1985

Attorney Fees—United States is Not Liable for Attorney Fees under the Equal Access to Justice Act by Analogy to Section 1983

David Schoen
ATTORNEY FEES—UNITED STATES IS NOT LIABLE FOR ATTORNEY FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT BY ANALOGY TO SECTION 1983—Premachandra v. Mitts, 753 F.2d 635 (8th Cir. 1985).

The Veterans Administration (VA) terminated Dr. Bhartur Premachandra's employment with the VA as a research scientist. In addition to dismissing him, the VA ordered Dr. Premachandra to dismantle his laboratory. He appealed his termination to the Merit Systems Protection Board (MSPB). He also filed a motion for an injunction in United States District Court for the Eastern District of Missouri. In his motion, Dr. Premachandra sought to enjoin the VA from firing him and from requiring him to close his laboratory before the MSPB could rule on the validity of his discharge. He claimed that the due process clause of the fifth amendment entitled him to a hearing prior to his termination and the dismantling of his laboratory. The district court denied plaintiff's motion for an injunction, and further denied his motion for an injunction pending appeal to the United States Court of Appeals for the Eighth Circuit. Plaintiff then made another motion for an injunction pending appeal, in which he asked to be allowed to keep his laboratory open and to continue his experiments, notwithstanding the termination of his employment. The VA agreed to these terms, and the Eighth Circuit entered an order permitting plaintiff to keep his laboratory open and to continue his experiments without pay, pending oral arguments before the court of appeals. The court of appeals subsequently heard oral arguments on the district court's denial of plaintiff's motion for an injunction. Before the court ruled on the matter, however, the VA agreed to permit plaintiff to continue to maintain his laboratory and conduct research until the MSPB could decide on the merits of his termination.

The MSPB reinstated the plaintiff and the court of appeals accordingly dismissed his appeal as moot. Plaintiff then successfully sought an award of attorney's fees from the district court. The court held that plaintiff had prevailed in the injunction litigation, and was therefore entitled to recover fees under the provisions of the Equal Access to Justice Act and the Civil Rights Attorney's Fees Awards.

2. Id. at 120-21. 28 U.S.C. § 2412(b) (1982) provides:
   Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her
Act.\textsuperscript{3} The VA appealed on two separate grounds. First, it contended, the plaintiff had not "prevailed" in the injunction litigation within the meaning of the attorneys' fees statutes, since the VA's agreement allowing plaintiff to keep his laboratory open had been voluntary. The VA's second ground for appeal was that the district court improperly assessed attorney's fees against the federal government pursuant to the Equal Access to Justice Act (EAJA). The VA argued that the United States could not be liable for attorneys' fees under the EAJA unless some "other party" would be liable for fees under a fee-shifting statute or common law exception.\textsuperscript{4} In this case, the VA argued, no such "other party" existed. Plaintiff's lawsuit involved a claim of violations committed under color of federal, not state law, and thus no "other party" would be liable under sections 1983 and 1988. Therefore, the "same extent" language of the Act did not authorize an award of attorneys' fees against the United States.

A three-judge panel of the Eighth Circuit rejected the VA's arguments and affirmed the district court's award of attorneys' fees. The official capacity. . . . The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award. Section 2412(d)(1)(A) provides:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Since the court of appeals found that Dr. Premachandra was entitled to attorneys' fees under § 2412(b), it did not consider the applicability of § 2412(d).

3. Premachandra, 548 F. Supp. at 120-21. 42 U.S.C. § 1988 (1982) provides in part: "In any action or proceeding to enforce a provision of [42 U.S.C. § 1983], 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." (Section 1988 provides for awards of attorneys' fees in actions commenced under other provisions of the code as well).


Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects . . . 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.

The district court based its award of attorneys' fees on the language in § 2412(b) making the United States liable for fees to the same extent that other parties would be liable under a fee-shifting statute. The court construed subsection (b) as making the provisions of § 1988 applicable to the United States when it acted in a manner which would constitute a violation § 1983 by a person acting under color of state law.

4. See supra note 2.
court held that the plaintiff had prevailed, notwithstanding the VA’s “voluntary” compliance. The court further held that the EAJA permits awards of attorneys’ fees in civil rights actions against the United States to the same extent that a party acting under color of state law would be liable under section 1988.5

The VA requested and was granted a rehearing en banc.6 On rehearing, the Eighth Circuit reversed the panel decision and held that section 2412(b) does not by analogy to section 1988 authorize awards of attorneys’ fees against the United States. Premachandra v. Mitts, 753 F.2d 635 (8th Cir. 1985).

Under the English rule, successful parties may recover attorneys’ fees. At common law, fees were not ordinarily recoverable, although costs of the suit were probably awarded to successful parties in actions for damages.7 Costs were first expressly provided for by the Statute of Gloucester in 1275,8 which allowed successful plaintiffs to recover their costs in certain actions for the possession of real property. The term “costs” was liberally construed to include attorneys’ fees.9

In 1531, successful defendants were first allowed costs in certain actions such as trespass, contract, covenant, debt, detinue and account.10 In 1607, awards of costs to defendants were extended to include all actions in which plaintiffs could recover costs. Various other statutes subsequently extended costs to prevailing parties.11 In 1875, the Supreme Court of Judicature Acts made the award of costs discretionary.12

Conversely, the American rule generally denies awards of attorneys’ fees, although statutory and common law exceptions to the rule do exist. The United States Supreme Court in 1796 first expressed the American rule in Arcambel v. Wiseman.13 The federal courts have consistently followed the rule since then,14 except for the short-lived appli-

6. Id. at 717.
8. 6 Edw. I. ch. 1 (1275).
9. Goodhart, supra note 7 at 852.
10. 23 Hen. VII. ch. 15 (1531), cited in Goodhart, supra note 7 at 853 & n.23.
12. 36 & 37 Vict. ch. 66 (1873); 38 & 39 Vict. ch. 77 (1875), cited in Goodhart, supra note 7 at 853 & n.27.
13. 3 U.S. (3 Dall.) 306 (1796).
cation of the "private attorney general" doctrine, discussed below.16

The courts have advanced three arguments in favor of the American rule. One argument is that society should not penalize litigants for asserting claims or defenses in court, since the outcome of litigation cannot be known in advance with any certainty.18 Another argument is that the possibility of having to pay opposing counsels’ fees would discourage the poor from asserting their legal rights through litigation.17 Finally, proponents of the American rule assert that the additional litigation occasioned by disputes over attorneys' fees would place unacceptable administrative burdens on the judicial system.18

Historically, federal statutes created limited exceptions to the American rule in federal courts. Today, however, federal law permits only nominal fee awards in the absence of statutory or common law exceptions.19 At the inception of the federal court system, a statute made fee awards in federal court subject to the prevailing practice in the state where the court was located.20 In 1853, Congress provided a standardized fee schedule for counsel fees in federal courts.21 Substantially the same provisions found in the 1853 Act were continued in the Revised Statutes of 1874,22 the Judicial Code of 1911,23 and the Revised Code of 1948.24 The Revised Code of 1948 is the current law and provides for nominal attorneys' fees, the highest amount being $100.00 in admiralty appeals involving more than $5,000.00.25 Thus, with the exception of the nominal fees permitted under section 1923(a), the Supreme Court has followed the American rule in disallowing attorneys' fees against the United States.26 In 1948, Congress enacted the rule into statute.27

15. See infra notes 32-34, 47-50 and accompanying text.
16. Fleischmann, 386 U.S. at 718.
17. Id.
18. Id.
19. Alyeska, 421 U.S. at 257; Fleischmann, 386 U.S. at 717.
20. For a detailed history of early federal statutes on the subject of attorneys' fees, see Alyeska, 421 U.S. at 248-56, nn.19-29.
27. 28 U.S.C. § 2412 (1978), amended by 28 U.S.C. § 2412 (1982). The current section 2412 contains the EAJA. Prior to the passage of EAJA, section 2412 provided in pertinent part that “a judgment for costs . . . 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. . . . ”
In addition to the statutory exception found in section 1923(a), the federal judiciary has recognized common law exceptions to the American rule. These are the "common fund" or "common benefit" exception, and the "bad faith" exception. The United States Supreme Court in 1882 recognized the "common benefit" exception as part of the courts' historical equity powers. The exception permits a court to award attorneys' fees to one whose lawsuit benefits others as well as himself. In such cases, the successful party may recover fees out of a fund his suit has preserved or from the parties whom the litigation has benefitted. A court may also assess fees against a losing party who has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." In addition, a court may require a party to pay attorneys' fees for "willful disobedience of a court order . . . as part of the fine to be levied on the defendant."

Congress has supplemented the common law exceptions by enacting various statutes that include fee-shifting provisions designed to encourage enforcement of the law through suits by private parties. Congress has often used this "private attorney general" approach to assist in implementing legislation on matters of important public policy. An example is the Civil Rights Attorneys Fees Awards Act of 1976, which provides for attorneys' fees to prevailing parties other than the United States in actions to enforce various provisions of the federal civil rights laws.

---

28. Trustees of the Internal Improvement Fund of Florida v. Greenough, 105 U.S. 527 (1881) (bondholder whose suit benefitted other bondholders by preventing trustee from wasting or misapplying funds in trust securing bonds entitled to counsel fees payable from trust fund).

29. See, e.g., Hall v. Cole, 412 U.S. 1 (1973) (suit by members against union to vindicate free speech rights guaranteed by federal labor statute benefitted both union and members, entitling plaintiffs to attorneys' fees); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (shareholders who established violation of securities laws by corporation benefitted both corporation and other shareholders held entitled to fees); Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) (trust beneficiary who established right to lien on funds in receivership established by stare decisis same right for others in her position).

30. For Arkansas cases recognizing the "common fund doctrine," see Crittenden County v. Wiliford, 283 Ark. 289, 675 S.W.2d 631 (1984) (taxpayer awarded fees in successful suit against county to recover misappropriated funds); Powell v. Henry, 267 Ark. 484, 592 S.W.2d 107 (1970) (fees awarded in class action by electrical ratepayers for refunds of improper charges); Marlin v. Marsh & Marsh, 189 Ark. 1157, 76 S.W.2d 965 (1934) (fees awarded stockholders of savings and loan association whose suit benefitted other stockholders).


34. Id. For a discussion of § 1988, see Note, The Civil Rights Attorneys' Fees Award Act of
The courts do not require a party to actually win a suit on its merits in order to qualify as a "prevailing party" under section 1988 and other fee-shifting statutes. For example, a party may recover fees after obtaining a favorable settlement. Or, a defendant may recover after the plaintiff has voluntarily dismissed an unmeritorious action. A plaintiff may be entitled to fees even though he does not prevail on every issue. A fee may be awarded when an interlocutory appeal was "sufficiently significant and discrete to be treated as a separate unit." A final judgment is not necessarily a prerequisite to an award of fees.

The First Circuit expressed the foregoing principles in the form of a two-part test in Nadeau v. Helgemoe. The plaintiffs in Nadeau were prisoners who sued officials of the New Hampshire State Prison under section 1983, seeking greater access to library facilities and an improvement in prison conditions. Plaintiffs successfully litigated the library issue and entered into a consent judgment with the defendants that resulted in improved prison conditions. The First Circuit held that the plaintiffs were entitled to attorneys' fees if the district court found on remand that plaintiffs had satisfied both prongs of the test. Under the first prong of the test, the court must factually determine whether the litigation was a catalyst in bringing about the relief sought by the plaintiff. The second prong required a legal determination of whether

35. The standards for awarding attorneys' fees are generally the same "in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" Hensley v. Eckerhart, 461 U.S. 424, 433 n. 7 (1983); Hanrahan v. Hampton, 446 U.S. 754, 758 n.4 (1980) (per curiam).
36. Maher v. Gagne, 448 U.S. 122 (1980) (action to enforce rights under AFDC program concluded through settlement); United Handicapped Federation v. Andre, 622 F.2d 342 (8th Cir. 1980) (suit by handicapped plaintiffs alleging inadequate transportation facilities dismissed pursuant to settlement); Williams v. Miller, 620 F.2d 199 (8th Cir. 1980) (action alleging sex discrimination dismissed by plaintiff after rendered moot by defendant's voluntary compliance).
37. Corcoran v. Columbia Broadcasting System, Inc., 121 F.2d 575 (9th Cir. 1941) (complaint dismissed by plaintiff after court order granting motion by defendant for a more particular statement).
38. Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970) (plaintiff in class action who failed to establish personal right to damages or injunction entitled to recover fees for establishing that employer discriminated against blacks generally). But see Hensley, 461 U.S. 424, 440 (hours spent by attorney on unsuccessful claims unrelated to successful claims excluded from computation of fee award).
41. 581 F.2d 275 (1st Cir. 1978).
42. Id.
43. Id. at 279. Accord Hensley, 461 U.S. 424.
the suit was so “frivolous, unreasonable, or groundless” as to render the
defendant’s compliance gratuitous, that is, not required by law.\textsuperscript{44} If so,
then the plaintiff is not a “prevailing party,” and cannot recover attor-
neys’ fees.\textsuperscript{46} The Eighth Circuit adopted the \textit{Nadeau} test in \textit{United
Handicapped Federation v. Andre}.\textsuperscript{58}

Perhaps taking a cue from congressional attempts to implement
important public policies by means of fee-shifting statues, the federal
courts began to apply the “private attorney general” doctrine even in the
absence of specific fee-shifting statutes or common law excep-
tions.\textsuperscript{47} The Supreme Court struck down that practice, however, in \textit{Aly-
eska Pipeline Service Co. v. Wilderness Society}.\textsuperscript{48} The Court held that
28 U.S.C. section 2412\textsuperscript{49} expressly barred fee awards against the
United States absent some specific statutory authorization.\textsuperscript{50}

Another bar to the recovery of fees against the United States is
the doctrine of sovereign immunity.\textsuperscript{51} Sovereign immunity precludes
suits against the United States unless Congress waives the immunity.\textsuperscript{52}
The courts strictly construe asserted acts of waiver.\textsuperscript{53}

As a partial response to the holding in \textit{Alyeska} barring fee awards
against the United States,\textsuperscript{44} Congress passed the Equal Access to Just-
ice Act.\textsuperscript{66} The purpose of the EAJA is to put the United States on an

\begin{itemize}
\item \textsuperscript{44} \textit{Nadeau}, 581 F.2d at 281 (quoting Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 422 (1978)).
\item \textsuperscript{45} \textit{Id}
\item \textsuperscript{46} 622 F.2d 342 (8th Cir. 1980); see supra note 36.
\item \textsuperscript{47} \textit{See, e.g.}, Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974); Cornist v. Richland Parish School Bd., 495 F.2d 189 (5th Cir. 1974).
\item \textsuperscript{48} 421 U.S. 240, 263. (1975).
\item \textsuperscript{49} See supra note 27 and accompanying text.
\item \textsuperscript{50} \textit{Alyeska}, 421 U.S. at 265-68.
\item \textsuperscript{51} Spencer v. NLRB, 712 F.2d 539, 544 (D.C. Cir. 1983). For a discussion of the doctrine
of sovereign immunity generally, see Note, \textit{Federal Tort Claims Act—Feres Doctrine Bars Post-
\item \textsuperscript{52} \textit{Note, supra note} 51, at 449.
\item \textsuperscript{53} \textit{Id}
\item \textsuperscript{54} \textit{H.R. REP. NO. 1418, 96th Cong., 2d Sess. 6, reprinted in 1980 U.S. CODE CONG. & AD. News at} '4985.
\item \textsuperscript{55} 28 U.S.C. § 2412 (1982). See supra note 2. For more thorough discussion of the Act’s provisions,
equal footing with other litigants and to ensure that individuals and small businesses are not deterred from "seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights." \(^{57}\)

However, the Act does not make clear under what circumstances a successful litigant may recover attorney's fees against the United States under section 2412(b). That section makes the United States liable for attorneys' fees "to the same extent as any other party" under the common law or a fee-shifting statute. However, the words "to the same extent as any other party" are ambiguous. This language could mean that the United States should be liable for attorneys' fees whenever another party, engaging in similar conduct under color of state law, would be liable for fees under section 1988. Opponents of this argument point out that sections 1983 and 1988 cannot be directly applied to any "other party" in actions for violations of a plaintiff's rights committed under color of federal law. \(^{58}\) Section 1983 by its terms applies only to violations committed under color of state law. Inasmuch as no "other party" (such as a state official) would actually be liable when only federal action has occurred, section 2412(b) can be read to mean that the United States should not be liable either.

At the time that Premachandra came before the Eighth Circuit, the federal district courts were divided on this question. In United States v. Miscellaneous Pornographic Magazines, \(^{59}\) the District Court for the Northern District of Illinois held that section 2412(b) did not authorize an award of attorneys' fees against the United States in an action for violation of first amendment rights. Since the action was based directly on the Constitution, and not on section 1983, the plaintiff was not permitted to invoke the provisions of 42 U.S.C. section 1988. While the suit was analogous to a section 1983 action, the complaint did not allege any deprivation of rights under color of state law. Therefore, had the defendants been anyone other than federal officials, no other party would be liable. Thus the United States was held not liable "to the same extent." \(^{60}\) The court rejected the plaintiff's argu-

---


57. Id. at 5, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 4984; see also Berman v. Schweiker, 713 F.2d 1290, 1295-96 (7th Cir. 1983).

58. See Premachandra v. Mitts, 753 F.2d at 637.

59. 541 F. Supp. 122 (N.D. Ill. 1982).

60. Id. at 128.
ment that the purpose of the EAJA, to place the government on an "equal footing" with private litigants, would be effected by an award of fees based upon an analogy to section 1988. The court reasoned that the plaintiff’s reading of section 2412(b) would not put the United States on an equal footing with other parties. Private parties would not be liable to a plaintiff for attorneys' fees for committing "garden variety" torts which, if committed by the federal government, would be constitutional violations. Therefore, according to Judge Shadur, the plaintiff's interpretation of section 2412(b) would render the government "less equal" than private parties.62

Judge Shadur next considered the testimony of Armand Derfner of the Lawyers Committee For Civil Rights Under Law before the House subcommittee drafting the EAJA. Originally, the bill read, "[t]he United States shall be liable [for fees] to the same extent that a private party would be liable. . . .63

Mr. Derfner testified:

These bills say that the United States should pay fees . . . in those circumstances where the court may award such fees in suits involving private parties.

That doesn’t say state or local government, but if the language were amended to read, "in those circumstances where the court may award such fees in suits involving other litigants" it would achieve that purpose. And I think it would go even further toward putting the United States on a par with other governmental bodies.64

Without explanation, the bill's authors subsequently substituted the words "any other party" in place of "a private party."65

Judge Shadur recognized that this change could indicate a desire to impose liability for attorneys' fees upon the United States by incorporating the provisions of section 1983 into the EAJA. Nonetheless, he wrote, "[a]rguable congressional intent must give way to unambiguous congressional language."66 Significant problems would arise from a contrary result, he thought:

---

61. Id. at n.5.
62. Id. at 127-28.
63. Id. at 128 (quoting Hearings on S. 265 Before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, 96th Cong., 2d Sess. 3, 9 (1980) [Hereinafter cited as Hearings].
64. Miscellaneous Pornographic Magazines, 541 F. Supp at 128-29 (quoting Hearings, supra note 63, at 100).
65. Id. at 129.
66. Id.
Where the challenged action is one exclusively committed to the federal government under "Our Federalism" . . . multiple fictions are involved: We must posit state action of the same nature, then hypothesize the imposition of fees against the state under a Section 1983 lawsuit attacking that action, then saddle the United States with an equivalent liability though it could not be sued under Section 1983.67

Two other federal district courts followed Miscellaneous Pornographic Magazines in denying attorneys' fees to prevailing plaintiffs under similar circumstances.68 However, in Lauritzen v. Secretary of the Navy,69 federal district Judge Tashima took the opposite view. The change in the wording of the Act following Mr. Derfner's testimony70 convinced Judge Tashima that Congress intended to make the United States liable for attorneys' fees in civil rights suits under the terms of section 1988.71 The judge asserted also that his interpretation harmonized with the EAJA's underlying policy of encouraging individuals and small businesses to challenge unreasonable conduct by the government.72

The district court in Premachandra73 joined Lauritzen in allowing attorneys' fees, and by the time Premachandra reached the Eighth Circuit, only one other federal circuit had ruled on the question posed by the troublesome language of section 2412(b).74

After first determining that the plaintiff was a prevailing party within the meaning of the EAJA,75 the court of appeals turned its at-
tention to the issue of whether section 2412(b) would permit Premachandra to recover his attorneys’ fees. The court accepted the plaintiff’s contention that such an award was consistent with the purpose of the EAJA.\cite{76} The court also compared the Act’s provision of fee awards on the basis of other fee-shifting statutes to the provision for fees based on the common law exceptions. No one had suggested, wrote Judge Floyd R. Gibson, that the provision in the Act subjecting the government to liability under the common law “bad faith” exception, for instance, would only be effective when some “other party” to the litigation had acted in bad faith as well.\cite{77} The United States would be liable for fees if it acted in bad faith, “regardless of whether . . . similar conduct was committed in the same suit” by other parties.\cite{78} The court found it logical, then, that the provision relating to fee-shifting statutes should be interpreted in the same way: the federal government should be liable for fees whenever it engages in conduct which would subject state officials to fee awards under section 1988.\cite{79} While conceding that the statute is ambiguously written, the court said that “Congress’ lack of precision in drafting legislation should never be an instrument for defeating or frustrating the manifest purpose and intent of Congress, as revealed by the legislative history.”\cite{80} Armend Derfner’s testimony before the House subcommittee and the subsequent change in the wording of the Act indicated to the court that Congress intended to apply the provisions of sections 1983 and 1988 to the federal government.\cite{81}

The court next addressed the VA’s argument that such a reading of section 2412(b) would “swallow up” the more lenient provisions of section 2412(d), which permits the government to escape liability if the court finds that its position was “substantially justified.”\cite{82} Judge Gibson reasoned that his construction of section 2412(b) would not swallow up section 2412(d), since the latter was designed to include many causes of action not analogous to section 1983.\cite{83} Furthermore, he explained, the Eighth Circuit has construed section 1983 as providing a

\textsuperscript{76} Premachandra, 727 F.2d at 724-25. See supra notes 55-57 and accompanying text; see infra notes 134-37 and accompanying text.

\textsuperscript{77} Id. at 726.

\textsuperscript{78} Id.

\textsuperscript{79} Id. at 726-27.

\textsuperscript{80} Id. at 727.

\textsuperscript{81} Id. at 728-29.


\textsuperscript{83} Premachandra, 727 F.2d at 730.
cause of action for only those violations of rights "akin to fundamental rights protected by the fourteenth amendment." Thus, many causes of action would remain in which section 1983 could not be applied analogously, and opportunities for the United States to raise the "substantial justification" defense would still remain.

While recognizing the EAJA as a waiver of sovereign immunity, and therefore subject to strict construction, the court decided that the legislative history and purpose of the Act indicated Congress "waived the government's sovereign immunity for cases like this one."

The next development in the debate over the correct interpretation of section 2412(b) came with the Ninth Circuit's decision in *Lauritzen v. Lehman*. The Ninth Circuit reversed the district court's award of fees, and rejected the reasoning of the panel in *Premachandra*. Judge Sneed, writing for the majority, discounted Derfner's testimony, noting his reluctance to "pick up bits and scraps of legislative history to aid interpretation. . . ."

The *Lauritzen* opinion also raised the "swallow up" argument, which the panel in *Premachandra* had rejected: "[n]early every case alleging a constitutional or statutory violation by the federal government could be characterized as analogous to an imaginary section 1983 action." Thus, the federal government would never be able to successfully assert that its position was substantially justified, as section 2412(d) permits, since the prevailing plaintiff could always request fees under 2412(b).

In his partial dissent to the majority opinion of the court of appeals in *Lauritzen*, Judge Boochever argued that the change in the act following Derfner's testimony could only signify an intent to incorporate sections 1983 and 1988:

Of all the statutes mentioned in section 1988 . . . only section 1983 differentiates between states and "private parties," because only sec-


85. *Premachandra*, 727 F.2d at 731; Monark Boat Co. v. NLRB, 708 F.2d 1322 (8th Cir. 1983). *See also supra* notes 51-53 and accompanying text.

86. *Premachandra*, 727 F.2d at 729.

87. 736 F.2d 550 (9th Cir. 1984).

88. *Lauritzen*, 736 F.2d at 555.

89. Id. at 557.
tion 1983 requires parties to act under color of state law before liability may attach.

In order to avoid the logical conclusion that [the EAJA] was amended to impose fees in these actions, however, the majority construes the amendment in an unrealistic manner. The majority concludes the amendment merely removes sovereign immunity as a bar to fees awards "where the government is found liable under a substantive provision that would authorize a fee award against a state." . . . The majority, however, cites no "substantive provision" other than section 1983 that distinguishes between states and individuals. The original version of [the EAJA], therefore, removed the sovereignty bar to fee awards in all cases except those arising under section 1983, because "private parties" could be liable under all of the other statutes named in section 1988.90

Judge Boochever criticized the majority's view that the amendment to the Act only permitted fee awards against the federal government in those cases in which federal officials had acted under color of state law, as opposed to federal law. Such instances are rare, he noted, since "[f]ederal officials usually act under color of federal law and seldom act to deprive a party of constitutional rights under color of state law."91

The dissent also disagreed with the majority's assertion that subsection (b) would negative the "substantial justification" defense in subsection (d). Although the courts are limited in their discretion to deny attorneys' fees to successful 1983 plaintiffs, they need not always award fees pursuant to section 1988.92 Thus, the courts would have as much discretion to deny fees for marginal claims under section 2412(b) as they do under section 1988. To that extent, 2412(b) would not swallow up 2412(d).93

Shortly after Lauritzen, Premachandra came up before the Eighth Circuit for an en banc rehearing. The Eighth Circuit reversed the panel's holding that section 2412(b) permitted awards of attorneys' fees against the federal government by analogy to section 1983.94

By the time the court rendered its decision on rehearing, it was able to state that the VA's position was the majority view.95 The court

90. Id. at 562 (Boochever, J., concurring in part and dissenting in part).
91. Id.
92. Id. at 564.
93. Id.
94. Premachandra v. Mitts, 753 F.2d 635 (8th Cir. 1985).
95. Id. at 637 (citing Holbrook v. Pitt, 748 F.2d 1168 (7th Cir. 1984); Lauritzen, 736 F.2d
reasoned that since Premachandra had not alleged that the VA had acted under color of state law, no section 1988 liability existed. Thus, no statute would specifically provide for attorneys' fees, making section 2412(b) inapplicable.96

As an aid to interpreting subsection (b), the court looked to "the context in which section 2412(b) appears."97 The court reasoned that Premachandra's reading of subsection (b) would negate the "substantially justified" and "special circumstances" exception to federal liability provided in subsection (d).98

The court recognized that the limitations it had placed on section 1983 actions in prior cases would bar most plaintiffs who sue the federal government from asserting a right to attorneys' fees by analogy to section 1988.99 Nonetheless, the court focused on the state of the law at the time section 1988 was enacted in 1980: "section 1983 meant what it says: causes of action could be based on violations of federal law by officials acting under color of state law."100 In support of this interpretation, the court relied on the Supreme Court's decision in Maine v. Thiboutot,101 which held that the application of section 1983 was not limited to violations of civil rights or equal protection laws. The en banc majority in Premachandra cited Justice Powell's dissent, in which he asserted that the decision in Maine would provide a cause of action under section 1983 for a violation of "any federal statutory right."102 If that were so, reasoned the court in Premachandra, "parties could readily bypass the 'substantially justified' requirement and evade the other substantive limits in subsection (d) under Premachandra's theory."103

The court rejected Judge Boochever's dissenting argument in Lauritzen that the discretionary nature of subsection (b) would prevent it from swallowing up the substantial justification defense in subsection (d).104 Even though subsection (b) grants a court discretion in awarding fees,

---

96. Premachandra, 753 F.2d at 637.
97. Id. at 638.
98. Id.
100. Premachandra, 753 F.2d at 638.
102. Id. at 11 (Powell, J., dissenting).
103. Premachandra, 753 F.2d at 639.
104. See supra notes 92-93 and accompanying text.
the court must award fees under section 1988 unless special circumstances would make an award of fees unjust, under the Supreme Court’s holding in *Newman v. Piggie Park Enterprises, Inc.* That standard, noted the court, is much easier for a plaintiff to satisfy than to show a lack of substantial justification for the government’s position.

The court next addressed Premachandra’s argument that the legislative history of section 2412(b) evidenced a congressional intent to apply the terms of section 1988 against the United States. Although the court found that the language of the Act and the relationship between subsections (b) and (d) provided sufficient bases for its opinion, it nonetheless explored the legislative history in order “to meet the panel’s findings and the contention that the result we reach is inconsistent with congressional intent.”

The majority found Derfner’s testimony and the subsequent change in the Act undeterminative. First, no statement linked the amendment to Derfner’s testimony. The legislative history indicated the Conference Committee’s belief that “at a minimum, the United States should be held to the same standards in litigating as private parties.” This reference to private parties led the court to conclude that an inference of an intent to place the United States government in a position of parity with state governments was unwarranted.

Furthermore, the court noted a disparity between Derfner’s suggested amendment and the language of the bill as passed. The original bill provided for fees “in those circumstances in which the court may award fees in such suits involving private parties.” The bill in its final form eliminated the word “circumstances.” The majority took this omission as another indication that the United States should not be liable for fees whenever the circumstances could support an analogy to section 1988.

The majority concluded its opinion by invoking the doctrine of strict construction of waivers of sovereign immunity. Congress could have easily clarified any intention to make the United States liable for fees in cases involving deprivations of federal rights. Its failure to spe-

105. 390 U.S. 400 (1968).
106. *Premachandra*, 753 F.2d at 639 n.3.
107. *Id.* at 639-40.
110. *Id.* (quoting *Hearings, supra* note 60, at 230-31).
111. *Premachandra*, 753 F.2d at 640-41.
specifically do cast enough doubt on the meaning of the Act to require strict construction, said the court, and strict construction required a resolution of those doubts in the government’s favor.112

Premachandra did not come away from the court’s en banc decision totally empty-handed, however. He had raised the argument that the government acted in bad faith, thus entitling him to attorneys’ fees under EAJA’s provision for common law exceptions.113 The court agreed that the district court should have an opportunity to decide that issue, and remanded the case for a determination of the VA’s liability for fees under the common law.114

Judge Floyd R. Gibson, author of the panel opinion, was joined by Judge Heaney in a dissent. Judge Gibson based his dissent on the reasoning in his panel opinion, but wrote to express his perception of the weaknesses of the majority opinion.115

Judge Gibson criticized the majority’s argument that Premachandra’s reading of section 2412(b) would negate the “substantially justified” and “special circumstances” defenses to fee liability in section 2412(d). He argued that the majority’s interpretation effectively read out of the EAJA the “same extent” language in subsection (b), by allowing the federal government to escape fee liability for unconstitutional acts which would render state officials liable for fees.116 While recognizing that a waiver of sovereign immunity should be strictly construed, Judge Gibson argued that the EAJA was a remedial statute, and should therefore not be so strictly construed as to unduly restrict recovery.117

The dissent also took issue with the majority’s contention that congressional silence in response to Derfner’s testimony was an indication of support for the majority’s position. The amendment was a “significant response to Derfner’s suggestion.”118 Judge Gibson noted that if the final version of the Act did embody Derfner’s proposal, “then one would not [expect] the amendment to be surrounded by a great deal of discussion.”119

Finally, the dissent noted the overall purpose of the EAJA of removing the economic barriers to litigation over governmental violations

112. Id. at 641.
114. Premachandra, 753 F.2d at 642.
115. Id. (Gibson, J., dissenting).
116. Id. at 643.
117. Id.
118. Id.
119. Id.
ATTORNEY FEES

of citizens' rights. The majority, wrote Judge Gibson, simply disregarded that intent. Federal officials are consequently left "as free . . . to violate the constitutional rights of citizens as they were before the EAJA was enacted. What then, could have been the purpose of enacting this waiver of sovereign immunity?"120

The panel decision in Premachandra, reversed by the full court, was a common sense approach to resolving the ambiguity embodied in section 2412(b). The panel appropriately focused its inquiry upon the conduct of governmental actors rather than upon their identities. The en banc decision permits a plaintiff who prevails in a section 1983-type action against the United States to obtain attorneys' fees only in certain limited instances. A plaintiff could recover fees in a case in which federal officials have acted under color of state law so as to bring themselves directly within the ambit of section 1983.121 Or, a plaintiff could recover fees against the United States when a federal official has acted in concert with state officials in violating rights enforceable under section 1983.122 Only in those situations, under the court's ruling, would EAJA make the United States liable for fees "to the same extent" that any other party (i.e., one acting under color of state law) would be liable under sections 1983 and 1988.

The court's reliance on the "swallow up" argument does not square with the limitations placed on section 1983 actions. Even in the Ninth Circuit where Lauritzen was decided, not every violation of a federal statute gives rise to a cause of action under section 1983.123 As the majority in Lauritzen noted, "we have recently held that a section 1983 action for statutory violations exists only if Congress intended the statute to create rights for the special benefit of the class to which plaintiffs belong."124 As noted above, the Eighth Circuit has limited recovery under section 1983 to violations of statutory rights akin to fundamental rights protected by the fourteenth amendment.125 When a plaintiff is unable to prevail on a section 1983 claim because of such

120. Id. at 644.
121. For a recent case in which the United States was found liable for fees under §§ 2412(b) and 1988, see Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd., 735 F.2d 895 (5th Cir. 1984). The government's liability was predicated on its violation of plaintiffs' rights under color of state, as opposed to federal law. The court declined to reach the question of whether the United States is liable under § 2412(b) when it violates a plaintiff's rights under color of federal law only.
122. See Premachandra, 727 F.2d at 729 & n.15 (panel opinion).
123. Lauritzen, 736 F.2d at 564 (Boochever, J., concurring in part and dissenting in part).
124. Lauritzen, 736 F.2d at 557 n.8.
limitations, but nonetheless prevails on another theory, the government will not be foreclosed from asserting the substantial justification defense provided by 2412(d). In summary, while section 2412(b) does have a dampening effect on the "substantial justification" defense, it does not entirely swallow up the defense.

Another aspect of Premachandra that is open to question is the court's use of the doctrine of strict construction of waivers of sovereign immunity. One noted authority on statutory construction points out that the doctrine "should be liberally relaxed where the demands of a contrary policy include the government within the purpose and intent of a statute. . . . [A] contrary policy is indicated where the inclusion of a particular activity within the meaning of the statute would not vitally interfere with the processes of government."126 The courts have limited the scope of section 1983 in a manner that would limit its usefulness to plaintiffs claiming fees under 2412(b). In the Eighth Circuit, for instance, section 1983 could only be used to support a fee claim under EAJA in cases involving serious encroachments upon Constitutional or fundamental rights.127 Thus, it cannot be said that awards of attorneys' fees in those few successful section 1983-type claims would vitally interfere with governmental functions. In fact, the functioning of the government could only be improved by such an incentive to avoid conduct which violates its citizens' most basic and valued rights.

The court's application of the strict construction doctrine to 2412(b) led it to a result that is arguably anomalous.128 As the majority noted, its decision precluded fees against the United States under section 1988 only for acts falling within the ambit of section 1983. Federal actors may still be liable for violations of the other statutes listed in section 1988, which do not require state action.129 Thus, the United States could be liable for fees if, for example, it prevents a plaintiff from entering into contracts,130 or exercising property rights.131 It is perhaps anomalous to suggest that Congress intended to expose the government to fee liability for those violations, but not for infringe-

127. See supra note 125 and accompanying text.
128. See Giordano v. City Comm'n of Newark, 2 N.J. 585, 67 A.2d 454 (1949) (rule that abrogation of sovereign immunity should be strictly construed not applied where literal interpretation would lead to absurd or anomalous results); Vedutis v. Tesi, 135 N.J. Super. 337, 343 A.2d 171 (1975) (same).
129. Premachandra, 753 F.2d at 641 n.7.
ments of constitutional or other statutory rights encompassed in section 1983. Nothing in the legislative history indicates that Congress intended to make that distinction. On the contrary, the language of the act, with its broad reference to any other party, would seem to indicate that parity with state officials was contemplated. The Premachandra holding hampers the intent of Congress to put the United States on an "equal footing" with other litigants by removing the financial disincentive to contesting unreasonable government conduct. One of the purposes of the American rule is to ensure that parties will not be discouraged from litigating their rights in court. Congress has recognized, however, that the American rule often defeats its underlying purposes, especially where the government is a party to the litigation. The government has greater litigating expertise and resources at its disposal than do most citizens and small businesses. If the cost of challenging the government's action is too high, "a party has no realistic choice and no effective remedy." Congress found this state of affairs aggravated by the expanding influence of government regulations in modern American life. When compliance with the government's position is brought about because the affected citizens are unable to afford a court challenge, then precedent may be set by coercion rather than by a carefully considered judicial opinion informed by opposing viewpoints. Congress enacted the EAJA to overcome these ills. One has difficulty imagining how that purpose could be fully effected by the holding in Premachandra. The majority's decision severely restricts successful plaintiffs' ability to recover attorneys' fees against the federal government for violations of their constitutional rights. That restriction discourages the private challenges to unreasonable government conduct that Congress intended to encourage.

The pervasiveness of federal statutes and regulations enhances the danger that governmental abuse of constitutional and federal statutory rights is highest when federal officials act under color of federal law. Congress intended the EAJA to help citizens combat unreasonable government conduct. No conduct by the government could be more unreasonable.

132. See Curry v. Block, Civ. A. No. 281-037 (S.D. Ga., May 6, 1985) (available on WESTLAW, DCT Database) (State officials are possible "other parties" to actions for violations of federal statutory rights; United States liable to same extent).
133. See supra notes 16 & 17 and accompanying text.
135. Id.
136. Id. at 9-10, 1980 U.S. CODE CONG. & AD. NEWS at 4988.
137. Id. at 10, 1980 U.S. CODE CONG. & AD. NEWS at 4988.
sonable in a democratic society than the violation of its citizens' constitutional rights. The en banc decision in *Premachandra* construes section 2412(b) so as to prohibit awards of fees to parties who vindicate their constitutional rights in actions against the United States. As a result, the congressional intent to encourage such challenges has been thwarted.

*David Schoen*