above in ACUS Council)
Assistant Attorney General Scalia (listed above as former ACUS Chairman)
Assistant Attorney General Rex Lee

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

September 30, 1976

OFFICE OF
THE CHAIRMAN

MEMBERS OF THE COUNCIL

Robert A. Anthony
Chairman
Suite 500, 2120 L Street, N.W.
Washington, D.C. 20037
Telephone: (202) 254-7020

Harold R. Tyler, Jr.
Vice Chairman
Deputy Attorney General
Department of Justice
Washington, D.C. 20530
Telephone: (202) 739-2101

John W. Barnum
Deputy Secretary
Department of Transportation
Washington, D.C. 20590
Telephone: (202) 426-2222

Philip W. Buchen
Counsel to the President
The White House
Washington, D.C. 20500
Telephone: (202) 456-2632

Walter Gellhorn
Professor
Columbia University Law School
435 West 116th Street
New York, New York 10027
Telephone: (212) 280-2664

Marion Edwyn Harrison
Harrison, Lucey, Sagle & Solter
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 298-9030

Betty Southard Murphy
Chairman
National Labor Relations Board
Washington, D.C. 20570
Telephone: (202) 254-9445

Harold L. Russell
Gambrell, Russell, Killorin,
& Forbes
4000 First National Bank Building
Atlanta, Georgia 30303
Telephone: (404) 658-1620

Richard C. Van Dusen
Dickinson, Wright, McKean & Cudlip
800 First National Building
Detroit, Michigan 48226
Telephone: (313) 223-3500

Richard E. Wiley
Chairman
Federal Communications Commission
Washington, D.C. 20554
Telephone: (202) 632-6336

Edwin M. Zimmerman
Covington & Burling
888 - 16th Street, N.W.
Washington, D.C. 20006
Telephone: (202) 452-6042

American Bar Association

Lawrence Edward Walsh
Past President of ABA
1 Chase Manhattan Plaza
44th Floor
New York, New York 10005
(212) HA2-3400

Justin Stanley
President
American Bar Association
1155 E. 60th Street
Chicago, Illinois 60637
(312) 947-4000
or
(312) 782-0600

Whitney North Seymour
Past President of ABA
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

William Warfield Ross
1320 19th Street, N.W.
Washington, D.C. 20036
(202) 296-2121

Ashley Sellers
Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006
(202) 452-7500

Cornelius B. Kennedy
Chairman, ABA Administrative Law Section
Kennedy & Webster
888 17th Street, N.W.
Washington, D.C. 20006
(202) 298-8208

Jerre S. Williams
Past Chairman, ABA Administrative Law Section
[listed above as past ACUS Chairman]

Marion Edwyn Harrison
Past Chairman, ABA Administrative Law Section
[listed above in ACUS Council]

Harold L. Russell
Past Chairman, ABA Administrative Law Section
[listed above in ACUS Council]

Administrative Conference Staff

Richard K. Berg
Executive Secretary

Stephen H. Klitzman
Staff Attorney

Legal Scholars who influenced this legislation

Kenneth Culp Davis
Professor
University of San Diego
School of Law
San Diego, California 92110
(714) 291-6480 x335

Clark Byse
Professor
Harvard Law School
Cambridge, Massachusetts 02138
(617) 495-3168

Walter Gellhorn
[listed above in ACUS Council]

Roger C. Cramton
[listed above as former ACUS Chairman]

Congress

The bill was introduced by Senators Kennedy and Mathias. It was reported out by the Judiciary Subcommittee on Administrative Practice and Procedure, Senator Kennedy, Chairman, and Senator Thurmond, ranking Minority member. Thomas M. Susman, Chief Counsel of the Subcommittee staff, was very helpful in advancing this legislation (as was Minority Counsel William Coates, who is no longer with the staff). On the House side the bill was reported out by the Judiciary Subcommittee on Administrative Law and Governmental Relations, Congressman Flowers, Chairman, and Congressman Moorhead, ranking Minority member. Subcommittee Counsel William P. Shattuck and Minority Counsel Alan F. Coffey were helpful on this legislation.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

OFFICE OF
THE CHAIRMAN

October 15, 1976

MEMORANDUM FOR: Kenneth A. Lazarus, Esq.
Associate Counsel to the President

FROM: Robert A. Anthony RAA
Chairman

SUBJECT: Signing of S. 800

The President may wish to consider a signing ceremony for S. 800.

S. 800 removes the defense of sovereign immunity and certain other technical obstacles to so-called nonstatutory judicial review of federal administrative action (summarized in Attachment A). Its provisions have long been favored by the American Bar Association, the Administrative Conference of the United States, and students of administrative law and federal jurisdiction generally.

This Act probably will not change outcomes in large numbers of cases. But it will simplify court review of agency action, by eliminating certain defenses and issues which have puzzled lawyers and judges, complicated and lengthened judicial proceedings, and occasionally worked hardship and injustice on private plaintiffs.

Thus, it will be easier for citizens to have courts decide the merits of their disputes with the Government. The bill is not expected to increase the caseload of the federal courts.

While the problems it deals with are somewhat technical, the bill is of interest to a knowledgeable and influential community. In addition, it has important symbolic value as representing a commitment by the Government to deal fairly with its citizens and to subject its actions to the test of the rule of law.

It should be especially noted that passage of the bill was achieved after the Department of Justice this year discontinued its opposition to the provision abolishing the sovereign immunity defense.

A list of persons who might be invited to a signing ceremony is enclosed (Attachment B).

ATTACHMENT A

SUMMARY OF S.800

S.800 implements three recommendations of the Administrative Conference, Nos. 68-7, 69-1 and 70-1. It removes certain technical obstacles to suits for judicial review of administrative action. Section 1 of the bill amends 5 U.S.C §702 to remove the defense of sovereign immunity in suits for nonstatutory review of agency action (other than suits for money damages) and amends 5 U.S.C §703 to permit the plaintiff to name as defendant in such a suit the officer, the agency, or the United States. Section 2 amends 28 U.S.C §1331 to eliminate, in suits against the United States, federal agencies, or officers, the $10,000 amount in controversy required to establish federal question jurisdiction. Section 3 permits a plaintiff to implead nonfederal defendants in a suit against the United States or a federal officer or agency without losing the benefit of the liberal venue and service of process provisions available under 28 U.S.C §1391(e).

ATTACHMENT B

POSSIBLE INVITEES TO SIGNING CEREMONY ON S. 800

Council of the Administrative Conference

List attached

The Chairman and all other members were appointed to their current terms by President Ford, except for Messrs. Gellhorn, Harrison and Russell, who were appointed by President Nixon.

The Council will be meeting in Washington October 22.

Former Chairmen of the Administrative Conference

Honorable Antonin Scalia
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C. 20530
(202) 739-2041

Dean Roger C. Cramton
Cornell Law School
Ithaca, New York 14853
(607) 256-3527

Professor Jerre S. Williams
University of Texas Law School
2500 Red River
Austin, Texas 78705
(512) 471-5151

Department of Justice

Attorney General Levi
Deputy Attorney General Tyler (listed above in ACUS Council)
Assistant Attorney General Scalia (listed above as former ACUS Chairman)
Assistant Attorney General Rex Lee

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

September 30, 1976

OFFICE OF
THE CHAIRMAN

MEMBERS OF THE COUNCIL

Robert A. Anthony
Chairman
Suite 500, 2120 L Street, N.W.
Washington, D.C. 20037
Telephone: (202) 254-7020

Harold R. Tyler, Jr.
Vice Chairman
Deputy Attorney General
Department of Justice
Washington, D.C. 20530
Telephone: (202) 739-2101

John W. Barnum
Deputy Secretary
Department of Transportation
Washington, D.C. 20590
Telephone: (202) 426-2222

Philip W. Buchen
Counsel to the President
The White House
Washington, D.C. 20500
Telephone: (202) 456-2632

Walter Gellhorn
Professor
Columbia University Law School
435 West 116th Street
New York, New York 10027
Telephone: (212) 280-2664

Marion Edwyn Harrison
Harrison, Lucey, Sagle & Solter
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 298-9030

Betty Southard Murphy
Chairman
National Labor Relations Board
Washington, D.C. 20570
Telephone: (202) 254-9445

Harold L. Russell
Gambrell, Russell, Killorin,
& Forbes
4000 First National Bank Building
Atlanta, Georgia 30303
Telephone: (404) 658-1620

Richard C. Van Dusen
Dickinson, Wright, McKean & Cudlip
800 First National Building
Detroit, Michigan 48226
Telephone: (313) 223-3500

Richard E. Wiley
Chairman
Federal Communications Commission
Washington, D.C. 20554
Telephone: (202) 632-6336

Edwin M. Zimmerman
Covington & Burling
888 - 16th Street, N.W.
Washington, D.C. 20006
Telephone: (202) 452-6042

American Bar Association

Lawrence Edward Walsh
Past President of ABA
1 Chase Manhattan Plaza
44th Floor
New York, New York 10005
(212) HA2-3400

Justin Stanley
President
American Bar Association
1155 E. 60th Street
Chicago, Illinois 60637
(312) 947-4000
or
(312) 782-0600

Whitney North Seymour
Past President of ABA
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

William Warfield Ross
1320 19th Street, N.W.
Washington, D.C. 20036
(202) 296-2121

Ashley Sellers
Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006
(202) 452-7500

Cornelius B. Kennedy
Chairman, ABA Administrative Law Section
Kennedy & Webster
888 17th Street, N.W.
Washington, D.C. 20006
(202) 298-8208

Jerre S. Williams
Past Chairman, ABA Administrative Law Section
[listed above as past ACUS Chairman]

Marion Edwyn Harrison
Past Chairman, ABA Administrative Law Section
[listed above in ACUS Council]

Harold L. Russell
Past Chairman, ABA Administrative Law Section
[listed above in ACUS Council]

Administrative Conference Staff

Richard K. Berg
Executive Secretary

Stephen H. Klitzman
Staff Attorney

Legal Scholars who influenced this legislation

Kenneth Culp Davis
Professor
University of San Diego
School of Law
San Diego, California 92110
(714) 291-6480 x335

Clark Byse
Professor
Harvard Law School
Cambridge, Massachusetts 02138
(617) 495-3168

Walter Gellhorn
[listed above in ACUS Council]

Roger C. Cramton
[listed above as former ACUS Chairman]

Congress

The bill was introduced by Senators Kennedy and Mathias. It was reported out by the Judiciary Subcommittee on Administrative Practice and Procedure, Senator Kennedy, Chairman, and Senator Thurmond, ranking Minority member. Thomas M. Susman, Chief Counsel of the Subcommittee staff, was very helpful in advancing this legislation (as was Minority Counsel William Coates, who is no longer with the staff). On the House side the bill was reported out by the Judiciary Subcommittee on Administrative Law and Governmental Relations, Congressman Flowers, Chairman, and Congressman Moorhead, ranking Minority member. Subcommittee Counsel William P. Shattuck and Minority Counsel Alan F. Coffey were helpful on this legislation.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

OFFICE OF
THE CHAIRMAN

October 15, 1976

MEMORANDUM FOR: Kenneth A. Lazarus, Esq.
Associate Counsel to the President

FROM: Robert A. Anthony RAA
Chairman

SUBJECT: Signing of S. 800

The President may wish to consider a signing ceremony for S. 800.

S. 800 removes the defense of sovereign immunity and certain other technical obstacles to so-called nonstatutory judicial review of federal administrative action (summarized in Attachment A). Its provisions have long been favored by the American Bar Association, the Administrative Conference of the United States, and students of administrative law and federal jurisdiction generally.

This Act probably will not change outcomes in large numbers of cases. But it will simplify court review of agency action, by eliminating certain defenses and issues which have puzzled lawyers and judges, complicated and lengthened judicial proceedings, and occasionally worked hardship and injustice on private plaintiffs.

Thus, it will be easier for citizens to have courts decide the merits of their disputes with the Government. The bill is not expected to increase the caseload of the federal courts.

While the problems it deals with are somewhat technical, the bill is of interest to a knowledgeable and influential community. In addition, it has important symbolic value as representing a commitment by the Government to deal fairly with its citizens and to subject its actions to the test of the rule of law.

It should be especially noted that passage of the bill was achieved after the Department of Justice this year discontinued its opposition to the provision abolishing the sovereign immunity defense.

A list of persons who might be invited to a signing ceremony is enclosed (Attachment B).

ATTACHMENT A

SUMMARY OF S.800

S.800 implements three recommendations of the Administrative Conference, Nos. 68-7, 69-1 and 70-1. It removes certain technical obstacles to suits for judicial review of administrative action. Section 1 of the bill amends 5 U.S.C §702 to remove the defense of sovereign immunity in suits for nonstatutory review of agency action (other than suits for money damages) and amends 5 U.S.C §703 to permit the plaintiff to name as defendant in such a suit the officer, the agency, or the United States. Section 2 amends 28 U.S.C §1331 to eliminate, in suits against the United States, federal agencies, or officers, the $10,000 amount in controversy required to establish federal question jurisdiction. Section 3 permits a plaintiff to implead nonfederal defendants in a suit against the United States or a federal officer or agency without losing the benefit of the liberal venue and service of process provisions available under 28 U.S.C §1391(e).

ATTACHMENT B

POSSIBLE INVITEES TO SIGNING CEREMONY ON S. 800

Council of the Administrative Conference

List attached

The Chairman and all other members were appointed to their current terms by President Ford, except for Messrs. Gellhorn, Harrison and Russell, who were appointed by President Nixon.

The Council will be meeting in Washington October 22.

Former Chairmen of the Administrative Conference

Honorable Antonin Scalia
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C. 20530
(202) 739-2041

Dean Roger C. Cramton
Cornell Law School
Ithaca, New York 14853
(607) 256-3527

Professor Jerre S. Williams
University of Texas Law School
2500 Red River
Austin, Texas 78705
(512) 471-5151

Department of Justice

Attorney General Levi
Deputy Attorney General Tyler (listed above in ACUS Council)
Assistant Attorney General Scalia (listed above as former ACUS Chairman)
Assistant Attorney General Rex Lee

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

September 30, 1976

OFFICE OF
THE CHAIRMAN

MEMBERS OF THE COUNCIL

Robert A. Anthony
Chairman
Suite 500, 2120 L Street, N.W.
Washington, D.C. 20037
Telephone: (202) 254-7020

Harold R. Tyler, Jr.
Vice Chairman
Deputy Attorney General
Department of Justice
Washington, D.C. 20530
Telephone: (202) 739-2101

John W. Barnum
Deputy Secretary
Department of Transportation
Washington, D.C. 20590
Telephone: (202) 426-2222

Philip W. Buchen
Counsel to the President
The White House
Washington, D.C. 20500
Telephone: (202) 456-2632

Walter Gellhorn
Professor
Columbia University Law School
435 West 116th Street
New York, New York 10027
Telephone: (212) 280-2664

Marion Edwyn Harrison
Harrison, Lucey, Sagle & Solter
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 298-9030

Betty Southard Murphy
Chairman
National Labor Relations Board
Washington, D.C. 20570
Telephone: (202) 254-9445

Harold L. Russell
Gambrell, Russell, Killorin,
& Forbes
4000 First National Bank Building
Atlanta, Georgia 30303
Telephone: (404) 658-1620

Richard C. Van Dusen
Dickinson, Wright, McKean & Cudlip
800 First National Building
Detroit, Michigan 48226
Telephone: (313) 223-3500

Richard E. Wiley
Chairman
Federal Communications Commission
Washington, D.C. 20554
Telephone: (202) 632-6336

Edwin M. Zimmerman
Covington & Burling
888 - 16th Street, N.W.
Washington, D.C. 20006
Telephone: (202) 452-6042

American Bar Association

Lawrence Edward Walsh
Past President of ABA
1 Chase Manhattan Plaza
44th Floor
New York, New York 10005
(212) HA2-3400

Justin Stanley
President
American Bar Association
1155 E. 60th Street
Chicago, Illinois 60637
(312) 947-4000
or
(312) 782-0600

Whitney North Seymour
Past President of ABA
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

William Warfield Ross
1320 19th Street, N.W.
Washington, D.C. 20036
(202) 296-2121

Ashley Sellers
Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006
(202) 452-7500

Cornelius B. Kennedy
Chairman, ABA Administrative Law Section
Kennedy & Webster
888 17th Street, N.W.
Washington, D.C. 20006
(202) 298-8208

Jerre S. Williams
Past Chairman, ABA Administrative Law Section
[listed above as past ACUS Chairman]

Marion Edwyn Harrison
Past Chairman, ABA Administrative Law Section
[listed above in ACUS Council]

Harold L. Russell
Past Chairman, ABA Administrative Law Section
[listed above in ACUS Council]

Administrative Conference Staff

Richard K. Berg
Executive Secretary

Stephen H. Klitzman
Staff Attorney

Legal Scholars who influenced this legislation

Kenneth Culp Davis
Professor
University of San Diego
School of Law
San Diego, California 92110
(714) 291-6480 x335

Clark Byse
Professor
Harvard Law School
Cambridge, Massachusetts 02138
(617) 495-3168

Walter Gellhorn
[listed above in ACUS Council]

Roger C. Cramton
[listed above as former ACUS Chairman]

Congress

The bill was introduced by Senators Kennedy and Mathias. It was reported out by the Judiciary Subcommittee on Administrative Practice and Procedure, Senator Kennedy, Chairman, and Senator Thurmond, ranking Minority member. Thomas M. Susman, Chief Counsel of the Subcommittee staff, was very helpful in advancing this legislation (as was Minority Counsel William Coates, who is no longer with the staff). On the House side the bill was reported out by the Judiciary Subcommittee on Administrative Law and Governmental Relations, Congressman Flowers, Chairman, and Congressman Moorhead, ranking Minority member. Subcommittee Counsel William P. Shattuck and Minority Counsel Alan F. Coffey were helpful on this legislation.