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Attorney's Fees in Civil Rights Actions against the Federal Government - NAACP v. Civiletti

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ATTORNEY'S FEES IN CIVIL RIGHTS ACTIONS AGAINST THE FEDERAL GOVERNMENT— *NAACP V. CIVILETTI*

The protection of an individual's civil rights from governmental infringement often entails extensive adjudication; consequently, the preservation of constitutional rights could depend upon a person's ability to afford the high costs of litigation. If individuals are precluded from full appreciation of their civil rights due to their lack of financial resources, such rights become mere privileges of the wealthy.[1] To ensure equal access to the courts for all citizens, Congress enacted the Civil Rights Attorney's Fees Awards Act (Fees Act)[2] which authorizes an award of attorney's fees to a prevailing party[3] in any action or proceeding brought under certain civil rights laws.[4] This legislative policy has been implemented by federal court decisions allowing

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1. *See generally* Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation*, 33 MD. L. REV. 379 (1973) [hereinafter cited as Falcon]; Note, *Civil Rights—Attorneys' Fees*, 4 HARV. C.R.-C.L. L. REV. 223 (1969).

2. 42 U.S.C. § 1988 (1976). The Civil Rights Attorney's Fees Awards Act of 1976 provides as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681 *et seq.*], or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d *et seq.*], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id.

The Senate Report describes the purpose of the Fees Act as follows:

> [C]ivil 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.

S. REP. NO. 94-1011, 94th Cong., 2d Sess. 2 (1976). *See also* H. REP. NO. 94-1558, 94th Cong., 2d Sess. 1 (1976).

3. The term "prevailing party" has been defined to include both a victor after a final judgment on the merits and a litigant who succeeds prior to a full hearing before a judge or a jury. *See* H. REP. NO. 94-1558, 94th Cong., 2d Sess. 1, 7 (1976). Courts have awarded attorney's fees to a party in a suit even though that party did not prevail on the merits. Provided that a genuine civil rights issue is involved, the outcome of the litigation is not the determining factor in the allowance of a fee award. *See, e.g.*, Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979).

4. *See* note 2 *supra*.

awards of attorney's fees against both private parties[5] and state governments[6] under the Fees Act.

In *NAACP v. Civiletti*,[7] a suit brought under the Fees Act, the Court of Appeals for the District of Columbia severely limited the scope of the Fees Act by denying an award of attorney's fees when the federal government was the defendant. The court ruled that a statutory expression of sovereign immunity prevented an award of attorney's fees against the federal government in the absence of other specific statutory authorization[8] or consent of the United States.[9] Because the *NAACP* court interpreted the Fees Act as not providing such specific statutory authorization, private party suits against the United States in certain civil rights actions will be inhibited.

This Note argues that the *NAACP* court's interpretation of the Fees Act is antithetical to the congressional purpose behind the Act. Additionally, it

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5. *See, e.g.*, McNamara v. Moody, 606 F.2d 621 (5th Cir. 1979) (attorney's fees awarded under the Fees Act against prison official in his official and individual capacities).

6. Hutto v. Finney, 437 U.S. 678 (1977) (state barred from asserting an eleventh amendment defense against liability for fee awards); Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979) (attorney's fees awarded under Fees Act against Connecticut Commissioner of Social Services); Perez v. University of Puerto Rico, 600 F.2d 1 (1st Cir. 1979) (attorney's fees awarded against University of Puerto Rico); Holley v. Lavine, 605 F.2d 638 (2d Cir. 1979) (attorney's fees awarded against both county and state commissioners of social services); Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979) (attorney's fees awarded against officials of state department of public welfare); Corpus v. Estelle, 605 F.2d 175 (5th Cir. 1979) (award of attorney's fees against State Department of Corrections); Harkless v. Sweeny Independent School Dist., 608 F.2d 594 (5th Cir. 1979) (attorney's fees awarded against school district and several of its officials in suit alleging racial discrimination); International Soc'y for Krishna Consciousness v. Anderson, 569 F.2d 1027 (8th Cir. 1978) (attorney's fees awarded against Omaha city officials); Howard v. Phelps, 443 F. Supp. 374 (E.D. La. 1978) (attorney's fees awarded against Secretary of State Department of Corrections in his official capacity).

7. 609 F.2d 514 (D.C. Cir. 1979).

8. A statutory grant of sovereign immunity with respect to attorney's fees is found at 28 U.S.C. § 2412 (1976), which provides:

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

Id. (emphasis added).

This statute is ancillary to the federal doctrine of sovereign immunity, an implied policy immunizing the United States from suit without its consent. Stanley v. Schwalby, 162 U.S. 255, 270 (1896). Title 28 establishes that even in those cases in which the United States has consented to suit, it nevertheless maintains its immunity from fee awards absent a relevant statute creating federal liability for attorney's fees. 28 U.S.C. § 2412 (1976). For a more detailed discussion of federal sovereign immunity and 28 U.S.C. § 2412, see notes 16 and 17 and accompanying text *infra*.

9. Under the common law doctrine of sovereign immunity, "[i]t is now well settled—though for a century the rule was stated only in dicta—that the United States may not be sued without its consent." C. WRIGHT, LAW OF FEDERAL COURTS § 22, at 82 (3d ed. 1976). *See, e.g.*, Larson v. Domestic & Foreign Corp., 337 U.S. 682, 688 (1948) (a suit is barred if "it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction").

shows that the Fees Act, by its very language, could include the United States within its ambit. Finally, it explores the impact the federal immunity from liability for attorney's fees will have upon civil rights litigation.

HISTORICAL BACKGROUND: JUDICIAL AND LEGISLATIVE

The general rule governing awards of attorney's fees is the "American rule," under which each party to litigation is responsible for his or her own attorney's fees.[10] A few exceptions to this rule have arisen from judicial exercise of equitable powers and from congressional mandate.[11] Even under one of these exceptions, however, awards of attorney's fees have still been denied where the federal[12] or state government[13] was the defendant.

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10. The "American rule" originated from a general distrust of lawyers. The assumption underlying the rule was that if attorney's fees were available to litigants, lawyers might encourage unnecessary litigation. One court has summarized the original rationale behind the "American rule": "[T]he American practice of generally not including counsel fees in costs was a deliberate departure from the English practice, stemming initially from the colonies' distrust of lawyers and continued because of a belief that the English system favored the wealthy and unduly penalized the losing party." Conte v. Flota Mercante Del Estado, 277 F.2d 664, 672 (2d Cir. 1960). The rule was reaffirmed in Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), where the Court stated that "the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." *Id.* at 718.

11. The four major federal law exceptions to the American rule are: (1) statutory exceptions; (2) the bad faith theory; (3) the "common-fund" theory; and (4) the "private attorney general" theory. Examples of statutes that include provisions for the allowance of attorney's fees include: Civil Rights Attorney's Fees Awards Act of 1876, 42 U.S.C. § 1988 (1976); Clean Air Act, § 304(d), 42 U.S.C. § 7604(d) (Supp. II 1978); Civil Rights Act of 1964, tit. II, § 204(b), 42 U.S.C. § 2000a-3(b) (1976); Fair Housing Act of 1968, § 812(c), 42 U.S.C. § 3613(c) (1976). For a complete list of statutes that allow attorney's fees, see Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 260 n.33 (1974).

The "bad-faith" theory allows courts to award attorney's fees against a party who willfully violated a legal duty. The underlying purpose is to punish the guilty party and to deter others from bad faith conduct in the future. *See* Runyon v. McCrary, 427 U.S. 160 (1976); Hall v. Cole, 412 U.S. 1 (1968). The "common fund" theory, which allows fees to a single party acting on behalf of a larger group, was used as the rationale for fee awards in Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939), Trustees v. Greenough, 105 U.S. 527 (1881), and more recently, in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). The "private attorney general" theory was established in the Supreme Court decision, Newman v. Piggie Park Enterprises Inc., 390 U.S. 400 (1968). The purpose of this theory is to allow a recovery of attorney's fees to a private party who advances an issue of importance to the general public.

For a general discussion of the exceptions to the American rule and the rationale behind these exceptions, see Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966); Thueson, *Slipping from the American Rule Straight Jacket*, 40 MONT. L. REV. 308 (1979); Taylor, *Resistance Stiffens to the Abandonment of the Rule*, 5 ORANGE COUNTY B.J. 343 (1978); Comment, *Theories of Recovering Attorney's Fees: Exceptions to the American Rule*, 47 U.M.K.C. L. REV. 566 (1979).

12. *See* Southeast Legal Defense Group v. Adams, 436 F. Supp. 891 (D. Or. 1977); Shannon v. United States Dep't of Housing & Urban Dev., 433 F. Supp. 249 (E.D. Pa. 1977).

13. *See* Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 496 F.2d 1017 (5th Cir. 1974). The Supreme Court decision in Hutto v. Finney, 437

In such cases, the doctrine of sovereign immunity has been applied to protect the governmental entity from incurring liability for fees. Until recently, state governments remained immune from liability for attorney's fees under a general eleventh amendment grant of sovereign immunity.[14] Moreover, the federal government has consistently been protected from liability for fee awards by an explicit statutory grant of sovereign immunity as contained in 28 U.S.C. § 2412.[15]

The federal doctrine of sovereign immunity, which shields the United States from lawsuit, is an implied governmental protection having its source in the common law.[16] Because the purpose of the doctrine is only to protect the federal government, the United States may waive this immunity. A statutory exception often is essential to surmount the formidable barrier posed by the doctrine of federal sovereign immunity,[17] but the courts strictly construe statutory waivers.[18] Evidencing the strength of the doctrine is 28 U.S.C. § 2412, which forbids implied waivers of federal sovereign immunity with respect to attorney's fees.[19] Essentially, this statute requires the existence of other express authority in order to create federal government liability for attorney's fees.

In 1974, the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*,[20] underscored the vitality of section 2412. The Wilderness Society, seeking to prevent the issuance of a government permit necessary for construction of the trans-Alaska pipeline, brought suit against the Alyeska Pipeline Service Company and the United States Secretary of the Interior.

U.S. 687 (1977), however, now bars the states from asserting an eleventh amendment defense against liability for fee awards. For a general discussion of the *Hutto* decision, see notes 29-31 and accompanying text *infra*.

14. *See, e.g.*, Taylor v. Perini, 504 F.2d 899 (6th Cir. 1974), *vacated on other grounds*, 421 U.S. 982 (1974); Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1974). *See generally* Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875 (1975). In the context of attorney's fees, however, the eleventh amendment defense is no longer open to the states. *See* note 13 *supra* and notes 29-31 and accompanying text *infra*. For a general discussion of the eleventh amendment doctrine of sovereign immunity, see C. WRIGHT, LAW OF FEDERAL COURTS § 46, at 197 (3d ed. 1976) ("a state is immune from suit in federal court unless it consents"). *See also* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972); Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 214-17 (1968).

15. *See* note 8 *supra*.

16. *See* note 9 *supra*.

17. Examples of statutes that waive federal sovereign immunity include 28 U.S.C. § 1346(a) (1976), which gives district courts jurisdiction over damage actions based on contract, federal law or regulations, or the Constitution (provided the amount in controversy is less than $10,000) and also § 410 of the Tort Claims Act, 28 U.S.C. § 1346(b) (1976), which grants district courts jurisdiction over certain tort claims against the federal government.

18. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 22, at 83 (3d ed. 1976).

19. *See* note 8 *supra*.

20. 421 U.S. 240 (1974). *Alyeska* involved an environmental issue advanced by the Wilderness Society. The plaintiff attempted to prevent issuance of government permits necessary for construction of the trans-Alaska pipeline.

The plaintiffs alleged that the government was liable for attorney's fees under the private attorney general theory, an exception to the American rule that allows the federal courts to award attorney's fees to parties vindicating important public rights.[21] The *Alyeska* Court reasoned that because the purpose of this exception is to hold government officials accountable to the public, it should follow that in such cases the government would be liable for attorney's fees.[22] Finding the federal government protected from liability for fee awards under section 2412, however, the Court decided that this statute prevented fee awards under the private attorney general theory. Thus, the *Alyeska* Court held that absent express statutory authorization, the United States is not liable for attorney's fees.[23] Furthermore, the Court stated that it is the responsibility of Congress, not the courts, to determine which public policies merit a fee award.[24]

Accepting the *Alyeska* Court's challenge to create an express waiver of section 2412, Congress passed the Fees Act.[25] The purpose of the Act is twofold. First, it is intended to create uniformity among the remedies available under federal civil rights laws.[26] Through its broad, encompassing provisions, the Act allows recovery of fees in all actions that do not already contain an explicit fee provision.[27] Second, the Act is intended to encourage private suits under civil rights laws.[28]

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21. *Id.* at 265-67.

22. *Id.*

23. *Id.* at 267-68. The Court stated that it was not within its discretion to authorize a fee award which, "if allowable at all, must be expressly provided for by statute." *Id.*

24. *Id.* at 269. The Court explained: "It appears to us that the rule suggested here and adopted by the Court of Appeals [awarding attorney's fees] would make major inroads on a policy matter that Congress has reserved for itself." *Id.* The Court further stated that in addition to requiring statutory authorization for fee awards against the federal government, "the federal courts [should not] purport to adopt on their own initiative a rule awarding attorneys' fees based on the private-attorney-general approach when such judicial rule will operate only against private parties and not against the Government." *Id.*

25. That the Fees Act was enacted in response to *Alyeska* is indicated by the remarks of Senator Mathias: "I believe that [the Fees Act] constitutes a much needed response to *Alyeska* and is necessary to guarantee the proper enforcement of our civil rights laws which the Congress has so earnestly labored for in the past." 122 CONG. REC. S31,471 (daily ed. Sept. 21, 1976).

26. Senator Kennedy expressed the need for uniformity of fee provisions in civil rights statutes:

> This bill [the Fees Act] would close a series of loopholes in our civil rights laws created by the Supreme Court's Alyeska decision last year, and would reestablish a uniformity in the remedies available under federal laws guaranteeing civil and constitutional rights. . . .The result is plain: few private civil rights enforcement actions can now be brought under these Federal statutes not providing for fee awards. The bill before us today would eliminate this anomaly by permitting courts to make discretionary fee awards under all Federal civil rights statutes.

122 CONG. REC. S31,472 (daily ed. Sept. 21, 1976).

27. *See* S. REP. NO. 94-1011, 94th Cong., 2d Sess. 2-6 (1976). Under some civil rights statutes, attorney's fees provisions are included. Under other statutes protecting the same rights, however, there may be no attorney's fee provision. It is the stated purpose of the Fees Act to remedy the "gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*. . . ." *Id.* at 4.

28. *See* note 2 and accompanying text *supra*.

After the enactment of the Fees Act, the courts were presented with the question of whether the language of the Fees Act is specific enough to be applicable to governmental entities in the face of the eleventh amendment and section 2412 defenses. The Supreme Court held, in *Hutto v. Finney*,[29] that state governments may be held liable for attorney's fees under the Fees Act. The Court pointed out the existence of a historical tradition allowing awards of litigation costs against the states without regard to eleventh amendment immunity. The Court further noted that the Fees Act specifically allowed for fees as part of the costs of litigation. In light of these factors, the *Hutto* Court concluded that there existed no constitutional barrier to such awards.[30]

Moreover, the *Hutto* Court analyzed the language of the Fees Act providing that "in any action" to enforce civil rights reasonable attorney's fees may be awarded. Concentrating on the phrase "any action," the Court reasoned that such general language gave very broad scope to the Act.[31] Further, the Court found no explicit exception for the states either in the language of the statute or in the legislative context in which it was enacted. Accordingly, the *Hutto* Court concluded that the statute must be read to include the states within its provisions.

Although the *Hutto* decision clearly held the Fees Act applicable to state governments, the issue of federal governmental liability under the Act remained unsettled. The most recent attempt by a federal court to ascertain the propriety of an award against the federal government under the Fees Act is *NAACP v. Civiletti*.[32]

FACTS OF *NAACP v. CIVILETTI*

NAACP v. Civiletti was a consolidation of two district court cases involving claims for attorney's fees under the Fees Act. The first case, *NAACP v. Bell*,[33] arose out of the fatal shooting of a black man, Carnell Russ, by a white police officer during an arrest for a traffic violation.[34] The Justice Department chose not to prosecute the arresting officer under the federal criminal civil rights statute.[35] The Russ family and the NAACP, however,

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29. 437 U.S. 678 (1977).

30. *Id.* at 697. The *Hutto* Court noted that clear congressional intent to abrogate the states' eleventh amendment defense may be found where Congress "does not impose enormous burdens on the States." *Id.* Because it did not consider the costs of litigation to be an enormous burden, the Court concluded that it was unnecessary for state liability to be explicitly mentioned in the Fees Act. *Id.*

31. *Id.* at 694. The Court stated: "The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions. . . ." *Id.*

32. 609 F.2d 514 (D.C. Cir. 1979).

33. 448 F. Supp. 1164 (D.D.C. 1978).

34. A state jury acquitted the policy officer on charges of manslaughter. *Id.* at 1165.

35. 18 U.S.C. § 242 (1976).

brought suit against the Justice Department under the Civil Rights Act,[36] challenging the adequacy of the federal investigation and the decision not to prosecute.

While this suit was pending, Griffin Bell, then attorney general, issued a memorandum directing the Justice Department to fully investigate all alleged violations of civil rights laws. Because the memorandum accomplished the purpose of their suit, the Russ family's claim against the Justice Department became moot and the district court dismissed the case. The plaintiffs, as prevailing parties, sought and were awarded attorney's fees under the Fees Act.[37]

In the second case, *Andrulis v. United States*,[38] the plaintiff alleged race and sex discrimination in employment practices.[39] Dr. Marilyn W. Andrulis, on behalf of Andrulis Research Corporation (ARC), applied and was granted admission to a program under the Small Business Act (SBA).[40] A purpose of the SBA is to provide persons who had been denied employment opportunity due to social or economic disadvantage access to contract employment with federal agencies.[41] Shortly after Andrulis' admission to the SBA program, the Small Business Administration, claiming that because she, and therefore ARC, were not "minorities" for the purposes of the SBA program, terminated ARC's participation.[42]

After termination from the SBA program, Andrulis and ARC instituted a suit against the United States alleging that the termination constituted unfair race and sex discrimination. The parties to the suit entered into a consent agreement that resulted in the reinstatement of ARC to the SBA program. Pursuant to this agreement, the plaintiffs applied for and were granted attorney's fees by the district court.[43] In both *Andrulis* and *Bell*, the United States Government appealed the award of attorney's fees to the Court of Appeals for the District of Columbia.

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36. The suit was brought under 42 U.S.C. § 1981 (1976), which provides for equal rights under the law for all persons within the jurisdiction of the United States, and 42 U.S.C. § 1985 (1976), which provides a right of action against conspiracy to interfere with civil rights. 448 F. Supp. at 1166. Both of these statutes are included under the provisions of the Fees Act. For a general discussion of these sections of the code, see Chaloupka, *A Prohibition Against Private Discrimination: Section 1981*, 14 IDAHO L. REV. 677 (1978), and Comment, *Civil Rights–Private Actions Under 42 U.S.C. § 1985 for Conspiracies to Impede the Due Course of Justice*, 27 KAN. L. REV. 621 (1979).

37. 609 F.2d at 516.

38. No. 77-1936 (D.D.C. June 13, 1978).

39. 609 F.2d at 515. The plaintiff alleged violations of 42 U.S.C. §§ 1981, 1985(3) and 2000(d) (1976). For a description of sections 1981 and 1985, see note 36 *supra*. *See also* Note, *Section 1985(3): A Viable Alternative to Title VII for Sex-Based Employment Discrimination*, 1978 WASH. U.L.Q. 367 (1978). Section 2000(d) generally prohibits discriminatory exclusion from the benefits of federally assisted programs on the basis of race, color, or national origin. 42 U.S.C. § 2000(d) (1976).

40. 15 U.S.C. §§ 631-47 (1976). Andrulis was granted admission to a program under section 8(a) of the Small Business Act, *id.* § 637(a).

41. *Id.* § 631(a), (c).

42. 609 F.2d at 515.

43. *Id.*

THE *NAACP* OPINION

Faced with the issue of whether the federal government is liable for attorney's fees under the Fees Act, the *NAACP* court found that neither the language of the statute nor its legislative history evinced intention to abrogate the statutory grant of federal sovereign immunity.[44] Accordingly, the court reversed the decisions of the district court, holding that attorney's fees could not be awarded against the federal government. The court reasoned that to overcome the defense of federal sovereign immunity, express statutory authority[45] or authority by necessary implication[46] was required. Conforming to the Supreme Court's interpretation of 28 U.S.C. § 2412 in *Alyeska Pipeline Service Co. v. Wilderness Society*,[47] the court cited this statute as the source of a federal immunity from fee awards that may be abrogated only by other clear or express statutory authority.[48] Thus, the court interpreted section 2412 as embodying a policy against implied waiver of federal sovereign immunity.

The court next explained what was meant by a "necessary implication" of liability. The court cited the Clean Air Act[49] as an example. One provision of this Act specifically permits suits against the federal government.[50] Another provision authorizes attorney's fees to "any party" mentioned in the previous provision.[51] The court concluded that because these two provisions must be read *in pari materia*, a necessary implication of United States liability arose.[52]

To determine whether the Fees Act manifested sufficient intent to waive United States immunity from fee awards, the court focused on the portion of

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44. 609 F.2d at 518. *See* note 8 *supra*.

45. 609 F.2d at 518. The court stated that in order for attorney's fees to be awarded against the federal government, "there must be [an] 'unequivocally expressed' affirmative authorization to overcome 28 U.S.C. § 2412." *Id.* (quoting Fitzgerald v. United States Civil Serv. Comm'n, 554 F.2d 1188, 1189 (D.C. Cir. 1977)).

46. 609 F.2d at 516-17. The court found that "statutory authorization may be inferred by necessary implication from the statutory context in which a fee provision arises." *Id.*

47. 421 U.S. 240, 267-68 (1975).

48. As examples of express statutory authority, the court cited several statutes, including 42 U.S.C. § 2000a-3(b) (1976), which provides:

> In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, *and the United States shall be liable for costs the same as the private person*.

Id. (emphasis added). The court also cited the following statutes which make specific reference to United States liability in a fee provision: 5 U.S.C. § 552(a)(4)(E) (1976); 15 U.S.C. § 2059(e) (1976); 42 U.S.C. §§ 2000b-1, 2000e-5(k) (1976). 609 F.2d at 516 n.4.

49. 42 U.S.C. §§ 7401-7642 (Supp. II 1978).

50. Section 304(a) of the Clean Air Act specifically permits suits against the Administrator of the Environmental Protection Agency. *Id.* § 7604(a).

51. Section 304(d) of the Clean Air Act provides: "the Court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." *Id.* § 7604(d).

52. 609 F.2d at 517.

the Act allowing recovery of attorney's fees in "any action" to enforce civil rights laws.[53] Noting the generality of the phrase "any action," the court reasoned that when Congress has intended a statute to create federal liability for attorney's fees, it has specifically so provided.[54] Therefore, the *NAACP* court concluded that the "any action" language of the Fees Act was not sufficiently specific to constitute either express statutory authorization, or necessary implication, of United States liability for attorney's fees.[55]

Finding the language of the Fees Act insufficient to create federal liability, the court applied the rationale of *Hutto v. Finney*[56] to discern whether there was express authorization or a necessary implication of federal liability under the Fees Act. The *NAACP* court immediately distinguished *Hutto*.[57] To waive the states' defense of eleventh amendment sovereign immunity, the *Hutto* court relied upon a tradition of awarding attorney's fees as part of the costs against state governments.[58] The *NAACP* court stated that federal immunity from attorney's fees could not be waived in the same manner for two reasons.[59] First, there existed no such analogous tradition of awarding attorney's fees against the federal government. Second, the court stated, without elaboration, that the statutory assertion of federal sovereign immunity as contained in section 2412 creates a more formidable barrier to a waiver of sovereign immunity than does the eleventh amendment.[60]

Finally, the court examined the legislative history surrounding the Fees Act. Because of the divergence of opinion in the congressional debates and the silence of the House and Senate committee reports regarding federal liability, the *NAACP* court found no evidence of intended federal liability under the Fees Act.[61] The court did, however, admit that strong policy reasons existed that would support fee awards in civil rights cases.[62] Nevertheless, the *NAACP* court deferred to congressional authority for the determination of policy regarding the Fees Act.

ANALYSIS OF THE COURT'S DECISION

The *NAACP* court asserted that a statute creating federal liability for attorney's fees must contain either an express authorization or a necessary im-

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53. *Id.* at 517-18.

54. *Id.* The court stated: "Unless we are to regard the prior specific references to the United States inserted in fee provision statutes as mere surplusage, we must assume that Congress considered the 'any action' language insufficient standing alone to waive federal sovereign immunity." *Id.*

55. *Id.* at 518.

56. 437 U.S. 678 (1977). *See* notes 29-31 and accompanying text *supra*.

57. 609 F.2d at 518.

58. *See* notes 29-31 and accompanying text *supra*.

59. 609 F.2d at 518.

60. *Id.*

61. *Id.*

62. *Id.* at 520-21.

plication[63] of United States liability. The court's application of these two tests, however, was not only strained, but contrary to the plain language of the statute and its legislative history.

Initially, to determine if the Fees Act constituted sufficient statutory authorization abrogating a grant of sovereign immunity, the court interpreted the Fees Act in light of the *Alyeska Pipeline Service Co. v. Wilderness Society*[64] mandate that a statute must expressly allow for attorney's fees in order to overcome a defense of sovereign immunity as contained in section 2412.[65] Although the *NAACP* court did state that an implied waiver of section 2412 was unacceptable, it did not delineate the distinction between an implied and an express waiver. Rather, as examples of express waiver, the court merely listed a number of statutes that made specific reference to United States liability in a fee provision.[66] The court emphasized that these statutes did overcome the defense of federal immunity from fee awards.[67] By listing only statutes which specifically named the United States in a fee provision, the *NAACP* court implied that only such specificity could satisfy the *Alyeska* holding. The *NAACP* court's reasoning on this point is problematic because *Alyeska* did not require the United States to be specifically mentioned by name in a statute. All that is necessary, according to *Alyeska*, is an express statute that can fairly be interpreted to include the United States within its meaning.[68] The *NAACP* court strained the meaning of the *Alyeska* holding.[69]

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63. *See* notes 45 & 46 and accompanying text *supra*.

64. 421 U.S. 240 (1974). *See* notes 20-24 and accompanying text *supra*.

65. 609 F.2d at 518.

66. *See* note 49 *supra*.

67. 609 F.2d at 516.

68. Because the *Alyeska* Court held that § 2412 could be restricted in application by a statute which expressly provided for attorney's fees, the problems of statutory interpretation necessarily arose. Because, once Congress enacted such a statute (e.g., the Fees Act), it became the duty of the courts to determine its scope. Clearly, the courts needed standards for statutory interpretation in respect to waiver of federal immunity from attorney's fees. In a 1976 Supreme Court decision, the Court set forth a test by which to judge the degree of specificity necessary to waive the defense of federal sovereign immunity: "[A] grant of a right of action must be made with specificity. . . . [T]he asserted entitlement to money damages depends upon whether any federal statute 'can be fairly interpreted as mandating compensation by the Federal Government for the damage sustained.' " United States v. Testan, 424 U.S. 392, 400 (1976) (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967). Thus, neither the *Testan* test nor the *Alyeska* holding requires specific mention of the United States in a statute in order to waive the defense of federal sovereign immunity. All that is needed is a statute with a fee provision that could be fairly interpreted under the *Testan* rule to include the United States within its ambit.

For other cases which hold that an express statute is needed to create federal liability for attorney's fees, but do not specify that the United States must be explicitly mentioned, see United States v. King, 395 U.S. 1, 4 (1969); Fitzgerald v. United States Civil Serv. Comm'n, 554 F.2d 1186, 1189 (D.C. Cir. 1977); Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 512 F.2d 1351, 1353 (D.C. Cir. 1975).

69. The *Alyeska* Court held that the statutory assertion of sovereign immunity contained in § 2412 bars awards of attorney's fees against the federal government "which if allowable at all,

Nevertheless, the *NAACP* court believed that only a statute specifically mentioning the United States in a fee provision could be fairly interpreted to include the United States within its scope. Because the court was so restrictive in allowing negation of section 2412, a clear explanation of the criteria used to differentiate adequate from inadequate nullification was essential to prevent the court's decision from appearing arbitrary. The *NAACP* court, however, did not clearly articulate how it arrived at its conclusion.[70] Moreover, the court's decision did not establish any standards for statutory interpretation. Thus, the *NAACP* court's failure to illuminate its method of statutory interpretation rendered the opinion ineffective as a tool for future courts to use when interpreting statutory language.

Because the *NAACP* court construed the plain language of the Fees Act as insufficient express authorization of federal liability for attorney's fees, the court next attempted to discern the congressional intent behind the Fees Act in order to discover whether a necessary implication of federal liability arose. The court stated that because Congress specifically mentioned the United States by name in other fees provisions, it likely would have used language at least as unequivocal in the Fees Act if it meant to abrogate section 2412.[71] This reasoning led the court to conclude mistakenly that Congress did not intend the "any action" language of the Fees Act to create United States liability for attorney's fees.[72]

The court's logic is faulty. Simply because Congress wrote fee provisions one way in the past does not mean that it will always draft such provisions identically. Furthermore, the court ignored the fact that Congress has enacted broadly worded statutes that allow the courts discretion in interpretation.[73] The Fees Act is exactly such a statute. Although the Act does not specifically mention federal liability, it need not because the generality of

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must be expressly provided for by statute." 421 U.S. at 267-68. This holding of the *Alyeska* Court merely prohibits attorney's fees awards absent statutory authbrization. The Court did not state that specific mention of the United States in a statute is necessary to overcome § 2412.

70. The court stated, without elaboration, that clear statutory authority for attorney's fees "may be found in language referring specifically to the liability of the United States." Although the court did not state that only such specificity constituted adequate waiver, it failed to cite any other examples of adequate waiver of federal sovereign immunity. 609 F.2d at 516.

71. *Id.* at 518.

72. *Id.*

73. The propriety of using broad or liberal statutory interpretation to accomplish policy objectives has been advocated by the Court of Appeals for the District of Columbia:

> [O]ur duty is to favor [a statutory] interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where, as here, that interpretation is consistent with the plain language of the statute.

United States v. Chrysler Corp., 591 F.2d 948, 961 (D.C. Cir. 1979).

In addition, the Supreme Court has liberally construed vague civil rights statutes in order to carry out perceived congressional intent. *See, e.g.*, Griffin v. Breckenridge, 403 U.S. 88, 96-97 (1971) (interpreting 42 U.S.C. § 1985(3) to include private conspiracies even though not specifically mentioned in the statute; citing the general language of the statute and its legislative

the "any action" language may be interpreted as manifesting congressional intent to include the United States within its meaning.[74]

Because it is so broad, the phrase "any action" can properly allow for a wide range of interpretative readings.[75] It is common for the courts to take advantage of broadly worded civil rights statutes in order to effectuate policy considerations.[76] One policy consideration that engendered the Fees Act was the encouragement of civil rights litigation.[77] Accordingly, a broad reading of the Fees Act, which would include the United States within its meaning, is consistent with relevant congressional intent and traditional judicial practice.[78]

In addition to its language, the legislative history of the Act compels a necessary implication of federal liability.[79] Both the Senate[80] and House[81]

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history as evidencing its broad scope); Jones v. Mayer Co., 392 U.S. 409, 437 (1968) (interpreting 42 U.S.C. § 1982 as prohibiting all discrimination, including purely private discrimination, even though the language of the statute does not specifically mention private action; citing congressional intent as the source of such a broad reading).

74. In his dissent in *NAACP*, Judge Wright stated:

> The majority says that this [finding the Fees Act to include federal liability] may be done in one of two ways: (1) statutory language that specifically refers to the liability of the United States; and (2) necessary implication from the statutory context in which the fee pjovision arises. . . . In my view, Section 1988 satisfies the latter test.

609 F.2d at 521-22 (Wright, J., dissenting). Judge Wright considered the broad language of the Fees Act and its legislative history as adequate evidence of congressional intent to include the United States within its provisions. *Id.* at 522-30.

75. "Any" is a word capable of denoting generality in certain contexts where it can be considered synonymous with the phrase "any and all." This usage of the word "any" has been described by linguists as the "stress any" because of its emphatic and inclusive connotations. *See generally* Lawler, *Any Questions?* 3 SYNTAX & SEMANTICS 62 (1971).

76. *See* note 73 *supra*.

77. Emphasizing the importance of attorney's fee awards in civil rights litigation, Senator Kennedy stated:

> It is of little moment for the Congress to enact laws expanding the protections afforded citizens in securing jobs, housing, credit or education without insuring that the beneficiaries of our laws have the means of enforcing compliance with them. Legal battles to vindicate basic human rights—congressionally secured rights—can be as costly as any other form of litigation, and the costs frequently outrun the economic benefits ultimately obtained by successful litigants. Inevitably this leads to the inability of the victims of discrimination to obtain legal redress because they cannot shoulder the full costs of vindicating their rights.

122 CONG. REC. S31,472 (daily ed. Sept. 21, 1976). *See* note 2 *supra*.

78. The courts have awarded attorney's fees in civil rights actions "not simply to penalize litigants, but to encourage individuals injured by racial discrimination to seek judicial relief." Lyle v. Teresi, 327 F. Supp. 683, 685 (D. Minn. 1971). The purpose of fee provisions has also been stressed in the Senate: "Where Congress decides to emphasize certain policies, and correspondingly to secure private rights or encourage more vigorous enforcement of federal laws, Congress frequently includes fee-recovery provisions in its enactments." 122 CONG. REC. S31,472 (daily ed. Sept. 21, 1976) (remarks of Senator Kennedy).

79. *See* Brief for Appellee at 26-37, Andrulis v. United States, 609 F.2d 514 (1979). *See also* 609 F.2d at 523-29 (Wright, J., dissenting).

80. *See* note 2 *supra*.

81. *Id.*

Reports, and the congressional debates[82] concerning the Fees Act, make it clear that the purpose of the Act was to prevent financial limitations from stifling adjudication of claims under any and all civil rights laws. Although the *NAACP* court acknowledged the importance of the policy behind the Act, it deferred to congressional authority for a resolution of the issue.[83] The Act itself, however, invites courts to make policy determinations by authorizing awards to be made in the discretion of the court.[84] Therefore, to be consistent with the purpose and the language of the Act, the court should have exercised its discretion and held the federal government liable under its provisions.[85] Nevertheless, the *NAACP* court shunned this opportunity by refusing to consider the social ramifications of federal liability for attorney's fees.

The *NAACP* court's recalcitrance to construe the Fees Act liberally was, however, also based upon policy considerations. Clearly, the court followed a policy of judicial restraint regarding abrogation of federal sovereign immunity for attorney's fees.[86] Although the position of the court is clear, the reasons why the court regarded the statutory grant of sovereign immunity as such a formidable barrier to federal liability remains unclear. The court's failure to explain its recalcitrance leads only to the conclusion that its narrow reading of the Fees Act was arbitrary.

The court did assert, however, that section 2412 presents a stronger immunity defense to federal liability for attorney's fees than does the eleventh amendment in regard to the states.[87] The basis of the court's distinction was that section 2412 explicitly requires a statute to override its provisions whereas the eleventh amendment does not. It is this distinction that allowed the *NAACP* court to reject the *Hutto v. Finney*[88] Court's reading of the Fees Act to include states as irrelevant in respect to federal liability under the Act.[89] Although this distinction is valid, it appears rather doctrinaire because it fails to explain adequately why courts more liberally allow waiver of an eleventh amendment grant of sovereign immunity than a statutory grant.

It is important to note that the *Hutto* decision is one of a trend of cases limiting the restrictive power of the eleventh amendment.[90] No such simi-

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82. *See* notes 25 & 26 *supra* and note 92 *infra*.

83. 609 F.2d at 521.

84. The relevant clause in the Act reads: "[T]he court *in its discretion*, may allow the prevailing party . . . a reasonable attorney's fee. . . ." 42 U.S.C. § 1988 (1976) (emphasis added).

85. 609 F.2d at 531 (Wright, J., dissenting).

86. The kind of legal reasoning used by the court resembles what Karl Llewllyn has termed the "Formal Style." Under this style a court will not inquire into policy, nor will it broadly or liberally construe a statute. Rather, a court will strictly adhere to precedent in its resolution of an issue. W. TWINING, KARL LLEWELLYN AND THE REALISTIC MOVEMENT 211 (1973).

87. 609 F.2d at 519.

88. 437 U.S. 678 (1977). *See* notes 29-31 and accompanying text *supra*.

89. 609 F.2d at 518-19.

90. In *Ex parte Young*, 209 U.S. 123 (1907), the Supreme Court held that a federal court could enjoin a state official. The *Young* doctrine, therefore, allowed federal courts to monitor

lar progression of cases exists regarding judicial limitations upon the federal doctrine of sovereign immunity. Rather, the judiciary has traditionally strictly construed any waiver of immunity by the United States.[91] The *NAACP* decision is part of this tradition of judicial restraint with respect to waivers of federal sovereign immunity. Therefore, the *NAACP* court's deference to the statutory grant of sovereign immunity merely reflects the judicial conservatism of the court. That the court's approach was conservative is not disquieting. That the court did not explain the policy behind its conservatism, however, is disappointing.

IMPACT OF THE *NAACP* DECISION

The *NAACP* decision impairs, rather than furthers, the intended purpose of the Fees Act. A recurring theme during congressional consideration of the Act was the effect which the high cost of litigation has upon enforcement of an individual's federally mandated rights.[92] The proponents of the bill were acutely aware that the typical plaintiff in a civil rights suit is often not in a position to afford the ever increasing costs of litigation.[93] In contrast, the typical defendant, often a private corporation or government agency, is capable of bearing such costs.[94] Unless a plaintiff is given financial help in securing his or her civil rights, those rights exist only in theory.[95] The aftermath of the decision in *Alyeska Pipeline Service Co. v. Wilderness Society*[96] evidences the deterrent effect that denial of attorney's fees has in civil rights cases. After *Alyeska* the number of private suits brought to enforce federal laws declined due to the judicial restriction upon the permissibility of fee awards.[97] The *NAACP* decision will result in a similar pattern of decline

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state conduct by allowing injunctions against state officials. The doctrine was refined in Edelman v. Jordan, 415 U.S. 651 (1974), which established standards to determine the limits of the eleventh amendment. *Edelman* held that the states were liable for prospective damage awards; however, retroactive relief was held barred by the eleventh amendment. *Id.* at 668-72. *Edelman* was extended in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), which held that states were liable for retroactive relief because the eleventh amendment was limited by the enforcement provisions of the fourteenth amendment. *Id.* at 456.

91. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 22, at 82 (3d ed. 1976).

92. *See* note 2 *supra* and note 97 *infra*.

93. *Id.*

94. For a detailed discussion of the necessity of fee awards to mitigate the discrepancy between the financial resources of the typical plaintiff and defendant in civil rights litigation, see Falcon, *supra* note 1, and Cedar, *Defrosting the Alyeska Chill: The Future of Attorney Fee Awards in Environmental Litigation*, 5 ENVT'L AFF. 297-99 (1976). Although Cedar concentrates on environmental litigation, he notes that the typical situation in public interest and civil rights litigation often involves defendants with far greater financial resources than individual plaintiffs.

95. *See* Falcon, *supra* note 1, at 389.

96. 421 U.S. 240 (1974). *See* notes 20-24 and accompanying text *supra*.

97. The decline of private party suits in civil rights litigation is evidenced by the remarks of Senator Scott after *Alyeska*:

> Given the often staggering costs of litigation, this decision [*Alyeska*] has predictably slowed the number of private suits brought to enforce federally mandated rights,

in the number of private suits brought against the federal government under the Fees Act.[98]

Because the *NAACP* holding discourages lawsuits against the federal government by individual plaintiffs, many federal agencies will be immunized from strict accountability to the public.[99] The impact of the District of Columbia Circuit's decision is amplified due to the significant number of federal agencies located within that jurisdiction. In the final analysis, it is ironic that although the federal government authored the Fees Act in the best interests of the public, it is held least responsible under the Act's provisions.

CONCLUSION

The rising costs of litigation compels judicial activism regarding attorney's fee awards. The need for judicial activism is particularly important in civil rights cases because basic human rights associated with the dignity and equality of individuals are at stake. Many federal agencies are responsible for programs that inherently involve civil rights concerns, such as housing, employment, and credit. To ensure that these federal entities are responsible to the public, judicial discipline of such agencies should not be inhibited by a plaintiff's lack of funds. By enacting the Fees Act, Congress granted the judiciary broad discretionary power to authorize fee awards. Because the congressional purpose is so clear, it should be a paramount concern of the courts to include the federal government within the scope of the Act. Clearly, the *NAACP* court, by denying an award of attorney's fees against the federal government, has restricted implementation of this congressional policy and has threatened the private enforcement of fundamental human rights.

Marie Adornetto

> including cases premised upon our civil rights laws. . . .Unless Congress enacts [the Fees Act], one of the groups of potential litigants most severely affected by Alyeska—those persons seeking to assert their rights under Federal civil rights statutes—will frequently be denied access to Federal courts.

122 CONG. REC. S31,471 (daily ed. Sept. 21, 1976).

98. *See* notes 2 & 94 *supra* and note 99 *infra*.

99. The Senate Report stressed that the full enforcement of federal statutes depends on the availability of fee awards which "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." S. REP. NO. 1011, 94th Cong., 2d Sess. 5 (1976).