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S. 265

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON

IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 265

APRIL 19, 20, AND 21, 1979

Serial No. 96-23

Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1979

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# EQUAL ACCESS TO JUSTICE ACT OF 1979, S. 265

THURSDAY, APRIL 19, 1979

U.S. SENATE,  
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:55 a.m., in the Tucson City Council chambers, Tucson City Hall, Tucson, Ariz., Senator Dennis DeConcini (chairman of the subcommittee) presiding.

Also present: Romano Romani, staff director, Subcommittee on Improvements in Judicial Machinery, and Pamela Eldred, counsel.

Senator DeConcini. The Subcommittee on Improvements in Judicial Machinery will come to order.

## OPENING STATEMENT OF SENATOR DeCONCINI

I want to thank the city of Tucson, the other fine people who helped us set this up, the clerk and the secretary for the city council, the mayor and the city council, and I also want to thank Senator Kennedy for authorizing these hearings to be held in Arizona and New Mexico by the Judiciary Committee and by the subcommittee, and the ranking members of those committees, both the Republicans and the Democrats, for their support of these hearings. It is a real pleasure to be back in Tucson today to hold hearings on S. 265, a bill that is pending before the Subcommittee on Improvements in Judicial Machinery, which I chair.

Senate bill 265, which is titled the Equal Access to Justice Act; represents a vital weapon in our struggle to tame Government regulations, and I hope it will mark a new era in the development of a responsive and responsible bureaucracy.

Under this bill, if the citizen prevails in a civil action or agency proceedings brought by or against the U.S. Government, he or she will be able to recover attorneys' fees from the Government unless the Government can show that its actions were substantially justified.

The fee award will come directly from the operating budget of the offending agency.

The purpose of the bill is twofold. First, it is intended to provide citizens with effective legal and administrative remedies where none now exist. It is clear that in many situations under the present law, citizens do not have viable remedies. It simply costs too much to resort to agencies or court proceedings to vindicate our rights. Under these circumstances the only realistic alternative left to the citizen is to capitulate to the Government, even when you believe the Government is wrong, unreasonable, or irresponsible. The bill is intended to overcome those financial obstacles and thus to provide citizens and small businesses with an opportunity to stand up for their rights.

It would, I hope, at least make it a fair fight for all concerned by increasing citizens access.

In this way, the bill will achieve its second purpose—to make the bureaucracy more accountable to the exercise of its regulatory powers and more responsive to its citizens' needs.

As I mentioned, the fee award will be taken from the budget of the agency involved.

The bill thus recognizes that the most persuasive way to make an agency assume a more responsible posture is to affect its pocketbook. Agencies which are paying awards under this bill will have good cause to evaluate their rules, their procedures, and their staff. Even more importantly, the awards will provide an objective gage of whether or not an agency is engaging in excessive, unreasonable regulations and will also allow Congress to carefully scrutinize that agency's budget request each year.

We are not seeking to dismantle the governmental authorities to regulate, nor are we seeking to provide an opportunity for General Motors or Exxon to challenge the Government on every regulation. What we are seeking is more responsibility on the part of the Government in enforcing its rules, and a fair shake for the corner grocery store and the husband-and-wife shoe repair shop. I hope these hearings in Arizona will help the Congress to pass an effective piece of legislation.

Again, I want to welcome you, the witnesses and the public, and particularly want to thank the many people who have taken time to put these hearings together including Pam Eldred and Romano Romani of my staff in Washington, and the staff here, Judy Berman in my office. I would like to ask that a copy of S. 265 be inserted in the record, and it will so be ordered.

[A copy of S. 265 can be found in the appendix.]

Our first witnesses today: this morning we will have a group of witnesses and then a panel. This afternoon we will have a public hearing starting at 2:30 where anyone will be available to come and give their opinion on such legislation and where it should be modified or changed, or anything else that's on their mind.

Our first witness this morning is Frank S. Swain, legislative counsel, National Federation of Independent Business.

#### **STATEMENT OF FRANK S. SWAIN, LEGISLATIVE COUNSEL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS**

Mr. SWAIN. Thank you very much, Senator. We appreciate the opportunity to lead off these hearings this morning on S. 265 and we congratulate you and your staff on the time and effort that you have put in in sponsoring this legislation. NFIB, the National Federation of Independent Business, is the largest individual membership organization in the Nation with over 580,000 small and independent businessmen including over 7,000 members right here in Arizona.

NFIB represents your average Main Street type of business, small wholesaler, retailer, construction, small manufacturer, professionals, and nonprofessionals. Most of our members have an average of seven or eight employees and a yearly gross of less than \$250,000.

Now, the reason I am taking the time to go into some amount of detail is because I think that too often the people that make the laws, and more importantly now, the people that make the regulations, neglect the fact that there is a very large and significant small business community out in the country. More importantly, they do not take this into account when they prosecute actions based on these rules and regulations.

Too often, the regulations are prosecuted with the same vigor against Joe's Body Shop as they would be against General Motors, or against Smith's Appliance Shop as they would be against General Electric. This is clearly inequitable. Small business, like every other part of the population, is caught up in the Government by regulation that we have today, but caught up in a much different way. Not only must they comply with regulations which are complex, burdensome, and expensive to comply with, but with the economic realities of our present adjudicatory system, they basically and simply just cannot afford to defend themselves properly.

We have to remember that the Federal Government in the form of its agencies and its prosecutors has a great deal of prosecutorial discretion to sue or not to sue in a particular case.

But a business with seven or eight employees, a business whose profits are measured in thousands of dollars rather than in the millions or billions of dollars, doesn't have any discretion at all. The economic fact-of-life forces that business to settle with the Government, even if the business believes in good faith that it could exonerate itself, rather than live with the lawyers and begin fighting a very expensive legal war. It doesn't have the resources to begin with.

NFIB has over the past several years become increasingly aware of this economic inequity which has become apparent in our legal system, at least in the context where Government agencies and small businesses are concerned. What we really have now is a system of adjudication which has been transformed into a system of intimidation, at least as far as the agency vis-a-vis small business.

In an effort to gage the national small business attitude about this problem, NFIB conducted a national poll about 2 years ago of its members on what we feel to be the simplest, most effective, and most efficient way of balancing this inequity, and that is the reimbursement of attorney fees for small businesses in Federal civil cases in which they prevail.

The results of that poll of the NFIB membership are not surprising. Such a system of reimbursement was favored by over an 8-to-1 margin. I might add that, right here in Arizona, NFIB members voted 89 percent in favor with only 9 percent opposed. It is absolutely clear that small businesses want and need this legislation.

It's important to keep in mind that these are not major industrialists we are talking about. They are owner, manager-operators of their business. They work 60 to 80 hours per week. They have very thin profit margins normally, and they have to put up with the competitive and inflationary pressures of our modern-day economy. They can't afford the time, and they can't afford the financial expenditures necessary to hire attorneys to litigate a citation which may be totally underserved but which is economically unfeasible to contest.

There is clearly a problem existing with small businesses and the Federal Government when they come head to head, and NFIB believes that S. 265 is a clear way out of this problem. I would like to emphasize this morning that we favor this legislation for more than the reasons that our membership favors it. We feel it is a positive and simple way of meeting a problem here in today's society. It is the most efficient and effective solution because it emphasizes the individual. It will enable the individual to assert himself and obtain a proper adjudication, and it will go a long way toward restoring the balance of power and putting it back where it belongs, with the judge rather than with prosecutorial discretion.

I might add, as we all know, there are a number of pieces of legislation being considered by the Congress in Washington which would deal with the agencies' side of this. We believe that your legislation, S. 265, would be only complementary and certainly not a substitute for this legislation. It's important to remember that it probably will be as effective, if not more effective, to attack the regulatory abuses here from Tucson and other cities in the country through individual action in the courts as well as attacking them through congressional oversight and scrutiny in Washington.

NFIB believes that it is essential that the individual businesses be able to defend themselves, and only in this way will we begin to regain the balance of power between Government and business that has been upset by the last few decades' growth of Government by regulation.

In summary, I would like to restate that we all know that small businesses are independent. They are not asking for any handouts. But the pressure brought by the growth of administrative Government is tremendous. The most immediate and effective way for a business to respond to that pressure is to challenge the agencies when they are wrong. The passage of S. 265 is essential to enable them to make this challenge.

Thank you, Senator. If you have any questions. I'd be happy to try and answer them.

SENATOR DE CONCINI. I do, Mr. Swain. Thank you for your testimony. You made reference to public participation legislation that was known as S. 270 last year, and that now is known as S. 262 as your organization may be aware of.

What would the attitude of your organization be if in fact the intervenor funding section of S. 262 were attached onto this bill for it to pass out?

What if that bill and our bill here passed as presented? I'm just trying to second-guess what might occur.

MR. SWAIN. In all candor, Senator, I don't think our attitude would be very good. The concepts embodied in last year's S. 270 and part of S. 262 this year, regarding public participation, we are somewhat skeptical about. We are not entirely sure whether they will work. We have some problems whether they might only further delay the administrative process rather than expediting it.

In short, we are not endorsing that section of the bill by any means, and the judgment is still out as far as our organization is concerned. We strongly endorse the reimbursement of private attorneys' fees, and we believe this is a much more effective way in adjudicatory actions.

Senator DECONCINI. Do you think small business would be less enthusiastic in its support of this bill if they were advised or aware of the potential cost? Last year the Justice Department in objecting to the bill raised the argument that the potential cost of the bill might range anywhere from \$1 to \$500 million, possibly even higher. That means Government funds. I'd like your opinion on that.

Mr. SWAIN. Senator, I read over the Justice Department statement from last year, and I just don't believe they did their homework very well in coming up with that figure.

First of all, I think it's important to point out that that estimate was based upon the bill as it was originally introduced last year, and several careful studies and work by your staff and by Senator Domenici's and Senator Nelson's staff have cleaned this bill up, so to speak, and changed some of the standards. So I think that before anybody accepted any estimate that they gave last year, they should be requested to make a new estimate, given the new standards in the bill this year, on what sort of businesses and individuals would qualify.

Senator DECONCINI. We have talked along those lines, and I anticipate getting some testimony, and I'm under the impression that their testimony will be somewhere in the neighborhood of \$100 million on this new bill.

Mr. SWAIN. I think, Senator, that anyone who tries to make an estimate on the cost of this bill is at best venturing an educated guess, and I think any estimate the Justice Department will present to you will probably be based on the fact that a certain number of cases are litigated and lost, and therefore, it's assumed that the Government would have to pay the attorneys' expenses in every one of these cases.

I don't think that's going to be the case at all.

You have to keep in mind that, when a small businessman under this bill goes to his attorney and says: "Will you handle this case for me? I can't afford to pay you, but if you win, you'll get paid at your normal hourly rate." That is not a particularly lucrative incentive.

It's merely a basic fairness provision that says the Government will reimburse you what you are worth.

Senator DECONCINI. It's not going to be any great incentive to the legal profession to handle these cases?

Mr. SWAIN. No, sir. I don't think so at all. I think the attorney is going to have to make a very careful analysis of the dispute in question and say to his client: "I think it's a very close case. You may not prevail. Of course, if you don't prevail, you are going to have to pay me out of your own pocket."

Senator DECONCINI. Do you think there would be some definite incentive from the standpoint of the Government to modify their process of citations and violations?

Mr. SWAIN. Absolutely. No question about it. I think that can't be emphasized too much. The bill basically will have two very good results. No. 1, it will put the small business back on the same footing as larger businesses, in terms of being able to fend off the Government; and No. 2, the section of the bill which funds the reimbursement out of particular agency budgets is very important, because it will force these agencies, these policymakers and these regulators, to take into consideration whether their litigation is well-founded. If it's not, they

are going to have to pay for it themselves. It's really analogous to a situation in private business and the Government should be forced to meet the same standards.

Senator DECONCINI. It's not going to come out of the Justice Department's budget?

Mr. SWAIN. No, sir. It should come out of the budget of the agency that makes the mistake. That's the best way of doing it.

Senator DECONCINI. The bill that is introduced this year, excludes IRS cases, although I had reservations about relieving the IRS from being subject to this. Great arguments were given last year, and we are going to entertain those statements again this year.

What is your general attitude about the Internal Revenue being subject to this?

Mr. SWAIN. Our general attitude is that certainly, probably the IRS is the most pervasive Government regulatory agency. It regulates all of us, whether we make a profit or not. Obviously, a lot of court cost are generated by IRS disputes. We are aware that some very persuasive arguments have been made by specialists in the tax field, that IRS cases are somewhat hybrid in nature, because of the particular processes within IRS and the particular range of cases that IRS gets involved in, not only Federal tax cases, but entering into miscellaneous estates and so on and so forth.

I think that there may be good arguments to exempt IRS from this bill. I say that only to follow up with that, if you do in fact pass legislation which would reimburse court costs but not IRS court costs, the very next day you should start writing such a bill that treats the specific problems of IRS in the proper fashion so that the tax and legal community can live with it.

Senator DECONCINI. Thank you. That's a very good suggestion. I appreciate your testimony.

Our next witness will be Richard Grijalva, representing the National Economic Development Association. Is Mr. Grijalva here?

Mr. Grijalva, we will print in full any prepared statement, if you'd like us to. If you would proceed to highlight or give whatever testimony you would like to, please proceed.

#### **STATEMENT OF RICHARD GRIJALVA, REPRESENTING THE NATIONAL ECONOMIC DEVELOPMENT ASSOCIATION**

Mr. GRIJALVA. What I have for you is an outline of the speech I will be giving.

Senator DECONCINI. That's fine. Please proceed.

Mr. GRIJALVA. I didn't receive a copy of the bill, so I'm not going to address the bill in its specifics, but I am going to be talking about the problems of the small businessman in southern Arizona, which I feel they will affect the bill, and ultimately, the outcome, if any legislative action takes place.

I am the area vice president for the National Economic Development Association. I run the Tucson office for this nationwide consulting company. We have been in existence for 7 years and work from a contract with the Department of Commerce, Office of Minority Business Enterprises. Our main function is to offer management and technical assistance to minority entrepreneurs in Pima, Santa Cruz, and Cochise Counties.

Our current portfolio of clients consists of over 300 small business persons with over \$30 million in various types of debt and equity financing.

We have spent over 7,000 hours examining their various problems. Therefore, I feel that we are somewhat aware of their economic problems as they pertain to these small business persons.

My comments will be directed to their problems and to three areas related to this act. If legislative action takes place and the small businessman wins a court case, these agencies will be more responsive to the small business person. These three areas are finances, governmental contracts, and a new bill that was just signed by President Carter, the SBA 8(A) Act, H.R. bill No. 11318.

I think the above bill is an important bill because it also affects the bill that you are dealing with now.

First of all, I will discuss debt and equity financing. This is a loan proposal. Who does that loan proposal for the small business person? Not me, not you, not the bank, not the SBA, if it's an SBA guaranty. The small businessman does this proposal. This proposal takes time and takes a lot of paperwork. The small business person does not have the time, or the knowledge to prepare a proposal that is knowledgeable in order to secure the proper financing that he needs. If you look at the paperwork that the Government requires in order to secure any type of Federal assistance for the small business person, you need an attorney in order to interpret it. Attorneys cost money. If it isn't done properly, the small business person still loses out on the proper financing that he needs. So the time, the paperwork, and the money involved in preparing a proposal just in order to expand his business or in order to keep him going are detrimental to the actual aspect of what the Government is trying to do, which is to help the small business person.

Let's look at another aspect of what the Government can do. In today's money market, money is tight. The interest rate in Tucson, Ariz., is 12 percent. The small business person is cut off from the money market first, it's not General Motors, not Ford, but the small business person. If money isn't there, the paperwork or time involved is academic. The money isn't there because banks are going to service the major accounts, the ones with the compensating balances, first they create the cash flow for the banks.

So who does the small business person turn to? He turns to the SBA and the SBA historically is out of direct funding. You say: OK, let's increase the SBA's funding.

However, it does not matter if you in Washington increase the SBA's funding in Washington, the small business person in southern Arizona will get the short end of the deal, due to the distribution mechanism of the SBA.

Direct funds are distributed this way:

They are distributed by regions, and within those regions they are distributed by population. In our region here, where are the major population centers? Not in Tucson, Ariz., not in southern Arizona, but in Los Angeles, San Francisco, Seattle. But when you take a look at the economic situations of southern Arizona, you find a high proportion of small business people in relationship to the population, who feed off the larger businesses. We have tourism, Government, and the mines. Therefore, you have many small businesses feeding off of the

larger businesses. The small businessmen have complicated problems and financial needs. But there is nobody to help them.

You look at me and say: Well, you can help them. I cannot help them. I am obligated by Government regulations, not my regulations, but Government regulations and contractual obligations, to help only one small segment of the small business population, and that is the minority entrepreneur.

So who is to help the rest? There is no one.

The SBA does not have an office in southern Arizona, even if it did, it might be staffed with maybe one of two persons. Is that sufficient to help the large small business population? I don't think so.

I am now going to turn to Government contracting which I consider directly affects Government agencies, more so in debt financing, which goes through financial institutions. I consider Government contracting and procurement, to be weak. The small business person receives a trickle effect until the end of the fiscal year, and then it's end-loaded. All the Government procurement people come in at the end of the year trying to maintain their quotas. The small business person cannot possibly comply with meeting the time frames imposed on them by the Government agencies for these contracts. Therefore the Government agencies come back and say: I'm sorry. I did not find anyone qualified for these particular types of contracts.

Another mechanism is to send out contracts to the small business persons through the 8(A) program. Have you ever seen the regulations for the 8(A) program? They are about 4 inches thicker than this book. To even get qualified, you have to have a potential contract.

Let me show you an example of a situation in which I think somebody should have sued an agency. For many years, one of my clients was trying to secure a HUD flood insurance program. As you know, HUD does flood study programs in Arizona for your flood plains. A lot of these contracts were going to out-of-State engineering firms. My client complained. He complained to his Senator and to his Congressman, and finally HUD came back and said: We will grant you one of these contracts but we can only go through the 8(A) program. So my client proceeded to get qualified for the 8(A) program. What happened? After he went through the paperwork, after he went through and spent time, money, and energy, the Federal Government came back and said: I'm sorry. You are not qualified. You are too big. Too big, in connection with what? Too big in southern Arizona, or too big in relationship to the competition in the United States for these HUD flood study contracts? Nobody could answer that question. The receptiveness of the agency to the needs of the small business person was not there.

Under the bill that you are proposing, I feel that when you hurt someone in the pocketbook, for example, if you have to give out \$5 for every mistake you make and are told it was your mistake, you would watch yourself very carefully. The agencies will watch themselves carefully, when it hurts them in their operating budgets.

My comments will now be turned to H.R. bill 11318. This is a bill that was recently signed by President Carter concerning SBA 8(A) act. This provided statutory guidelines for eligibility in the new SBA 8(A) bill signed by President Carter. It called for 51 percent owned and operated businesses by socially and economically disadvantaged people. What this means is, that under the SBA's 8(A)

program, the Government negotiates contracts with small business people. But in order to qualify for that program, you have to demonstrate that you are 51 percent socially and economically disadvantaged. Under the old act, it was "or." Now it is "and." You have to be both. I'm not debating whether that is bad or good. What I am saying is the bill says: The burden of proof falls on the small business person to prove that he is socially and economically disadvantaged. It doesn't say how to prove that. It says: You are guilty until proven innocent. Is that right? I don't think so.

In addition, the bill does not take up the question of female entrepreneurs. There is no place in any of the acts concerning the small business person that the question of the woman in the small business world is considered. No place. That should be addressed, too.

In conclusion, I sincerely believe that this act or any act or any bill that affects the small business person must take into account the following areas. It must take into account specific economic conditions of the area to be served. The argument against that would be that, when a bill is made, it is made for the Nation in general. But the Government does not operate in generalities. It operates in regions—region 9, region 2, region 3. Each region should know what the specific economic conditions are in those areas. If the regions don't, they are not doing their job. So a bill can take into account each region by assigning responsibilities to those regional areas in the agencies that are responsible for that, whether it's EDA, SBA, the judicial branch, whatever. The bill takes into account general economic conditions with respect to development, jobs, and the money market, and it must do away with the time and the paperwork.

This bill will do no good if the man, in order to get his money back after he wins a case, has paperwork this large and must wait 2 years to get his money back. It won't do any good. He will be out of business.

Senator DECONCINI. Thank you. Let me ask you a couple of questions, Mr. Grijalva.

What is the time that is normally put in on such a file or proposal? Do you give any idea of that in your outline?

Mr. GRIJALVA. Yes; I have it in my notes to you. Depending upon the complexity, it takes from 1 month to 3 months. That's from the time the small businessperson starts to the time he receives his first check. Anywhere from 1 month to 3 months.

Senator DECONCINI. In your counseling and consultation with people, do you find a number of instances in which small business people, individuals, businesses, are reluctant to proceed with appealing the decision of the regulatory agency in assessing them some fine or penalty for violating the agencies' rules that they just go ahead and pay it?

Is that a frequent thing that you come across?

Mr. GRIJALVA. Yes; it is, especially to Government contracting if there is a dispute.

Senator DECONCINI. Under the contract?

Mr. GRIJALVA. Under the contract. The small business person—if I understand your question—if there is a fine against him, he goes ahead and pays it rather than fight it, because, No. 1, he is not quite sure of his appeal process; and No. 2, even if he is quite sure of it, he is afraid to, because he is afraid that the word will get out and he will not get any more contracts.

Senator DECONCINI. When you add to that the cost that he'll have to go through, it's quite a deterrent.

Mr. GRIJALVA. Naturally.

Senator DECONCINI. But your second point is an interesting one. You think often they are under some intimidation.

Mr. GRIJALVA. I sincerely believe that.

Senator DECONCINI. They feel that if they protest the fine that they won't be considered impartially for the next contract awarded?

Mr. GRIJALVA. I sincerely believe that. You have to remember the contracting officer has SOP's that he can follow like that, and he knows those backward and forward.

You work in Washington. You know the way the bureaucratic system works. One person who's been in the Government for 30 years knows all the ins and outs. He knows all the SOP's, and he can find ways of holding up whatever wants to hold up forever, including bills that are enacted.

Senator DECONCINI. If the agency were going to pay out of their budget, like you say, if they were "hurt in the pocketbook," they might be less apt to do that?

Mr. GRIJALVA. I sincerely believe that, Senator.

Senator DECONCINI. Thank you very much, Mr. Grijalva. I appreciate your testimony.

If you want a copy of the bill, I think we have some here. We'll be glad to get you one.

Our next witness is Michael Hawkins, U.S. attorney, representing the Department of Justice.

Mr. Hawkins, I appreciate your coming down from Phoenix today to testify for us.

#### **STATEMENT OF MICHAEL HAWKINS, U.S. ATTORNEY, DEPARTMENT OF JUSTICE**

Mr. HAWKINS. Thank you, Senator. It's good to be here.

The Department of Justice asked me to come here this morning and express their viewpoint on this legislation. Let me say at the onset that we compliment the committee's endeavor to address what is a very real problem in Government and one which I can add by way of personal footnote that I see on a day-to-day basis.

The Department believes that the central concept of this legislation, that the Government should assume more responsibility for the actions it takes and think more carefully about the regulations it wants to employ, is a good one, but it opposes the legislation as presently drafted for several reasons, if I can briefly outline them.

I think the thing that concerns the Department more than anything is the standard that's involved. The standard in this bill, first of all, places the burden on the Government to substantially justify the position it has taken. This represents a substantial departure from the existing present "American rule" on apportionment of costs including attorneys' fees and litigation. It also places the burden on the Government, and in doing that, it creates a presumption which the Department feels may be unprecedented, that everything the Government does is wrong. That is not necessarily true. In fact, I think in most cases it's not true at all. The other difficulty is that this standard, proving the Government coming into court after losing litigation and proving that

they should not pay attorneys' fees—this substantial justification—is a difficult concept to apply.

The Department searched the cases on attorneys' fees across the country, and when you look at this area, it's very difficult to find cases that talk about substantial justification. We know in the Department that this standard was borrowed from rule 37 of the Rule of Civil Procedure. We feel that that's an entirely different area for different reasons, which I'll be happy to entertain by way of question later. The Department also believes that the passage of legislation would cost millions of dollars at a time when most Americans believe that less and not more tax dollars should be spent in connection with Government programs.

Finally, the Department believes, while there is undoubtedly a disease—Government regulations that overreach, Government agencies that know that their economic power and their litigative power is significantly counterbalanced against those of private individuals, especially small businessmen—this cure may be too much. Perhaps the cure—at least it's the Department's view—would be to eliminate regulations, indeed, eliminate those Government agencies themselves that are nonproductive and that are engaged in that kind of behavior.

I might add, Senator, simply as a personal footnote, that, and speaking from the viewpoint, I guess, of personal pride, and that is that one of the most difficult things in trying to keep these agencies from doing some of the unreasonable things they want to do, and there are agencies that want to do unreasonable things, is the continuing prevailing trend of independent agencies to come to the Congress and ask for independent litigative authority.

The Government ought to be able to speak with one legal voice. That legal voice ought to be the Department of Justice. Out in the States, it ought to be the United States Attorney's Office. But there are at least five, right now, independent Government agencies that can go into the district court and say anything they want to. The rest of them we can attempt, hopefully, to modify that. If one thing can be said for the present appointive system of both the Department of Justice and the U.S. attorneys, it is that we know that ultimately we are responsive to the elective will of the Members of Congress, and the oversight responsibility that they have over the administration. That's one area that this committee could endeavor to spend a good deal of time and that's examining the fact that these agencies have independent litigative authority.

If I can, for the committee's benefit, just review the present "American law" on apportionment of attorneys fees. America, unlike England, does not allow it. The flat general rule in America is that you cannot, even when you are successful in litigation, recover attorneys fees. There are only three exceptions to that. One is called the equitable trust or common fund exception. That's where you have gone into litigation and recovered or protected a substantial fund for the benefit of a number of other people, and that's benefited a wide, broadspread class of people.

Second, the courts will allow the order and the recovery of attorneys fees against a losing party where there is evidence that the party has willfully disobeyed an order of the court or has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

Finally, there are several specific statutes which allow recovery of attorneys fees. These are the Freedom of Information Act, Consumer Products Safety Act, the Civil Rights Act, just to name a few.

The Department has attempted to engage in some realistic assessment of what these costs would be, and I accept the intelligent criticism of the gentleman that spoke first, and that is, that it's difficult in this area at all to reach any kind of estimates that make any sense, but in attempting to reach some estimate of the potential cost of this legislation, the Department went back for the last year and looked at court cases and agency cases that had been adjudicated. They estimate that, as to court cases, the passage of the legislation as currently drafted, it could cost from \$130 to \$250 million a year; and as to the agency cases, from \$130 and \$215 million a year; for a total cost of between \$260 and \$430 million a year.

If that estimate is twice too high or 3 times too high or even 10 times too high, it represents a substantial cost. Even coming out of the budgets of these agencies, I query whether that would provide the kind of disincentive that's wanted.

The Department has an alternative proposal. First of all, they are persuaded, Senator, by your persuasive arguments and those of Senator Domenici that the Government ought to be more accountable for what it does in court and that it ought to think more carefully before it goes to an agency action or it goes to court to try to enforce regulations, particularly against people of lesser economic means and particularly against small business people. They feel, however, that the standard should be that the successful private party, as with the exceptions that I noted earlier, should be required to show the Government position was either "arbitrary, frivolous, unreasonable, or groundless." In most instances of the kind of horror stories you will hear, and they are legitimate horror stories about overreaching, excessive Government bureaucrats, that standard can and could be met.

By the way, in terms of costs again, again just a rough estimate, the Department estimates that, if their standard were enacted into your legislation, the cost would be \$25 million a year.

We have to note for the record that President Carter has proposed legislation which the Department believes would directly attack this problem; namely, the streamlining of the national Federal Government bureaucracy, including proposals which would streamline outmoded rules in HEW and OSHA, and other organizations are already going to do that and to require cost benefit studies to be done before regulations are imposed.

Finally, the Government strongly supports the efforts of small businessmen to modify rulemaking procedures where it can be done and to enact statutes which would provide for fee and expense payments to small business enterprises to participate directly in the rule-making process so their voice is heard, so that the impact of regulations is known and can be felt by the people that set the rules.

The administration also endorses sunset law legislation which would eliminate—and I know the Senator does too—which would eliminate outmoded Government bureaucracies and programs and stop the guaranteed lifetime existence of agencies.

The Government believes that all of these things taken into combination, together with the modified standard of S. 265, would reach the result that the committee wants to achieve.

Again, the committee and its chairman and Senator Domenici should be complimented for trying to address one of the very persuasive and pervasive problems present in America today and that is trying to make justice, access to justice, both in agencies and in court a reality and not just a myth.

I'll be happy to answer the chair's questions.

Senator DECONCINI. Thank you, Mr. Hawkins, for your testimony.

The bill provides a standard that, if the Government can show that its actions were "substantially justified," then of course they would not have the attorney fees assessed against them.

Is this too burdensome in your opinion?

Mr. HAWKINS. Well, in the opinion of the Department of Justice, we know that it's borrowed from rule 37 of the Federal Rules of Civil Procedure, but that the standard operates from a different presumption. That's in the discovery process in a civil case where parties exchange documents, and it starts from the proposition that both parties on either side of civil litigation are entitled to everything that the other party knows. It's not like criminal litigation. If anybody violates that general rule, then they ought to have to come into court and justify that.

We believe that standard would be inappropriately applied when brought over to the whole issue of attorneys fees in all different kinds of litigation.

Senator DECONCINI. It occurs to me that the Justice Department's standard of arbitrary or unreasonableness, is not that far out of line with having to just substantially justify their actions.

Let me go on to another line of questioning for a minute. In your experience as a trial lawyer, prior to becoming the district attorney and since then, do you believe courts, when given the discretion, that they are reluctant to award attorneys fees?

Mr. HAWKINS. No. That's not been my experience either as a private litigant, representing private parties, injured parties in personal injury cases, and other civil litigation. It's not been my experience as an attorney in various civil matters in Federal district court. That may be because we are fortunate in Arizona to have enlightened people on the bench. That may not be true in other places. I can't speak for the other 93 districts in the country, but that has not been a difficulty in this district.

Senator DECONCINI. Is this true under the statutes or exceptions you set forth where Federal law provides that the court may assess attorneys fees?

Mr. HAWKINS. I'm familiar with the operation, Senator, of only one of those statutes, and that's the Civil Rights Attorneys' Fee Award Act which I believe is about 2 years old now. In the operation of that, no.

I do not believe it was difficult for the recovery of attorneys fees, but in that case I will confess to the committee that I went in on behalf of the United States and suggested that fees ought to be awarded, but that's my only experience with the operation of any of those acts. I'm unfamiliar with the operation of the others.

Senator DeCONCINI. What evaluation process does your office use when deciding whether or not to proceed with civil cases when an agency has brought you something? Do you have a set of criteria?

Mr. HAWKINS. Yes; we do. We have internal working guidelines. The first question we ask the agency is: Can this be reconciled? Does it necessarily have to involve litigation? Has the claim been fully explored?

We never begin litigation of any kind until we write to the party affected and offer them the opportunity in the least oppressive way possible to explain their position.

Senator DeCONCINI. You only see those cases when they are brought to your office in anticipation of filing in the district court?

Mr. HAWKINS. That's correct. We do not see the agency side of it.

Senator DeCONCINI. You do not see the administrative procedures that they go through?

Mr. HAWKINS. That's correct, Senator.

Senator DeCONCINI. Thank you. I have no further questions. I appreciate your testimony.

Our next witness is Ed Bolding, a prominent Tucson attorney. Mr. Bolding, I'm very pleased to see you here today. Thank you for your time taken away from your busy practice, I'm sure.

#### STATEMENT OF ED BOLDING, ATTORNEY, TUCSON, ARIZ.

Mr. BOLDING. When I read this bill, I said, Senator DeConcini has done it again. He has done something nobody could object to—apple pie, et cetera.

I do not understand some of the objections. I do not understand how the Government could possibly object and say: This will cost us \$500 million a year, when you just look at it and say: That cost is going to be only if the Government had no substantial justification for its position in the first place.

Now, get rid of it. Test it awhile. If it's not costing anything, then everybody's doing a good job. If it is costing a lot of money, then a good job is not being done by the agencies involved, and they are hurting people to that extent. I don't understand that part of it.

Now, there are one or two thing in the bill that I find personally objectionable. I don't know the solution. I can raise only the problem, and that is, one of those is that you say: Let the agency itself decide if the proceedings were substantially justified and the agency itself sets whatever fees or whatever attorneys fees or cost assessment should be made.

It's a little like sending the fox to guard the henhouse, of course, but what do you do if you have an outside person assessing these amounts? Then you have additional expenses in that area. So I can certainly see the problems there. But that is a little bit of a bother to me.

I also do think that the provisions regarding the IRS and perhaps the provision regarding torts by the Government, the exclusions here, need to be looked at very strongly.

We have a situation, and my friend Mike Hawkins and I, who have been around quite a while together—if Mike were still here, he would tell you that he and I are involved in a case, he on one side and I on the other, involving substantial claims of negligence on the part

of the Government. Everyone agrees there are serious, serious damages. We have worked on this case for some 4 years now. This is a tort action actually, and so it would not fit under these provisions, but the problems that are involved in this kind of situation include that, if there is a recovery, if there is a recovery on the part of any individual against the Government for some negligence on the part of the Government, then a part of that fee, generally a part of that amount, is taken away from the individual and paid as attorneys fees.

It's the same thing as Mr. Smith, the corner groceryman, who is having to pay someone to represent him. That's taking money out of his pocket. I think that the provisions for paying the attorneys fees would bring things to a bit more—what is a good word—a faster conclusion. If the Government can say: Well, we have taken a substantially unjustified position. We had better cut it off now and get through with this thing, settle it, and get on with our business. It's going to cost us a lot of money in fees and attorneys fees.

I don't apologize for attorneys fees. A lot of people have talked about attorneys fees, and there are attorneys fees. I happen to have some typewriters in my office that I'm paying for and rent to pay and things like that, so lawyers do charge fees. If we are going to continue with the system that we now have, we are going to continue with that type of situation.

We feel that the party certainly who is not substantially justified in costing another party some money should pay the costs and the fees involved.

Is there reluctance on the part of judges, you asked Mr. Hawkins, to award attorneys fees. I must say that my experience is a little different, that there probably is some reluctance on the part of some judges to award attorneys fees.

We were involved in a fairly large case here recently along with a law firm from Phoenix. They put in a substantial amount of hours, 3,300 hours. We had nearly the same amount. We were awarded some attorneys fees. This firm feels that those attorneys fees were such and their expenses were such that that was pro bono work that they did. In other words; they gave the value of their services.

I'm not sure how much work, how much pro bono work, lawyers should do. I think they should do more than they do now for the general practitioner. But I'm not sure that the Government should require that all lawyers give  $x$  number of hours as pro bono work during the year.

Generally, those are my comments. I congratulate you for your efforts in seeing that this type of legislation is passed. I think it's good, as far as it goes. I'd like to see it go further.

Senator DECONCINI. Mr. Bolding, under the legislation, where the administrative agency sets the fee, assuming they lose, there is a discretionary appeal provided for.

Do you think we should have something in addition to that or should we have a separate fee setter?

Mr. BOLDING. Judges like to think that that is one of the areas they are expert in. They may well be.

The appeal, I think, should go in the usual course of justice as it slowly winds its way to its end.

Senator DECONCINI. Even in the administrative process, where the Government loses the case through the administrative process, then

that administrative judge has the right to set the fee; and you are indicating that there ought to be someone else setting the fee, because in fact, he worked for part of that agency; he's part of that agency?

Mr. BOLDING. Yes. That was one of my objections. I don't know what you do. Again, you raise the cost if you go outside.

Senator DECONCINI. Your point is well taken. There may be a feeling that he ought to keep the amount down because it's going to come out of that same agency.

Mr. BOLDING. Of course, on the other hand, you might say that, if the judge said that action or the action of the agency is substantially unjustified, maybe he will tap them fairly heavily for fees and costs.

Senator DECONCINI. The bill sets a maximum attorney fee of \$75 an hour. Do you think that is adequate?

Mr. BOLDING. Yes, I think that that's a general figure that's used in some other legislation. Again, that sounds like too much money for anything, but again, I have to say I can't quite pay for my typewriters yet out of a figure like that.

Senator DECONCINI. Of course, that's the maximum. Do you think we might be better to look toward language that "shall be awarded reasonable attorneys fees"?

Mr. BOLDING. Yes. I always like "reasonable," because then you do get the standard in the community at the time.

Senator DECONCINI. In your practice that has been in the commercial area and other areas, and you have gone to court to substantiate attorneys' fees when they are provided in the contract or the lease or what have you, do you find the courts carefully scrutinize reasonableness in attorneys' fees as to the time you put in and the prevailing hourly rate?

Mr. BOLDING. Yes. I think they do. I feel that some judges like to lean over backwards and do less than what is billed for what is shown just to say: we are in the business of compromising here.

I know one. This goes to the criminal case, but one case that I handled recently for 6 or 7 years, my attorney fees that were awarded—I was appointed—and my attorney fees that were awarded came within \$1,000 of paying my expenses. I mean, \$1,000 less than my expenses. So judges just don't go crazy with attorneys' fees.

Senator DECONCINI. One more question, Mr. Bolding. Do you think the bill would unnecessarily chill even reasonable enforcement efforts on the part of the Government?

Mr. BOLDING. No. I have never talked with a person in a Government agency to my knowledge and in my memory who didn't feel they were taking a substantially justified position. They feel that "what I am doing is right," and it's only where they are very incorrect that this cost will come into play.

Senator DECONCINI. Mr. Bolding, I want to thank you on behalf of the committee for taking your time and testifying at no cost to the Government. The committee is most appreciative of your testimony.

Mr. BOLDING. Thank you.

Senator DECONCINI. Our next witness is Jim Swerg, representing the Tucson Chamber of Commerce.

**STATEMENT OF JIM ZWERG, REPRESENTING THE TUCSON  
CHAMBER OF COMMERCE**

Mr. ZWERG. Good morning. I am the governmental affairs director of the chamber of commerce here. We have reviewed S. 265 and appreciate the opportunity to comment on what we think is an important piece of legislation.

I have presented a written outline of this, and I don't know if I need to get into great detail on it.

Senator DeCONCINI. We will put it in the record in its total.  
[The prepared statement of Mr. Zwerg follows:]

PREPARED STATEMENT OF JAMES W. ZWERG

Senator DeConcini, members of the subcommittee, I am Jim Zwerg, director of governmental affairs for the Tucson Metropolitan Chamber of Commerce. We have reviewed S. 265, The Equal Access to Justice Act, and appreciate the opportunity to comment on this important legislation.

Individual citizens and small businesses, those who bear the brunt of governmental regulation, must be able to check arbitrary agency actions by contesting them. Through the device of fee shifting, S. 265 would improve citizen's access to courts and administrative proceedings. It will encourage individuals and small businesses to vindicate their rights and not to acquiesce in a ruling or sanction which they believe arbitrary, misguided, or unfair. It should, hopefully, make Government more accountable in the exercise of its regulatory powers and more responsive to its citizens' needs.

The Tucson Metropolitan Chamber of Commerce heartily endorses the intent of S. 265, The Equal Access to Justice Act.

There are, however, two paragraphs within the bill which, we feel, need further clarification or possible revision.

The first is the paragraph marked (a) under 504. Costs and fees of parties, in section 3. Award of attorney fees and other expenses in certain agency actions. Let me read from the paragraph: "An agency that conducts an adjudication subject to section 554 of this title shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the agency finds that the position of the agency as a party to the proceedings was substantially justified or that special circumstances make an award unjust."

Unless we are totally misinterpreting these lines, the bill appears to be saying that the agency involved in the action will itself judge if its actions were justified. While not wanting to sound completely callous, the chamber questions the objectivity an agency might exhibit in evaluating its own actions.

The inclusion of a safety clause in the bill, that is, "A party dissatisfied with an award for fees and other expenses as determined by the agency may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adjudication," provides little solace.

In effect, what is said is that if the agency decides you don't deserve an award, even though they may have been in the wrong, the only option you have is to take them to court and go through the whole process a second time.

If our interpretation of this portion of the bill is correct, the legislation might possibly prove to be little more than an additional burden for the individual and small business instead of giving the a fighting chance against the Government bureaucracy.

Our second concern is with paragraph (B) under (b) which is also under 504. Costs and fees of parties in section. 3 Award of attorney fees and other expenses in certain agency actions. This paragraph gives the following definition of "party": "(B) 'party' means a 'person' as defined in section 551 of this title, but excludes any individual who had, at the time the adjudication was initiated, net assets in excess of \$1,000,000 and any partnership, corporation, association, or organization that had, at the time the adjudication was initiated, net assets in excess of \$5,000,000."

This paragraph is quite clear. However, we do wonder what criteria was used to determine the exclusion limits of \$1 and \$5 million, or if these figures were simply set arbitrarily. It would seem that there might be numerous citizens and businesses that would disagree with the bill's definition of a small business.

Senator DeConcini, members of the subcommittee, we applaud S. 265, The Equal Access to Justice Act as an honest attempt to redress the imbalance between the litigating resources of the individual, small business and the Federal Government. Such legislation is long overdue.

The Tucson Metropolitan Chamber of Commerce urges your consideration of our concerns. It is our sincere hope that the clarification of these items will result in a stronger, more effective piece of legislation.

Mr. ZWERG. I'll summarize quickly then. Mr. Bolding has hit upon one of the paragraphs that concerns the chamber, that having to do with the agency regulating itself. The specific wording is "unless the agency finds that the position of the agency as a party to the proceedings was substantially justified or that special circumstances make an award unjust."

Unless we are totally misreading and misinterpreting those lines, the bill appears to be saying that the agency involved in the action will itself judge if its actions were justified. While not wanting to sound completely callous, the chamber questions the objectivity an agency might exhibit in evaluating its own actions. I think Mr. Bolding has addressed this issue quite well.

Senator DeConcini, I know you alluded to the safety clause, where a party dissatisfied with the award could go back to court. Considering that possibility from the small businessman's point of view, I am concerned whether the effect of that would be more of a hindrance than a help. If the agency decides that it was justified in its actions, even though it loses the case, the only option given to the small businessman is to take the agency to court and go through the whole rigmarole and the whole process a second time I really don't think that option would be terribly attractive again to a small businessman.

The second paragraph of the bill that we have some concern with, and it's really more a question of clarification than concern, is the paragraph which is the capital "E" under small "b" which has to do with a definition of "party".

Within that paragraph it states that excluded from the definition of "party" are those individuals with net assets in excess of \$1 million or corporations, partnerships, associations with more than \$5 million.

The question we have, simply, is, what was the criteria used to come up with those figures? We have had some comment from individuals that would question whether or not that really is a good parameter for small business. I don't think anybody's arguing whether it's good or bad, but what was the justification, what was the formula used in coming up with those figures?

With those two exceptions, and if clarification of those two paragraphs might be considered by the committee, we think you will come up with a little more effective and stronger piece of legislation.

Basically, it's a good bill. It's long overdue. With our two suggestions, we hope it can be an even better bill.

Senator DeConcini. Thank you very much. Let me ask you a couple of questions.

You raise a couple of good points. You asked a definition of criteria. The criteria, to my recollection, came from what we believe is close to the definition of small business in the Small Business Administration Act.

Do you suggest some other criteria? We are not wedded to this at all. We felt this was certainly identifiable as excluding large gigantic conglomerate businesses and yet including the category of substantial business with net assets of \$5 million. Do you have any suggestion?

Mr. ZWERG. I don't think there was an anxiety other than clarifying where the figures come from? Frequently, we see figures in a bill or a piece of legislation that are not justified and just picked out of the air.

Senator DECONCINI. They came primarily from the Small Business Act, and it's difficult to draw the line, say, if an individual has a net asset of \$1,100,000 and some agency has filed an unjustifiable claim and it is determined that the individual spent \$5,000 defending it. It certainly doesn't seem fair. Maybe there should be some leeway there.

You indicate your concern about, as Mr. Bolding did, the agency's ruling on itself and then the individual or businessman having to appeal. The point is well taken.

Do you suggest any changes that perhaps in the administrative area the award could be mandatory, up to a maximum of \$10,000, or does that strike you as fair from the standpoint of the small business community?

Mr. ZWERG. It was discussed very briefly. We concentrated on pointing out possible problems, but didn't come up with any real solutions for you.

Our main concern on that particular paragraph was the idea of Government regulating itself again and whether or not it was substantially justified. We have been stung too often by the wordage of particular legislation or regulations. Frequently it sounds good but then is interpreted differently, resulting in its being implemented contrary to what was expected. I'm aware of the fact that as appropriations requests came up for that particular agency, certainly, how often they might have said they were justified in their actions would be looked at very carefully, and again it will have to be substantiated.

I am pleased that that was in there. I am not sure we have specific recommendations for you.

Senator DECONCINI. If you came up with one, I'm searching for a better handle on that subject matter, but quite frankly, I have not been able to do it without implementing some outside agency that would cost even more to come in and evaluate.

Mr. ZWERG. I think that's a very valid point. Our concern mainly was, it appears that the only option open to the small businessman is to go through the process all over again.

Senator DECONCINI. Thank you very much, Mr. Zwerg. We would like to express our appreciation to the chamber for their support of the bill and the time that they have put in.

Our next witness is Prof. Winton D. Woods, University of Arizona College of Law.

Professor Woods, we are very pleased to have you here, and I want to express to you our appreciation for the number of areas in which you have helped the committee. The resources at the university have been extremely generous in being available to us and our staff. We thank you.

STATEMENT OF PROFESSOR WINTON D. WOODS, UNIVERSITY  
OF ARIZONA COLLEGE OF LAW

Professor Woods. Thank you very much. It's been a real honor to have been of aid. I hope I have been. I particularly appreciate the opportunity to be here today to testify in regard to this bill because it deals with a matter that is close to my heart.

I started my first small business in 1956. My father until very recently was a small businessman in Phoenix. My wife owns a small business, and when I practiced law, many of my clients were small businessmen, I have seen firsthand the kind of impacts that Government regulation can have on small business people.

When I think of small business people, I think of people considerably smaller than the group that you have been talking about most recently. I did a quick check in preparation for this hearing, and I found in the 1974 U.S. Statistical Abstract that a 1974 study by the IRS indicated there were approximately 12 million businesses in 1974 in the United States that had gross receipts of less than \$100,000. About half of those had gross receipts of less than \$25,000.

I think those people are the people who may be most dramatically affected by the excesses of bureaucrats that we all know exist, and I think the Government wouldn't deny that either.

If a small business person is faced with \$1,500 claim, and he or she goes to a lawyer and says: "What is this going to cost me to litigate this?" The lawyer says: "\$3,000 or \$4,000." Obviously, as we all know, they are going to be very disinclined to do anything. The economic risk is just too great. Even though this bill takes a dramatic step in the right direction, by giving that person an economic option, I think it probably is still not enough.

The reason is this. If the client must ultimately be responsible for the payment of the attorneys fee, if it is ultimately determined that the agency's action is substantially justified, then the economic disincentive to challenge the agency action is still there.

The only way that I can see to avoid that is for lawyers to take the cases pro bono as Ed suggested, or on the other hand, to take them on a contingent fee basis.

Obviously, with a \$75-an-hour maximum and a standard of reasonable fees in the community, a contingent fee situation in a \$1,500 or \$3,000 case doesn't make very much sense, and I would suggest that the committee give very serious consideration to the possibility of applying a multiplier, I know the committee has considered this very carefully in regard to the class-action legislation. Applying a multiplier in those cases where the lawyer from the very beginning is willing to take it on a contingency, so that if he or she loses the case, the small business person is not going to be out any money at all would serve as an incentive.

I think that could be made workable, and I think it certainly would permit the small claims to be vindicated. I think it would encourage the attorneys to prosecute more vigorously cases that otherwise would not be economically justified from a business point of view, and it certainly would encourage the attorneys to carefully evaluate the cases, so that frivolous suits, or frivolous challenges to administrative action, might even be reduced.

Finally, I would like to add my support to the sunset provision of the act. In addition, however, I feel it would be very helpful either in

this legislation of in some complementary legislation if you implemented the suggestion of Professor Sands of the University of Alabama in the committee report on S. 2354 last year, and that was that it is very clear that we have very little empirical evidence about the effect of fee shifting in this country. This bill really provides us with the potential for learning some answers to questions we just can't answer right now. As you know, in Arizona we have recently embarked upon fee shifting with contract actions. I think people that I've talked to that have been involved in those cases really don't have much of a feel for the impact of that legislation. The reports that you have before you indicate a huge number of cases in the Federal Code where fee shifting has already been implemented.

It was shocking to me to see the number of cases. Even though this is an area that I have some familiarity with, I was simply unaware of the number of situations in which fee shifting has been utilized. Yet we know nothing about its real impact.

I would suggest that you, if at all possible, try and find some outside organization, perhaps a committee of academics and lawyers and judges who would work together to put together a very careful empirical study of this 3-year experiment, if it passes.

Finally, I would like to make one comment that I just can't resist, even though Ed somewhat stole my thunder in regard to this. Mike Hawkins suggested that it might cost—what was his final figure—\$430 million. If that's so, I think we are in serious trouble. If there are that many cases where the Government's action is substantially unjustified, then I think something far more drastic than this bill needs to be done. I don't think there are that many cases. I don't think it's going to cost that much. But whatever the cost, if in fact the Government is proceeding against small business people without substantial justification, then I think that cost is worth it. I think this is one of the few areas where economics ought not to be the determination of the viability of the bill. Thank you.

Senator DeCONCINI. Thank you very much, Professor. Do you see any danger in making this kind of exception to what is known as the "American rule" on attorneys fees?

Professor Woods. No. I really don't. I for a long time have believed, as I say, without any empirical proof, that fee shifting is in general a good idea. The argument in the normal fee shifting case is that it will act as a disincentive to small plaintiffs because the risk of having to pay the opponents' attorneys fee if they do not prevail may disincline them to pursue their rights.

This bill does not have the vice. It's a one-way avenue against the Government. The Government is not allowed to seek attorneys fees against the small business person, only the other way around. I think that's an important feature.

Obviously, if the bureaucrats could come after Joe's Body Shop that's doing a \$25,000 or \$30,000 a year gross and hit them for \$15,000 in attorneys fees, commonsense would tell you that litigation with OSHA might not occur. On the other hand, if there's no risk and if the attorney is willing to take a risk on a contingent fee basis because he or she believes it's a good case, then I think that case ought to be litigated.

Senator DECONCINI. Thank you very much. Do you believe that the burden on the Government to show that its action was substantially justified is too burdensome?

Professor WOODS. I don't believe it is. I was somewhat surprised to hear that they opposed that. It would seem to me that showing substantial justification is a fairly easy standard to meet.

Senator DECONCINI. Wouldn't rule 37 of the Civil Rules of Procedure be applicable here in your judgment?

Professor WOODS. That's right. Yes, and I disagree with Mr. Hawkins in saying this is a different kind of case. I think it's substantially similar, and it's not, for example, a burden in the area of immunity of Government officials. The standard that we now utilize is essentially the same thing, whether or not they acted in good faith; if they have acted in good faith, they are immune from individual damage liability.

I see this as not being much different from a good-faith standard.

Senator DECONCINI. Thank you very much, professor. We are looking forward to working with you in the future.

The next witness is Jerrold M. Lyons, prominent accountant in Tucson. Mr. Lyons, welcome to the committee. We appreciate your taking your time and being with us and sharing your observations of S. 265.

If you have any written prepared statement, we will put it in the record in full or you may proceed as you please.

Mr. LYONS. I don't have any.

Senator DECONCINI. Proceed.

#### STATEMENT OF JERROLD M. LYONS, ACCOUNTANT, TUCSON, ARIZ.

Mr. LYONS. The one point that I did want to bring out on this bill that's been presented—I'm looking at it, let's say, from a selfish standpoint, from the standpoint of the small business person dealing with the Internal Revenue Service. I note in here that the bill specifically excludes any litigation that may go with the Internal Revenue Service relative to the payment of fees if their case is won.

This, I think, is a situation that would well belong in the bill, because of the fact that many times, and I have had many cases myself, whereby clients who I feel have justification in taking a case to the courts, because of the costs involved, just have felt that it doesn't pay to do so.

Now, I am not talking about an office audit or a field audit, where the Service institutes the audit and you accept it. I'm talking about the case where they make a claim, in one of the two cases, whereby the taxpayer feels that this type of thing is unjustified.

Senator DECONCINI. Excuse me. Correct me if I'm incorrect, does this occur after the audit is made and the Internal Revenue sets or submits the bill or what they feel is due and owing?

Mr. LYONS. Let's back up. There are two sets of audits and whether it's an office audit or a field audit they come in. The Government makes their examination and makes a determination. At that point, we have what is called an "appeal situation," whereby if the taxpayer and his accountant and/or lawyer do not agree with the findings, they can go before the supervisor or the appellate in Phoenix, which is just a conference situation. These situations I don't feel belong in this bill.

Senator DECONCINI. Yes. That's what I wanted to get to. Explain where you feel that the attorneys fees ought to be included.

Mr. LYONS. After the point where the appellate or the conferee disagrees or sets up a point whereby he feels that the field agents' recommendations are correct. You have the point there you can go to trial.

Senator DECONCINI. Either to the district or the Tax Court.

Mr. LYONS. The district court, yes. That's where I feel that these should be, because this is the point where many clients, we have found, just don't want to get involved with it because of the cost of paying the attorneys to go that far.

Senator DECONCINI. You don't have a difficult time necessarily getting consideration from the appeals procedure within the Service or in going to Phoenix. That isn't a big, long, drawn out thing? Can you get a conference on that?

Mr. LYONS. Conferences, I have had some that lasted as long as 2 years, and we are not even at the point where we want to get into—we haven't really settled the case really. We are still in the talking stage.

Senator DECONCINI. At least you can get a hearing and you can get a conference? Your point is after the conference.

Mr. LYONS. After these conferences, if we still don't agree, I think that the taxpayer should have the right to be able to feel they can go to the court. If he does win, that at least he can get his costs back. This is the point I'm trying to bring out. If he loses, he loses. I'm not trying to say—this is like any other case. If you go to court and you lose, you have to pay your own attorneys fees. But many times, we have found that cases we feel are strongly justified and the case is such that the dollars involved by the time you do hire an attorney and hire the accountant to go to the courts, it just doesn't pay.

Senator DECONCINI. I realize this is an unfair question from the standpoint of the complications and specifics of the case.

What has your practical experience been in a small business tax return, an individual, uncomplicated tax return. Is your client willing to go to court?

Mr. LYONS. No. They are not willing to.

Senator DECONCINI. Is there a dollar amount?

Mr. LYONS. The dollar amount, more than anything else.

Senator DECONCINI. Where does that usually fall off—\$2,000, \$3,000, \$5,000? Are they willing to pay the amount?

Mr. LYONS. They are willing to pay \$2,000, \$3,000, \$5,000.

Senator DECONCINI. Rather than go to court?

Mr. LYONS. Yes. That's right.

Senator DECONCINI. It has to be really substantial, what I would consider \$5,000 or more, before they want to take on the IRS?

Mr. LYONS. Even in those, they will sometimes. I just had one the other day that I settled, as an example, whereby the tax liability was in the neighborhood of \$15,000, and we felt we were justified and we could have won. But he said, "Look, I just don't want to spend the amount, because it's going to drag out over 2, 3 years, and it's going to cost me easily that or more between the attorneys fees and whatnot."

Senator DECONCINI. What about the argument that often comes back from the Internal Revenue, "Well, the reason people settle those is because they really think there is more we could find or we might find in court when you are under cross-examination."

How do you respond to that?

Mr. LYONS. I would say what happens in these cases you have already gotten the issues down to a point. I would think that, once you got the point in question, this is where you end up. Because on cases, what you do is, there are usually four or five points. You get down to two or three or four or five of them which you settle which there could be either way, because many cases in the law are just sort of black and white. You take your stand and they take their stand. You settle it at one point, where they agree on all four other ones, and this is the only issue left open. Therefore, if they continue this way, this is the one I am talking about, the issue that you haven't settled one way or the other.

Senator DECONCINI. This obviously gives the Internal Revenue Service a much more stronger position when they are in the conference with you, when they know that you and your clients are reluctant to go to court, either the Tax Court or the district court, when it's just a few thousand dollars. Is that correct?

Mr. LYONS. Yes. We've found this very true.

Senator DECONCINI. If they do and they might have to pay the attorneys fees, do you feel that they would be a little more realistic?

Mr. LYONS. I think they may be more realistic, yes.

Senator DECONCINI. Do you have anything further?

Mr. LYONS. That's about all.

Senator DECONCINI. Thank you very much. We appreciate your examples and your testimony. It was very helpful to the committee.

Next, we will have a panel, and we would ask that the panelists sit up here, and they can look down here. I prefer that.

The panelists are Ray Bailey, a businessman, Tucson, Ariz., representing the National Small Business Association. Mr. Bailey, come around and sit in any seat you want. You can be councilman or mayor, whatever you like. The other witness is Ed Bundrick from Coolidge. Mr. Bundrick, thank you for coming this morning. If you would sit up there; then Bill Lohmeier. Is Mr. Lohmeier in? No. OK. We're going to have a panel of two.

Proceed with any statements you have.

Mr. BAILEY. First, Senator, I have prepared a statement, but there has been some excellent talkers here today, and I am a reader. In deference to your time, however, I will hit some of the highlights here and leave the statement which will be in full.

Senator DECONCINI. We will put the statement in full in the record. Please proceed.

#### STATEMENT OF RAY BAILEY, BUSINESSMAN, TUCSON, ARIZ.

Mr. BAILEY. Thank you very much. The essence of what I have to say involves a personal case that will validate a lot of the things you are getting at here today. I want to thank you for inviting me to appear this morning before your committee.

[The prepared statement of Mr. Bailey follows:]

## PREPARED STATEMENT OF RAY BAILEY

Thank you for inviting me to appear this morning before your committee to testify.

My name is Ray Bailey, and I am chairman of several small businesses headquartered in Tucson which employ about 300 full and part-time employees.

I speak for myself as a small businessman with some 40 years' experience and for the National Small Business Association, of which I am a trustee and member of the executive committee.

We commend and applaud Senator DeConcini for cosponsoring with Senators Nelson and Domenici, S. 265, a bill to provide equal access to the courts for individuals and small business. I understand that under this bill the prevailing party in action initiated by an agency of the United States shall be reimbursed for court costs and expenses.

This bill would strike a timely blow for free enterprise in America. As you stated in your letter announcing this hearing, Senator: "Never before in our Nation's history has the American businessman been so victimized by the Government bureaucracy. For practically every aspect of business activity there is a Government agency churning out rules and regulations. Often these regulations are overlapping and costly. Sometimes they defy logic and the English language. But always the businessman is held accountable.

"Under these circumstances, it is not surprising for someone to find himself the subject of a Government sanction which he believes to be arbitrary or unfair. What is alarming, however, is that the massive disparities in resources between the Government and the small businessman make it more practical to knuckle under than to challenge the Government. The result is the perpetuation of unreasonable and arbitrary regulations.

"This is an intolerable state of affairs. We fought a revolution to rid ourselves of arbitrary Government. We established the principle that each citizen should be able to vindicate his or her rights in our courts.

"To insure the continued vitality of our democracy, we must provide individuals with the means to oppose arbitrary Government action."

Last March at a hearing before a similar committee which you chaired, Senator Nelson pointed out that: "Because of their lack of ability and resources to defend themselves, small businesses are favorite targets for the 82 regulatory agencies in Washington, who last year put out some 45,000 pages of regulations. This underscores the burden forced upon small businesses by Washington, and makes it more difficult for the small businessman and woman to compete with big businesses who can afford the best in full-time CPA's, attorneys, and lobbyists."

If these pages were put end to end, they'd stretch 37,500 miles from Tucson around the world 1½ times. Or to put it another way, if one started out merely to read these regulations it would take over 3 years working 24 hours a day around the clock. If it weren't tragic it might be termed ludicrous. But, believe me, there is nothing funny to the harassed citizen or businessman who is bearing the brunt of this paper blizzard.

Ironically the agencies themselves, the ones who publish and perpetrate this folly, frequently cannot interpret their own regulations. How often have we read about the case of a typical taxpayer who submitted his form to six different IRS offices and received, in turn, six different answers.

I believe that the average citizen and the average businessman strive to do the right thing. But, his role in dealing with most Government agencies frequently is one in which the agency regards him as an adversary to be conquered rather than a citizen to be helped. How ironical that the "servants" of the people have become their masters in a bureaucratic jungle where Government and laws are too often determined by fiat and decree of unelected representatives whose salaries are paid by the taxes of the citizens they choose to harass and to intimidate.

So, we can understand why we hail any effort on the part of Congress to regulate the regulators and to hold them responsible and accountable for actions that result in substantial legal fees and court costs to the maligned businessman.

Oh how many forms have I filed over the years which have required me to declare their truth under dire penalties of perjury and veiled threats of fines and penalties. How far, Mr. Senator, we've drifted from the dream and intent of our colonial fathers.

Let's face it. The bureaucracy has gotten out of hand and small business and citizens are fed up! It almost appears to the average citizen that Congress has

abdicated its responsibility and delegated its powers to the regulatory Frankenstein it has created. Yet time and again well-meaning Members of Congress have stated as Senator Nelson did during your hearings last year that: "As a former businessman, I pledge to allow the small businessman and woman to get back to running their business by completely reforming our Federal regulatory agencies, their reporting requirements and tax laws to get the Government off his back."

Yes, I repeat, let the bureaucrats get off our backs so we can all go to work building a better America.

Appearing before a House committee several years ago in Washington, I pointed out that about a third of my time as a businessman was consumed in completing, compiling, reading, and filing Government reports of one form or another.

The unfortunate part of all this is that most of these forms contributed not at all to the economy but tied me up and restricted my building a business that created jobs for people.

President Carter recognizes the problem. While still a candidate he told the National Small Business Association, and I quote in part: "Because of their lack of ability and resources to defend themselves, small businesses are favorite targets for the 82 regulatory agencies in Washington. This underscores the burden forced upon small businessmen and women to compete with big businesses who can afford the best in full-time CPA's, attorneys, and lobbyists.

"As a former businessman, I pledge to allow the small businessman and woman to get back to running their business by completely reforming our Federal regulatory agencies, their reporting requirements and tax laws to get the Government off his back."

In preparing for this hearing today, I read through a transcript of the meeting you chaired last year. Senator, you certainly reflect an understanding of the plight of small business.

Your bill, in our opinion, can be viewed as perhaps the most valuable first step toward restraining the arbitrary nature of those Federal regulatory agencies that file judicial complaints against small businesses and individuals simply because they realize that small business rarely can afford a legal fight.

Mr. Chairman, it is certainly not news to the citizens of this country that the Federal Government has proliferated its reach into many areas by promulgating rules and regulations at an alarming rate over the last several years. We do not deny the need for statutory protection of the health, safety and general well-being of all Americans. Indeed, Government guidelines in many product and service areas have proved to be desirable. However, the small businesses and individual proprietors in this country can unequivocally voice their vehement opposition to excessive regulations that, in essence, provide the ammunition for the guns of Government agencies that frequently make a target of small business.

It has been the finding of NSB that, in many cases, the regulatory agencies have sought rulings against small firms that just do not have adequate resources to fight back. This process not only establishes precedents for rulings against larger enterprises, but, as has been suggested, builds the "batting averages" of the agencies to justify not only their very existence but larger appropriations from Congress as well.

On several occasions more candid employees of regulatory agencies have publicly stated their agency's intent to single out or prosecute small companies, rather than take on the giant firms that have large legal staffs and that could adequately defend themselves against prosecution by the Government. When a House small business subcommittee held hearings in 1976 on Antitrust and the Robinson-Patman Act, Dr. F. M. Scherer, former Director of the Bureau of Economics of the FTC, said: "I have not fully realized until I came to Washington how unfairly the burden of Federal regulation and antitrust enforcement falls upon small business as compared to large companies. The corporate giants can and do maintain stables of highly skilled attorneys to advise them how to stay clear of the law and defend themselves if they nevertheless run afoul. Small firms are less able to afford such counsel, and the law firms they retain typically lack the specialized knowledge needed to cope with a body of statutory, case and regulatory law as complex as Robinson-Patman.

"As a result, they are more likely to get in trouble and to settle by consent if a complaint is brought \* \* \* I had also understood little about the value system of Government antitrust attorneys. What I have learned since joining the Commission staff is that many attorneys measure their own success in terms of the number of complaints brought and settlements won. In the absence of broader policy guidance, therefore, the typical attorney shies away from a complex, long, uncertain legal contest with well-represented giant corporations and tries to build

up a portfolio emphasizing small easy-to-win cases. The net result of these broad propensities is that it is the little guys, not the giants that dominate our manufacturing and trade industries, who typically get sued."

Dr. Scherer's statement points directly to our concern with the "equal access" concept being addressed here today. Small manufacturers and distributors are not a General Motors or IBM with corporate legal teams and the financial resources to back those legal disputes that can tie up the courts for years.

A decision by an official of a regulatory agency, right or wrong, has caused more than just a handful of companies to become bankrupt or go out of business, as evidenced by testimony presented at the meeting you chaired last year. Moreover, even if the regulatory agency ruling has been proved wrong, a bankrupt company cannot afford the costs of suing the Government or righting the case through the appellate procedures. The Government has many lawyers who can make a career of one case. An already-exhausted business has no alternative but to throw in the towel and quit, that's why, we heartily endorse your efforts in cosponsoring this landmark legislation.

The Small Business Legislative Council, which is affiliated with NSB, also applauds and supports this bill.

If Government agencies are held responsible for their actions, it will cause irresponsible and over-zealous Federal employees to think twice before they bring action against a citizen or small businessman.

I am here today because, like thousands of others, I have tangled with a Government agency in a civil case over the status of the independent agents who represented our company.

In my case, the IRS went against a ruling they had made when I acquired the business from the previous owners.

The harassment and litigation continued for almost 5 years, cost my company about \$75,000 in legal fees (3 years' earnings) and eventually was responsible for my first heart attack. In the process, they seized our bank account to prevent our moving the case out of the kangaroo tax courts into the Justice Department. Meanwhile, I resolutely strove to keep my company solvent.

In the end we surrendered because it was suggested that even if we won the case the Government would appeal and that means another \$50,000 and 2 to 3 years of litigation. They were making cases to fight the critical area of self-employed and independent agents, and my company was one of the unfortunate "easy" targets they picked to browbeat into submission.

My attorneys urged me to accept a "settlement," which I did, rather than declare eventual bankruptcy.

It is germane to note that these years of litigation prevented my building my business so the hidden costs of the case ran into hundreds of thousands of dollars.

Who won? Outside of the attorneys, no one. Not even the Government. It was a pyrrhic victory \* \* \* no one won, not even the employees involved, but another coffin nail was driven into our free enterprise system. How many "victories" like this can we afford in America?

Senator, your bill is a step in long overdue reform and relief needed for small business \* \* \* to enable us to cope with a fiercely competitive economic society.

It is simple. Easy to understand. It lets the bureaucracy know it can no longer kick small businesses around and get away with it.

When agencies are required to pay for their own mistakes, when the funds come out of their own budgets, they will be forced to be more responsible. As a further salutary effect, it will probably reduce the litigations clogging up our courts.

In closing, Mr. Chairman, we emphasize that NSB firmly believes that the proliferation of agency rules and regulations within the last 15 years has resulted in an administrative and bureaucratic denial of justice to those individuals and small businesses that are unable to bear the financial burden of defending themselves in a court of law against the awesome power of the Federal Government. Our judicial system based on equal justice under law, must be open to every citizen of this country, not just to those able to afford the burgeoning cost of legal defense. We also urge careful consideration of initiating the "equal access" concept as a viable means to suppress the regulatory overkill that is threatening the very survival of the small business community.

Frustration with Government intervention and regulation is becoming increasingly widespread and counter productive—especially for those forced to bear the burden of the cost of compliance with those regulations, and then are often unjustly accused of failure to comply. This is not what has built the greatness of America, It is destroying it.

We reaffirm our enthusiastic support for "equal access," and thank you for the opportunity to submit this statement.

Mr. BAILEY [continuing]. My name is Ray Bailey, and I am chairman of several small businesses headquartered in Tucson which employ about 300 full-time and part-time employees.

I speak for myself as a small businessman with some 40 years' experience and for the National Small Business Association of which I am a trustee and member of the executive committee.

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What is alarming, however—and I continue your quote—

is that the massive disparities and resources between the Government and the small businessman make it more practical to knuckle down under rather than to challenge the Government. The result is the perpetuation of unreasonable and arbitrary regulations.

This is an intolerable state of affairs. We fought a revolution to rid ourselves of arbitrary Government. We established the principle that each citizen should be able to vindicate his or her rights in our courts.

Now, last March at a hearing before a similar committee which you chaired, Senator Nelson pointed out that: "Because of their lack of ability and resources to defend themselves, small businesses are favorite targets for the 82 regulatory agencies in Washington who last year put out some 45,000 pages of regulations."

Now, I had some fun with these figures. I found out that, if these pages were laid end to end, they stretch 37,500 miles from Tucson around the world one and a half times. Or to put it another way, if one started out merely to read these regulations, it would take over 3 years, working 24 hours a day around the clock. If it weren't tragic, it might be termed ludicrous, but believe me, there is nothing funny to the harassed citizen or businessman bearing the brunt of this paper blizzard.

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Yes; I repeat, let the bureaucrats get off our backs so we can all go back to work building a better America.

Appearing before a House committee several years ago in Washington, I pointed out that about a third of my time as a businessman was consumed in completing, compiling, reading, and filling Government reports of one form or another.

The unfortunate part of all of this is that most of these forms contributed not at all to the economy, but tied me up and restricted my building a business that created jobs for people.

President Carter recognizes the problem. While still a candidate, he told us at the National Small Business Association, and I quote in part: "Because of their lack of ability and resources to defend themselves, small businesses are favorite targets for the 82 regulatory agencies."

Then he goes on to say that: "As a former businessman, I pledge to allow the small businessman and women to get back to running their business by limiting the regulatory agencies and the reporting requirements and tax laws, and to get the Government off his back."

So the President is saying the same thing as Senator Nelson, and you, too, Senator, have said in the past.

In preparing for this hearing today, I read through a transcript of the meeting you chaired last year. Senator, you certainly reflect an understanding of the plight of small business, and we are grateful.

Your bill, in our opinion, can be viewed as perhaps the most valuable first step toward restraining the arbitrary nature of these Federal regulatory agencies that file judicial complaints against small businesses and individuals simply because they realize that small business rarely can afford a legal fight.

It has been the finding of NSB that in many cases the regulatory agencies have sought rulings against small firms that just do not have adequate resources to fight back. This process not only establishes precedents for rulings against larger enterprises, but as has been suggested, it builds the "batting averages" of the agencies to justify not only their very existence but larger appropriations from Congress as well.

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As a result, they are more likely to get in trouble and to settle by consent if a complaint is brought.

What I have learned since joining the commission staff is that many attorneys measure their own success in terms of the number of complaints brought and settlements won.

He concludes:

Therefore, the typical attorney shies away from a complex, long, uncertain legal contest with well-represented giant corporations and tries to build a portfolio emphasizing small, easy-to-win cases. The net result of these broad propensities is that it is the little guys, not the giant that dominate our manufacturing and trade industries, who typically get sued.

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Moreover, even if the regulatory agency ruling has been proved wrong, a bankrupt company cannot afford the costs of suing the Government or righting the case through the appellate procedures.

The Government has many lawyers who can make a career of one case. An already exhausted business has no alternative but to throw in the towel and quit.

That's why again we heartily endorse your efforts in cosponsoring this, what we term "landmark" legislation, in the free enterprise system. The Small Business Legislative Council, which is affiliated with NSB and represents over 80 national associations, and 4 million members, also applauds and joins with us in support of your bill.

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I am here today because, like thousands of others, I have tangled with a Government agency in a civil case, a fact case, over the status of the independent agents who represented our company.

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my first heart attack. In the process, they seized our bank account to prevent our moving the case out of the kangaroo Tax Courts into the Justice Department. Meanwhile, I resolutely strove to keep my company solvent and afloat, but in the end we surrendered, because it was suggested that, even if we won the case, the Government would appeal and that meant perhaps another \$50,000 and 2 to 3 years of litigation.

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When agencies are required to pay for their own mistakes, just as business does; when the funds come out of their own budgets, they will be forced to be more responsive and responsible. As a further salutary effect, it will probably reduce the litigation clogging up our courts.

In closing, we emphasize that NSB firmly believes that the proliferation of agency rules and regulations within the last 15 years has resulted in an administrative and bureaucratic denial of justice to those individuals and small businesses that are unable to bear the financial burden of defending themselves in court. We urge careful consideration—excuse me—I'll skip that. It's in the formal statement I am presenting today.

But the frustration with Government regulations and intervention and regulation is becoming increasingly widespread and counter-productive especially for those forced to bear the burden of the cost of compliance with those regulations and then are often unjustly accused of failure to comply. This is not what has built the greatness of America, but it is what will destroy it if it continues.

We reaffirm our enthusiastic support for equal access, and thank you again for the opportunity to submit this statement.

Senator DECONCINI. We'll take just a moment for the reporter. In the meantime, has Mr. Lohmeier come in? Please come up and join us on the panel.

Mr. Lohmeier, thank you for coming down today. Sit anywhere you like. We'll have some questions later.

Mr. Bundrick, do you have any statement you wish to make?

**STATEMENT OF ED BUNDRICK, RANCHER, COOLIDGE, ARIZ.**

Mr. BUNDRICK. I appreciate the privilege of being here to present this testimony. I have called it the need for Equal Access to Justice Act. It is a situation that happened to my family and myself. I have this material in a booklet, I am, however, going to make a brief statement.

[See appendix for material mentioned above.]

The material presented in this folder is a brief representation of facts and adverse procedure of the Government bureaucracy—a matter of the Government taking away our land, our business, 30 years of hard work, and my mother's home, all in 1969 and assigning the Bureau of Indian Affairs in 1975 to purchase it. This issue is still unsettled.

I deem it necessary to present letters and documents to substantiate my testimony. However, it is not an intent of defamation to anyone whose name may appear in this presentation.

The issues holding back any settlements derive from Public Law 93-530, 88 Stat., 1711. I have it included in the booklet.

The first issue in the paragraph, states: Acquire through purchase as of January 24, 1969, all privately owned real property. The BIA claims this means pay what the property was worth in 1969.

The second issue: For the reasonable value of such improvements—as determined by the secretary—their interpretation of this is whatever their appraisers deem it.

I have one appraisal book. That's all I have in possession for an example to present to the Senate.

The third issue is: In no event shall any person receive total compensation under this act in excess of \$300,000. The BIA claims this means \$300,000 per ranch, not per person, no matter how many persons are involved in the ownership of the ranch.

The fourth is: There are authorized to be appropriated for the purpose of this act not to exceed \$3 million. It appears now that there is not enough money to cover reasonable value of properties and deeded land involved, so they are at a dead end anyway, and this is where we stand at this point.

Senator DECONCINI. Thank you, Mr. Bundrick. I'd like to ask some questions about this.

Before I do that, let me ask Mr. Lohmeier if he has any opening statement.

**STATEMENT OF BILL LOHMEIER, BUSINESSMAN, TUCSON, ARIZ.**

Mr. LOHMEIER. My reason for coming was a letter which I received yesterday.

Senator DECONCINI. I'm sorry about that.

Mr. LOHMEIER. That's all right. On the same day I got a March 20, third-class mail from Chicago. I'm sorry I couldn't have had more notice so that I could be more prepared.

Basically, we have just had a set-to with the Department of Labor.

We had applied in 1977, after reading in the newspaper that our establishments would be counted together in volume to determine requirements for employing students with a certification from the Labor Department as 85 percent of minimum wage.

We had at that time what I considered an overabundance of students, because we had been approached by DECA teachers, and we had lengthened our hours to accommodate the DECA program and employ these young people.

We had received our application back from the San Francisco regional office, I presume of the Labor Department, red lined and underlined and circled. We resubmitted it. It came back red lined, underlined and circled. We resubmitted it a third time. We didn't get it back. We got a phone call. My office manager at the time had the phone call from someone in San Francisco. She was either disconnected or hung up on. We never got the application back. We never got a certificate. We presumed that not hearing from them was good news, and we went on paying 85 percent of minimum wage.

In 1978, about June, a representative of the Labor Department came and advised us that we had no certificate and we were in violation. I think the Senator's office had correspondence on that.

Anyway, the result of the thing was either, "Pay up or else. You have violated something. The fact that you applied in January of 1977, we haven't accepted or passed your application." We refused.

We were served with a summons in district court or Federal district court. We retained counsel, and we were advised that it would cost more than what the Labor Department said we owe to fight them, and we would have no recourse to recover that.

Naturally, discretion being the better part of valor in this case, we have agreed to accept a settlement, a stipulated settlement, in the Federal court, because we were not—

Senator DECONCINI. How much was involved?

Mr. LOHMEIER. It was \$1,700 over 2 years.

Senator DECONCINI. Your attorneys indicated it would cost you substantially more than that?

Mr. LOHMEIER. It would cost substantially more than that, yes, and we would have no—

Senator DECONCINI. Did your lawyer advise you that you had a good chance of winning the case?

Mr. LOHMEIER. Yes.

Senator DECONCINI. So even though you could have succeeded on the merits of the law, you had to make a judgment that it wasn't worth the success, because of the financial cost?

Mr. LOHMEIER. We couldn't afford the success of beating them. Previously, we spent 6 years with IRS trying to keep them from getting back some money they refunded us. I didn't want to go through that again.

Senator DECONCINI. Thank you very much. That's the kind of examples I know are there, because I've been in small business myself in the past.

I wanted to hear from somebody else.

Mr. Bundrick, your case is of interest. What kind of costs have you incurred so far to defend yourself from the implementation of 93-530?

Mr. BUNDRICK. The ranchers—back in the start of this, there were 26 ranches in the start of this. The ranch was assessed 5 cents a head in the period of time it took from 1969 until we could get a law passed through Congress, this one law they have here. Now, they are changing it. But they were assessed, we all were assessed, a percentage of head

of cattle per rancher to try to keep it even for the little ranchers and the bigger larger ones.

This amounted to, I believe, a matter of around \$13,000, something of this nature. This has all fallen by the wayside.

Senator DECONCINI. That's all been spent, you mean,

Mr. BUNDRICK. Right. After the law was passed, then everyone felt this was fine, so at this time now, I'm hiring my own personal attorney, because I cannot stand before the BIA when he says: "My solicitor says this." I cannot deny that. I have no way. I have to have an attorney.

Senator DECONCINI. So you paid your proportional share of the \$13,000; and in addition, you have employed your own attorney? Do you mind advising the committee just roughly what kind of money you have had to spend out of your own pocket in addition to the proportionate share of the \$13,000.

Are we talking about a couple of hundred dollars, a couple of thousand dollars?

Mr. BUNDRICK. Well, I spent probably between \$2,000 and \$3,000 of my own money plus the fact the attorney has already warned me he is going to take a 10-percent cut. Then he also advised, if I want to go through the Federal courts, he has an attorney who will do this for a 30-percent cut.

Senator DECONCINI. So the costs you have incurred so far are only to handle the problem within the agency?

Mr. BUNDRICK. Correct.

Senator DECONCINI. This is through the administrative process. It doesn't even start about going to court?

Mr. BUNDRICK. That's right.

Senator DECONCINI. You are already many thousands of dollars into it?

Mr. BUNDRICK. If we stay out of court.

Senator DECONCINI. If you stay out of court, yes. If you proceed and go to court, even if you win, you are not going to get a fair market price for your land by the time you get through with your costs. It's going to be substantially less?

Mr. BUNDRICK. That's right. It would be a 30-percent basis to the attorney that took it and 25 percent to Internal Revenue. What's going to be left?

Senator DECONCINI. This law that you talk about obviously does not provide for costs of litigation or appeal?

Mr. BUNDRICK. That's right.

Senator DECONCINI. It's up to you and the other small ranchers?

Mr. BUNDRICK. I wholeheartedly feel that, had this law been in effect back at the time we started, we would have been settled and out in 1972.

Senator DECONCINI. Mr. Bailey, going to some of your testimony, you mentioned and made slight reference to an IRS case you are involved in. This particular bill does not have the IRS in it, but the door is not closed. It was just decided to get the bill in without IRS, and we'll get some hearings on it. The committee certainly had indications at first that they would include the IRS. What are your observations of this?

Is that where the biggest problem is in small business?

Mr. BAILEY. My personal problem is that they should be included, especially in a fact case. In our particular case, it was just a fact case. It wasn't a criminal case. It was their opinion versus my opinion or our opinion. We bought a business that had been operating on a certain basis. That is, the people, most of the people working were independent agents and self-employed. When our attorneys here set up our corporation, they even checked with the IRS, and at the time, the IRS saw no reason why we shouldn't continue that way. But 3 years later, we had this devastating—

Senator DECONCINI. Is this the independent contractor rule of IRS?

Mr. BAILEY. I beg your pardon?

Senator DECONCINI. Is this what is known as the independent contract rule of IRS?

Mr. BAILEY. Yes; and incidentally, Senator, we were told at the time—I wasn't, but our attorneys were told that the Government was making a determined effort to remove as many independent agents from that category onto someone's payroll one way or another and that they were building cases against small business, people like ourselves.

At that time, my total sales were only \$600,000 a year.

Senator DECONCINI. That included the agents that worked for you, of course?

Mr. BAILEY. Yes. So one of the things that they did, and they had no right to do, is that Congress years ago gave them the right of jeopardy assessment, which is a good right—I mean, a good weapon to use in the case of presenting people like Vesco or whatever his name is, who fled the Country. But in a fact case, they do not have that right. Yet they seized our bank account while we were trying to get out of the Tax Courts into the Justice Department courts, so I feel that the IRS would be more responsible as far as their overzealous employees in cases like this.

Senator DECONCINI. Were you here when Professor Woods testified?

Mr. BAILEY. Yes.

Senator DECONCINI. No; I mean, Mr. Lyons, the accountant. He indicated that he thought if the IRS was included, that the proper place is after you have had the conference with the IRS when you have determined that you are not able to resolve it, so then your recourse is going to the Tax Court or the district court. Would you conclude that that is a fair place to impose this legislation as it related to IRS or should you do it sooner, when the first auditor comes in?

Mr. BAILEY. I'm not sure. I'm not sure. Again, I'm dealing with a fact case, and in our case, we could not remove—as I recall it, we could not move the case out of the tax courts and to the Justice Department until we first paid the assessment, which by that time, was some astronomical figure, and it had no bearing whatsoever.

Senator DECONCINI. I think that is correct. If you want to go to the district court, you have to pay the tax. I believe that's true.

What I am talking about is how soon should we impose this rule; where should the starting point be? Should it be—with the Internal Revenue now—in your judgment, should it be when they come in and they want to audit your books and so you have to hire an accountant or lawyer or one of your bookkeepers or even yourself to sit down with them, to go over those books, and they say: We're sorry. These are

not going to be accepted as deductions, or this is not going to be accepted as a business expense, so you are going to have to pay an increased tax and an interest penalty, and you say: No. I want to go talk to your supervisor. You go up to Phoenix. You hire your lawyer or accountant to go up with you. You can't settle it. Then you are posed with the question: Do I pay it or do I go and try to win my case in court?

Do you have any opinion on where in this process the cost reimbursement to you should begin, assuming you can win your case?

Mr. BAILEY. It might be at that conference. I don't know. I'd like to feel that you could sit down, all of us as Americans can sit down someday with the IRS people and others and that we could develop a relationship that we are all people in the same country working for the same common good, instead of the fact that they assume in many of the cases that you are guilty and you're trying to get away with something. That isn't the fact.

Senator DECONCINI. Let me ask you a personal question.

From your standpoint, working with the IRS, did you find them to be responsive or were they pretty arrogant and arbitrary?

Mr. BAILEY. Those are two good words you use. [Laughter.]

Senator DECONCINI. I understand what you are telling me.

Mr. BAILEY. If I could think of any stronger ones, I would, because they were very arbitrary.

Senator DECONCINI. This bill, if it were enacted into law, in your judgment, certainly would modify that attitude, would it not?

Mr. BAILEY. I think it would slow them up. If I make mistakes in business, and anyone in business will tell you this, we pay for it. We do make mistakes and so do they, but we pay for their mistakes, and that's wrong.

Senator DECONCINI. Mr. Lohmeier, have you had problems with the Internal Revenue?

Mr. LOHMEIER. Right. All I had, I didn't hire an attorney, but we had a lot of time with accountants trying to get them to look at the facts, and if it was early on, it would maybe prevent them from taking a position of, "We don't care about the facts. You are going to do it or else."

I think that if we had some early recourse that it would help us.

Senator DECONCINI. So when they came in and asked for an audit and you had to hire an accountant to explain your books and your procedures to them, if they knew that they would have to pay for that if they did not succeed in their potential litigation, that's where you think the fee assessment should begin.

Mr. LOHMEIER. That's right. Following a preliminary audit, I don't think you should go on and on with these people and bring accountants in at your expense to try to convince them of something they should be able to see at a preliminary audit.

Senator DECONCINI. Following that line, isn't the small businessman going to be subjected to the problem that the Internal Revenue agents or any other agents may say: Look, we have already made a preliminary audit. We are already on the hook to pay this guy's accountant. We might as well be as recalcitrant as we can and just refuse to do anything and go on to court. Maybe we'll win.

Mr. LOHMEIER. Well, I think that, hopefully, this bill wouldn't just allow them to keep running up expenses at the taxpayer's expense. We've got too much of that now.

Senator DECONCINI. Sooner or later, it's going to come home to roost, if they are not indeed harassing them in bringing frivolous cases or not willing to address the facts. Of course, that's why we have the sunset clause in there, so Congress will be forced to assess it in 3 years to see whether or not it has hampered Government from enforcing even good regulations or whether or not they have been responsive and responsible.

Mr. Bundrick, in your set of circumstances, have you had other unfavorable relations with other governmental agencies, the BLM or the Forest Service, that have cost you money from the standpoint of having to hire professional assistance?

Mr. BUNDRICK. Not in the sense of costing money. I have had one. See, I have another business besides this cattle ranch. Well, I don't have the cattle ranch any more. I have a plumbing, heating, and air-conditioning business also, contracting business. Of course, I have had these little deals that I won't hire attorneys. No, you just pay it and forget it, to get out of the way.

Senator DECONCINI. As Mr. Bailey points out "to get Government off their backs," I'm always amazed how strong and vibrant the small businessman is, how they can some way withstand it. I attribute that to the tenacity of the small business people in this country and the free enterprise system.

I want to thank you, Mr. Bailey, and the National Small Business Association for your involvement. I know of your work, not only here today, but other testimony and reports from your association that we have seen.

Mr. Bundrick, thank you for coming from Coolidge to give us the firsthand experience and the information you have. We will accept it and put it in the record. It will be helpful to the members of the committee, and it will be very convincing when we attempt to move this bill through the committee and on through the floor of the Senate. We will be able to point out specific problems and research them, and that's why we are most indebted to you to be willing to bring this forward.

The same to you, Mr. Bailey and Mr. Lohmeier. We appreciate immensely your time, and I can assure you this bill is going to have the priority of this Senator, as well as several others on the Judiciary Committee.

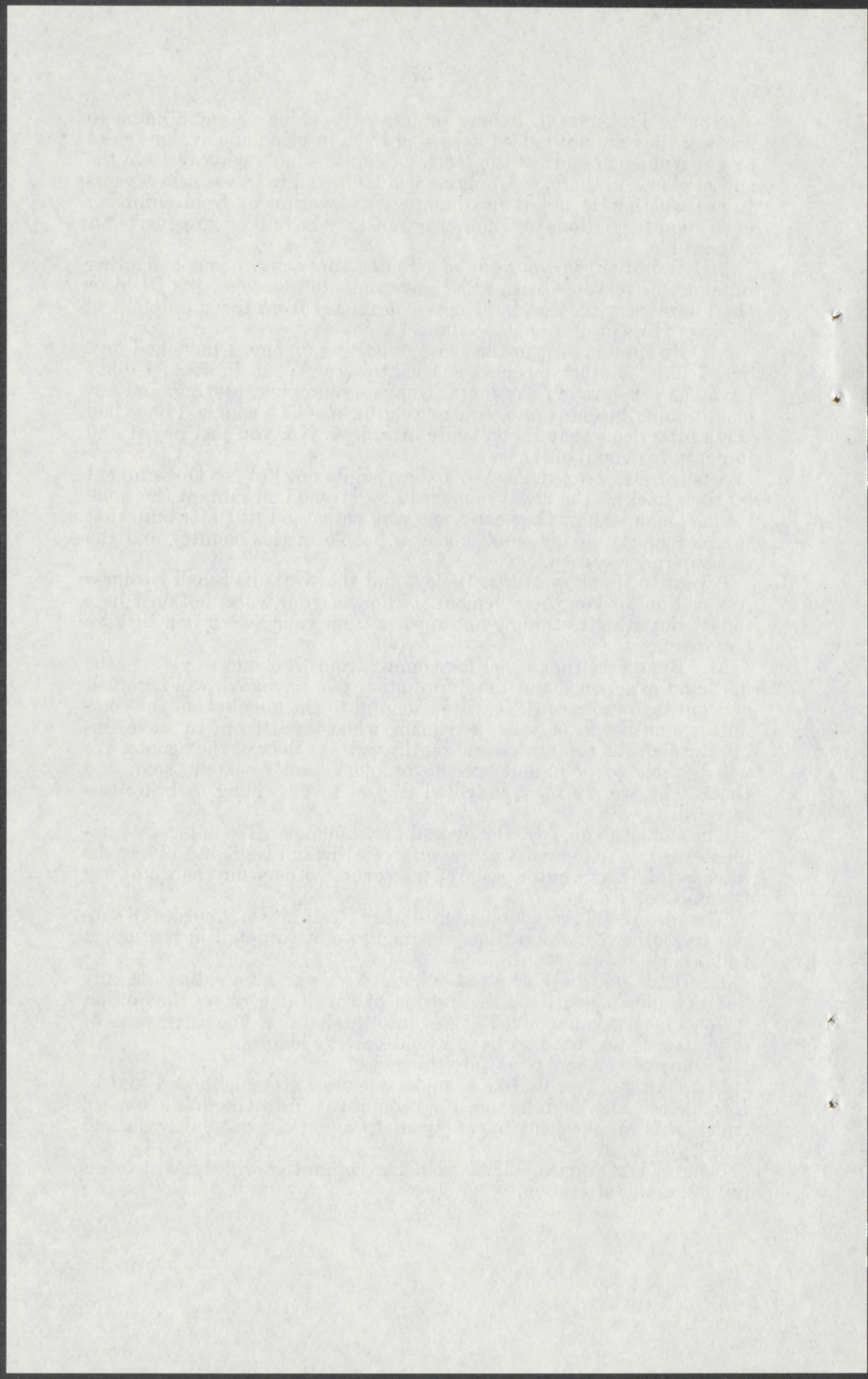
The record will remain open until May 10. If any of you care to submit any other examples that you might want to detail in writing, it will become public record.

Everyone will be able to see them. You won't be subject to any liability unless you defame someone or something along that order, which I'm sure you won't. But any information that you can give us or other associates that you have would be very helpful.

Do any of you care to say anything else?

Mr. BAILEY. Yes. I'd like to make one more statement, and that is, I think the idea of bringing a subcommittee into the grass roots of America is an excellent one. I want to again congratulate you and thank you for it.

Senator DECONCINI. Thank you. The committee will stand at recess until 2:30 this afternoon.



# EQUAL ACCESS TO JUSTICE ACT OF 1979, S. 265

FRIDAY, APRIL 20, 1979

U.S. SENATE,  
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:45 am., in the hearing room, Maricopa County Board of Supervisors, Phoenix, Ariz. Hon. Dennis DeConcini (chairman of the subcommittee) presiding.

Also present: Romano Romani, staff director; Pamela Eldred, counsel; Sally Rogers, legislative assistant to Senator Thurmond.

Senator DeCONCINI. The Subcommittee on Improvements in Judicial Machinery will come to order. It's a pleasure to be here in Phoenix to hold our second set of hearings on S. 265, a bill pending before the Senate Subcommittee on Improvements in Judicial Machinery, which I do chair.

## OPENING STATEMENT OF SENATOR DeCONCINI

S. 265, which is titled the Equal Access to Justice Act, represents a vital weapon in our struggle to tame Government regulations, and I hope it will mark a new era in the development of a responsive and responsible bureaucracy.

Under the bill, if a citizen prevails in a civil action or agency proceeding brought by or against the U.S. Government, he or she would be able to recover attorneys fees from the Government unless the Government can show that its actions were substantially justified. The fee award will come directly from the operating budget of the offending agency. The purpose of the bill is twofold.

First, it is intended to provide citizens with effective legal and administrative remedies where none now exist. It is clear that in many situations under the present law, citizens do not have viable remedies. It simply costs too much to resort to agencies or court proceedings to vindicate your particular rights. Under these circumstances, the only realistic alternative left is to capitulate to the Government, even when you believe the Government is wrong, unreasonable, or irresponsible.

This bill is intended to overcome these financial obstacles and thus to provide citizens and small businesses with an opportunity to stand up for their rights. It would, I hope, at least make a fair fight by increasing citizens' access. In this way, the bill will achieve a second purpose: to make the bureaucracy more accountable in the exercise of the regulatory powers and more responsive to its citizens' needs.

As I mentioned, the fee awards will be taken from the budget of the agency involved. The bill thus recognizes that the most persuasive way to make an agency assume a more responsible posture is to affect its pocketbook.

Agencies which are paying awards under this bill will have good cause to valueate their rules, their procedures, and their staffs. Even more importantly, the award will provide an objective gauge of whether or not an agency is engaging in excessive, unreasonable regulations and will also allow Congress to carefully scrutinize that agency's budget request each year.

We are not seeking to dismantle the Government's authority to regulate, nor are we seeking to provide an opportunity for General Motors or Exxon to challenge the Government on every single regulation. What we are seeking is more responsibility on the part of the Government in enforcing its rules and a fair shake for the corner grocery store and the husband-and-wife shoe repair shop. I hope these hearings in Arizona will help the Congress to pass an effective piece of legislation.

Again, I want to welcome all of you and particularly thank the witnesses who will appear here today, some of them coming from Washington and other places. I would also want to pay particular thanks to Pam Eldred of the Judiciary Committee staff and Romano Romani, the director of the subcommittee.

Our first witness will be Robert Robb, representing the Arizona Chamber of Commerce, and Perry Shilling, representing the Independent Business Committee of the Phoenix Chamber of Commerce.

Gentlemen, welcome, and thank you for being here with us today. If you have a prepared text, we will put it fully in the record and you may highlight it. If you do not, you can just proceed as you please.

Please speak directly into the microphone.

#### **STATEMENT OF ROBERT ROBB, ARIZONA CHAMBER OF COMMERCE**

Mr. ROBB. Thank you, Mr. Chairman. I am Robert Robb, director of government affairs and publications for the Arizona Chamber of Commerce.

We fully are in support of S. 265. Unfortunately, Mr. Chairman, these hearings occur toward the end of the State legislative session here. Unfortunately, we are unable to give the bill as much careful attention as it merits.

With the chairman's permission, we will file more extensive written comments at a later date.

Senator DECONCINI. We will be very pleased to have it. The record will remain open until May 10 for these hearings. We will look forward to receiving those comments. We understand your plight with the legislature trying to get out tonight.

Mr. ROBB. Hopefully, they won't get out without doing some things we'd like them to do.

Senator DECONCINI. I'm sure.

Mr. ROBB. Mr. Chairman, I do have some very general comments and some concerns to express despite our support.

One of the most encouraging developments for the business community in recent years has been the increased concern by Congress for the plight of the small business community. This concern has been manifested in many ways, not the least of which is this particular bill to allow small businessmen to be better able to protest and fight

what they consider to be unreasonable or wrong actions by the Government.

It is a concern that the Congress properly has. The small business community is playing an increasingly declining role in our economic mix. It is receiving less and less venture capital as a percentage of the total venture capital available. More and more, small businessmen are going out of business at an alarming rate. Small business bankruptcies have become a national concern.

The plight of small business has been caused by many many things, not the least of which—a very important factor—has been the growth in recent years of both regulation and regulatory agencies.

This bill would seek to alleviate at least one of the problems that small business faces by providing that if the small business was brought into court or into an agency adjudication and if the actions of the Government were not substantially justified, the small business could recover its costs of protesting the action.

We are fully in support of this concept, but do have two basic concerns about the bill as it presently exists.

This bill is different than last year's bill in that the award of attorneys fees and court costs, if the private party prevails, is not mandatory.

We understand, due to the testimony last year about the costs involved, that there was concern for the taxpayers with the effect of this bill.

However, we think that, if the testimony shows that the cost of making these awards mandatory would be beyond the ability of taxpayers to bear, it is more reason to make them mandatory, not less. It indicates that, on too many occasions, Government is proceeding with wrongful actions against private parties. We believe a larger principle is involved here than simply allowing small businessmen to go into court.

It's the principle that, if a private party, regardless of whether an individual or a business, is required to expend money due to Government actions and prevails, the private party ought not to have to pay for it.

If the public wrongfully moves against somebody, the public ought to pay for the individual's costs. We also have some questions about the way the discretionary provisions apply. We are doubtful or at least we are apprehensive about the willingness of an agency to determine that its own actions were not substantially justified. We are also concerned that the courts are only able to change the agency's decision if they determine that there has been an abuse of discretion.

We believe that even if the governmental action was substantially justified but was wrong and an individual was made to pay for it, that individual should be made whole.

Our other concern, Mr. Chairman, even though we share the plight of small business, is the fact that this bill is limited to small business and to individuals—although the limit on that indicates that some individuals of some wealth could still have the remedies provided for in this bill. As to business, however, it is seriously limited to small business.

We see this particular bill in this limitation as part of a pattern which exists. Without question, the small businessman is less capable

of dealing with the regulations which are imposed. He operates with less resources, so he is less capable of moving his resources around in response to governmental demands. He also operates on a smaller margin generally, so he is less capable of affording the cost of increased regulations.

The concern of Congress for this situation is very justified. However, we don't believe that the answer to unreasonable regulation is to exempt some part of the business community from it. The answer to unreasonable regulation is to repeal unreasonable regulation and not impose it in the first instance.

We are concerned, because we do see this as part of a pattern. Out of the White House Conference, the regional conference in preparation for the White House Conference on Small Business that occurred in Denver recently, there was a proposal that had some considerable support that there be a multitiered regulatory process, that small business would be subject to one set of regulations and big business to another set of regulations.

The President's recent Regulatory Reform Act incorporates this concept to a certain extent. We believe that the market should determine the extent to which small and big business prevails. There is a role for both to play, and it shouldn't be the interest of the Government to interfere with what the market dictates the economies of scale will be. We would prefer, Mr. Chairman, that this bill be expanded to all people and all businesses who are required to expend their resources or the resources of their stockholders to protest or fight wrong governmental actions.

We, Mr. Chairman, would very much support the bill as introduced, and we agree with the sunset provision in it which says this is part of an experiment. Perhaps at some point, the experiment can be expanded to include a mandatory provision and also provide that anyone who is wronged by Government action will be able to be made whole. But without question, even without those changes which we would prefer, the Arizona Chamber of Commerce and its small business council are fully in support of S. 265.

Senator DeCONCINI. Thank you, Mr. Robb.

#### **STATEMENT OF PERRY SHILLING, INDEPENDENT BUSINESS COMMITTEE, PHOENIX CHAMBER OF COMMERCE**

Mr. SHILLING. I am Perry Shilling, representing the Independent Business Committee of the Phoenix Metropolitan Chamber of Commerce.

We strongly are in favor of the bill and highly recommend passage of the bill. We too have some concerns, as Bob expressed. One of my concerns is that the small businessman is going to be convinced by some shrewd attorney that he has a very legitimate claim. He is going to proceed with an action, and he is going to be left holding the bag, because I don't think it's definite that he is going to get damages from it.

I do feel we are not going to have a rash of lawsuits. I think we are going to see that your governmental officials are really going to review their decisions, their actions, and perhaps stop some abuse going on in small business. As an independent business committee, we strongly recommend passage of the bill. Thank you.

Senator DECONCINI. Gentlemen, thank you. You raise a very good point about the agencies' reviewing their own cases and then making a determination that their agency is wrong, even though it may be an administrative law judge within the agency and then of course having to assess the attorneys fees if they find a substantially unjustified action.

It's been brought to my attention, as you have brought it here. I'm struggling to find some solution to that. The bill does provide of course that you can appeal that decision, but then you have to go to the district court and you are caught up with more attorneys fees and more time.

Do you have any suggestions or any thoughts on how you get somebody independent without creating another bureaucracy to oversee that this judgment of the agency's administrative court is minimal as far as bias is concerned in awarding attorneys fees once they find there is a wrong on the part of the Government.

One thing has come to my mind, before you answer that, is to maybe consider some mandatory minimum when you are dealing with an agency that's going to do it themselves and not any mandatory minimum, when you are talking about the court doing it, because they are independent, so to speak. Do you have any comment?

Mr. ROBB. Mr. Chairman, I would. I suspect that if the decision is made to provide these fees as penalties for unreasonable action or where the action is not substantially justified, you have no choice but to allow the agency to make its own decision. Creating any kind of administrative overview within the Government itself would, as you indicate, impose a bureaucrat, another bureaucracy, which would probably highlight the problem. Unless you go to a mandatory provision, as we suggest, I suspect that at the agency level, for reasons of economy, you are stuck allowing the agency to make its own determination.

One solution, however, would be to allow the courts on appeal to change the agency decision simply if they felt it was wrong rather than only change it if they felt there was an abuse of discretion.

That would provide an appeal where you could simply say that the agency had made a wrong decision rather than that the agency abused its discretion.

Senator DECONCINI. It's a good suggestion. We'll consider that.

You also mentioned the criteria that's set in the bill for who would qualify. As you no doubt know, it indicates \$1 million for any individual and also \$5 million of corporate net assets. We took that from what we believed to be the interpretation of or definition of small business.

I agree with you that it would be better not to have frivolous decisions by regulatory agencies and unreasonable decisions, whether it applies to Exxon or to the neighborhood grocery store or the tire shop. However, we are interested in primarily doing something for the small businessman that can't afford it. Not that the big businessman or big business corporation who can afford it should be subject to abusive regulations, because they should not.

You raised some question, Mr. Robb, about this criteria, whether or not it applies to people other than small business.

We believe the bill is explicit that anyone with net assets less than \$1 million, which is a fairly wealthy person in today's standards, I

think, would have an opportunity to avail themselves if they could prove their case.

Do you think we should consider raising those?

Mr. ROBB. Mr. Chairman, I think you should consider abolishing those.

Senator DECONCINI. Not having any?

Mr. ROBB. Not having—in at least our judgment, anyone who is wronged by governmental action ought not to have to pay for it and that it should be the economy as a scale within the market that determines the mix, a small business versus big business.

Senator DECONCINI. I understand that. In principle, I agree. What troubles me is that a company with resources and a legal department, I believe, is less apt to be harassed than a small businessman who has no in-house lawyer, who has to pay for it out of his own pocket and is far more apt to capitulate than, say, a company that says: "By God, we've got the legal resources. We're going to fight you."

I'm trying to weigh in my own mind whether or not it's reasonable to first take a look at the small individual before we expand this.

Mr. ROBB. Mr. Chairman, as I mentioned in the concluding comments, we would certainly support the bill with that type of limitation. However, I do feel compelled to say that it depends upon the regulatory agency as to whether the target is more likely to be a big business with large assets or a small business without the resources to fight.

Certainly to the extent the regulatory agency chooses to only fight those people that they can be victorious against, that's probably true. If you take, for instance, the Council of Wage and Price Stability, they are explicitly directed to regulate big business and at this point have not directed their concern against small business.

There is also some sense of glory that regulatory officials seem to feel when they take on Exxon that they don't feel when they take on the mom and pop grocery store. The problem of regulatory excess is one that's felt by small and big business.

We would certainly support limiting the concept if it is chosen by Congress to do so to small business.

Senator DECONCINI. We find in our hearings last year and some correspondence that we have had some feeling from large business, big business of some harassment, but not nearly as much as the small business people. They seem to be the ones that have testified that they can't sustain and remain in business because of harassment.

You know maybe some of your members, unfortunately. I know some in Pinal and Cochise County that claim they have gone out of business because of Federal regulations that were relatively minor in a layman's observation as to safety and clean air and clean water.

Gentlemen, I have no further questions. We would welcome any further remarks that you would want to submit to us. We appreciate your coming down this morning, knowing the legislature is winding up.

Our next witness is Raymond Calamaro, Deputy Assistant Attorney General, Department of Justice, and he is accompanied by Willie King.

Thank you for coming the long distance to bring the Government here. As you can see from the witness list, we are having a number of people from our local community, and I appreciate the Justice Department sending someone here.

STATEMENT OF RAYMOND S. CALAMARO, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, DEPARTMENT OF JUSTICE, ACCOMPANIED BY W. R. KING, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE

MR. CALAMARO. My name is Raymond S. Calamaro. It's a pleasure to be here, not only a pleasure to be testifying, but also to see your beautiful State.

As you said, I am accompanied by Mr. King who was a law professor in the District before he came to work in the Office for Improvements in Administration of Justice.

Although it was impossible for Karen Siegel to join us today, I think the record should reflect her contribution, as well as Professor King's, to the Department's work on this particular subject.

Mr. Chairman, this is my first time in a formal appearance before your subcommittee, although we have worked quite a bit together.

I'd like to take the opportunity to express my own, as well as the Justice Department's appreciation for the extraordinary accomplishments of the DeConcini subcommittee. Its work on legislation, like the Magistrates and Arbitration bills and many others, constitute a remarkable contribution in the field of court reform in improving citizens' access to justice.

I'd like also to say what a pleasure it has been to work with your subcommittee staff. They are very competent.

Mr. Chairman, I have a written statement that I have submitted for the record. Instead of going over it, what I'd like to do is summarize very briefly the position of the Justice Department and respond to questions.

[The prepared statement of Mr. Calamaro follows:]

PREPARED OF RAYMOND S. CALAMARO

I appreciate the opportunity to appear before you today to give the views of the Department of Justice on attorney fees and, in particular, on S. 265, the "Equal Access to Justice Act." The position of the Justice Department can be briefly stated. We oppose S. 265 for the following reasons:

(1) Its passage could cost United States taxpayers many millions of dollars at a time when both the Congress and the administration are searching for ways to cut Government expenditures.

(2) It is not the most efficient solution to the problem it purports to address, the cost and burden to individuals and businesses of contesting Government enforcement of regulations. Instead, indefensible regulations should be modified or eliminated and the regulatory process improved.

(3) The bill's standard for awarding attorney fees is faulty in two critical respects: First, it places the burden on the Government to vindicate its own conduct of lawsuits, thereby creating an incorrect, if not dangerous, presumption that the Government's position was unjustified in suits it loses; and second, the actual standard of "substantial justification" lacks proper definition, is too subjective, and invites misapplication. This standard and the placing of the burden of proof are inappositely drawn from Rule 37 of the Federal Rules of Civil Procedure.

(4) S. 265 may have the effect of hampering government enforcement of virtually all civil statutes, not just excessively burdensome regulations.

The Justice Department is persuaded, however, by the forceful arguments of Chairman DeConcini and the other sponsors of S. 265 that fairness requires the Government to assume greater responsibility for instances where it unreasonably conducts actions against private citizens and businesses of limited means. We are prepared to support (1) elimination of the Government's statutory exemption for common law liability for attorney fees and other expenses where it acts in bad faith, and (2) a version of S. 265 modified in several crucial respects,

most notably shifting the burden to a successful private litigant (who meets other requirements of proving the Government's position was "arbitrary, frivolous, unreasonable or groundless." We believe this proposal substantially meets the aims of S. 265 and is a more proper legislative experiment in the field of general attorney fee legislation.

Before addressing the specific issues raised by S. 265, I believe it would be useful to review briefly the state of the law in this area and to mention some of the problems that have arisen, in order to provide a context for later discussion.

As the Supreme Court reiterated in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975), the prevailing litigant in the United States is ordinarily not entitled to recoup his legal fees from the loser. In tracing the historical development of this "American rule," the Court acknowledged the three general expectations.

First, under the "equitable trust" or "common fund" exception a litigant whose legal action has the effect of preserving or recovering a fund for the benefit of others in addition to himself may be awarded attorney fees either from the fund or from the other parties enjoying the benefits.

Second, the court may award fees against a losing party who has willfully disobeyed a court order or has acted in bad faith, vexatiously, wantonly or for oppressive reasons.

And third, attorney fees may be awarded where a statute expressly so provides.

With regard to this latter exception, congressional authorization for fee awards presently exists in a number of statutes. Until about the mid 1960's, the Clayton Act (15 U.S.C. § 15) (1914) was the basis for most statutory fee awards. Within the past dozen years or so, however, Congress has enacted a number of laws containing provisions for the recovery of attorney fees.<sup>1</sup> With each of these statutes, Congress has enacted specific standards to meet the needs of particular problems in discrete subject matter areas. Each represents the expression of congressional intent to encourage citizens to advance the interests of specific, important social goals. As the legislative history to the Freedom of Information Act notes, "[t]he allowance of a reasonable attorney's fee out of government funds to prevailing parties in litigation has been considered desirable where the suit advances a strong congressional policy." 93 U.S. Code Cong. & Admin. News 6267, 6272 (1974). Congress has adopted different approaches for awarding fees, depending on the type of private enforcement it sought. Thus, the attorney fees provision of the Freedom of Information Act differs, for example, from those of Titles II and VII of the Civil Rights Act of 1964 and of the Civil Rights Attorney's Fees Awards Act of 1976.

Generally, this "categorical" approach to congressional authorization of attorney fees has worked well; it has not, however, been entirely free from problems. There has been substantial litigation, for example, over the matter of whether a party has "prevailed," for instance, within the meaning of Civil Rights Attorney's Fees Awards Act of 1976, or "substantially prevailed," as required by the Freedom of Information Act. And one recent case in particular has discussed in great detail the complexity of arriving at a "reasonable fee" and the temptation for private counsel to view the Federal Government as a "deep pocket" for the recovery of unreasonably high fees unwarranted by the quality of service or the results achieved. See *Copeland v. Marshall*, No. 77-1351 (D.C. Cir. October 30, 1978).

Turning to the legislation at hand, S. 265 represents a dramatic departure from the categorical approach. The Department's alternative, a copy of which is attached, is a similar departure, but is considerably more narrowly drawn.

The "Fairness in Government Act of 1979" (the Department's proposal) and the "Equal Access to Courts Act" (S.265) are very similar in purpose but differ in one important respect. Each would authorize, for the first time, the general award of attorney fees against the United States in administrative and judicial proceedings. Each seeks to remove economic barriers that deter individuals and organizations of limited means from obtaining review of, or defending against, arbitrary or unreasonable Government action. However, the

<sup>1</sup> Some of the most notable examples of attorney fee shifting statutes include: Titles II and VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a-3(b), 2000c-5(k) to promote private enforcement of the fair housing and employment discrimination policies of the Government, including suits against the Federal Government (42 U.S.C. § 2000e-16(d) (as amended in 1972)); the Freedom of Information Act (5 U.S.C. § 552(a)(4)(E) (as amended in 1974)) which also authorizes fees against a Government agency; Consumer Product Safety Act (15 U.S.C. §§ 2059(e)(4), 2060(c), 2072(a), 2073 (as amended in 1976)); and most recently the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988) (1976) which authorizes attorney fees to prevailing parties in cases involving a violation of civil rights.

bills differ significantly in the proposed standards under which fees would be authorized, and would thus have dramatically differing consequences in litigation involving the United States.

S. 265 would mandate an award of attorney fees to the prevailing party (other than the United States) in administrative adjudications or court proceedings unless the Government could demonstrate that its position in those proceedings was substantially justified. The bill would exclude tort and civil tax cases. Without regard to the subject matter of the case or litigating position of the United States, S. 265 would reverse the "American rule" that each party pay its own attorney fees, in cases involving the Federal Government. Unlike any other litigant, the Government would have to pay its opponent's attorney fees each time it was unsuccessful unless it could affirmatively show, to the satisfaction of the court, that its actions were "substantially justified." The source of this current language is Rule 37 of the Federal Rules of Civil Procedure which provides sanctions for discovery abuses.

The Department of Justice proposal, on the other hand, would authorize an award of attorney fees against the United States when the court found that the position of the government was "arbitrary, frivolous, unreasonable, or groundless," or that the Government continued the proceedings after its position clearly became so. The source for the standard, which rightfully places the burden of obtaining fees on the party seeking them, is taken from the recent Supreme Court decision on attorney fees, *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978).

It is the position of the Department of Justice that the *Christiansburg Garment* standard is the more reasoned principle under which to award attorney fees. One of the stated purposes of S. 265 is to remove the economic impediment that the burden of attorney fees places on parties of limited means, preventing them from challenging arbitrary Government action. The bill's sponsors have expressed particular concern with the plight of small businesses subjected to a morass of seemingly conflicting regulations. Their inability to contest such Government actions is seen as placing them at a competitive disadvantage with respect to larger business concerns which can better afford to plead their cases. The chief sponsor of S. 265, Senator Domenici, pointed out that the purpose of the proposal "is to insure against capricious and arbitrary Federal regulation." He felt that "the average American must be made to feel that he can question the exercise of the Government's discretionary power as to its reasonableness—without incurring large costs if he prevails." 125 Cong. Rec. S. 887 (daily ed. Jan. 31, 1979) (introductory remarks by Sen. Domenici).

Clearly, the award of fees is an indirect method, at best, for correcting this type of agency and Government overregulation, since it addresses abuses after the fact, rather than attempting to prevent them in the first place. Moreover, the availability of attorney fees does not alleviate the problems caused by conflicting regulations. Indeed, much more effective means exist to achieve this goal.

In a more direct attempt to meet this problem, on March 25, 1979, President Carter announced a legislative proposal to overhaul the Government's regulatory machinery. The proposed reform would do much to remove the potential for the Government regulatory misconduct with which the attorney fees bills are concerned. First, it would streamline regulatory procedures to insure that outmoded or ineffective rules are weeded out. The proposal would require a cost/benefit study of alternative methods for achieving an objective before an agency could issue a new regulation. This would be a big step toward untangling the regulatory complex confronting many citizens, and would insure that agencies are sensitive to the cost impact of their regulatory efforts on citizens.

This effort is already well under way. HEW has eliminated 300 pages of rules; OSHA has voided nearly 1,000 rules;<sup>2</sup> the FTC has cancelled 145 more. There are many more examples of similar successes.

A second major component of this proposal would provide financial assistance to certain interested persons, allowing them to participate in, and thereby make a contribution to, agency proceedings. In the past, agencies have promulgated regulations without always having received input from those most affected by the new proposals. Often interested persons have not made their views known simply because they could not afford the cost of engaging necessary experts

<sup>2</sup> The revoked standards made up roughly 10% of the word volume of OSHA's standards. When the proposal to void the regulations was originally made, OSHA commenced treating violation of these provisions as "de minimis."

and attorneys to present their positions. Under this proposal, it is envisioned that some individuals, consumers and small business entities, who have something useful to contribute, would be eligible to receive fees to enable them to make a effective presentations before an agency. The Federal Trade Commission already operates a similar program and a variety of groups, including representatives of small businessmen, have been able to make useful contributions with the assistance of the funds provided. Other agencies such as the Civil Aeronautics Board and the National Highway Traffic Safety Administration have instituted similar programs. It is hoped that if an agency is fully informed by those interested in and affected by a regulation, more realistic and less burdensome rule-making and enforcement will result.

The administration also supports a "sunset" requirement that Federal programs and activities be subject to review by functional categories in 10-year cycles. An agency's spending authority would be automatically terminated unless Congress acted affirmatively to reauthorize its programs. This review process should serve to eliminate inefficient and outmoded programs; regular reviews of these programs will also be a major contribution to the effort to control federal spending.

The measures discussed above, and others like them, are far more direct and effective means of reaching the types of agency conduct and regulatory burden with which S. 265 is concerned.

Although we hope these reform measures will be successful, we agree—partly as a result of the pioneering efforts of the sponsors of S. 265—that there would be merit in an experiment in shifting attorney fees against the Government if the application is sufficiently narrow and only for a finite period of time. Our particular concern is that there be explicit standards for the award of attorney fees, and that sufficient controls be specified to insure that legitimate Government enforcement efforts not be "chilled." We agree that under such an experiment, the Governor should be held to a higher standard of conduct than the common law "bad faith" exception for private litigants. Our proposal, based upon the Supreme Court's opinion in *Christiansburg Garment*, is that the Government be held liable for attorney fees if it acts in a manner that is "frivolous, unreasonable, or groundless." But before further elucidating the Government's proposal, we would like to discuss S. 265, which we regard as too far-reaching in its application to meet the needs as we have expressed them above.

We are especially troubled by use in S. 265 of the standard employed in rule 37, F.R.C.P., for the award of attorney fees. That standard, which is appropriate in the discovery context, is particularly unsuited when applied to the litigation of a case as a whole. The rule 37 standard starts with the premise that a party has abused the discovery process and as a result ought to pay for his opponent's fees incurred in responding to the abusive conduct unless there was substantial justification for his actions. In this context, it is fair to place the burden upon the abuser because it was his wrongdoing that led to the controversy in the first instance.

A close look at rule 37 is helpful in demonstrating this point. The provision calling for an award of fees, unless the wrongdoer can show substantial justification, appears in three sections of the rule. In rule 37(a) the losing party in a motion to compel discovery and, by reference from rule 26(c), the losing party in a motion for a protective order, must pay the opponent's fees unless the loser can establish that he was substantially justified in making the motion (or where appropriate, opposing the motion). In each case, when the court rules upon the motion, it has made a finding that a party has abused the discovery process. Thus, when a court grants a motion to compel, the court is ruling that the losing party has not provided the discovery materials which he is required to produce under the rules; in denying a motion to compel, the court, in effect, is ruling that the party making the motion is seeking more discovery material than he is entitled; in granting a motion for a protective order, the losing party has been found to be over-reaching; and, in denying a motion for a protective order, the court is finding that the moving party has resisted his opponent's proper discovery requests. In each instance the party who loses the motion has abused the court's process by seeking the intervention of the court into a controversy which is of his own making. And in each instance, when the court is considering the propriety of an award of fees, by its earlier ruling on the motion, it has already found that the losing party is prima facie an abuser of the discovery process.

The other rule 37 applications of this standard demonstrate the point even more forcefully. In rule 37(b), in accordance with the standard noted above,

attorney fees are available as one of several sanctions when a party has persisted in resisting discovery after his opponent has successfully obtained a favorable ruling on a motion to compel. In these circumstances the court, in granting the original motion, has already found that the losing party has committed discovery abuse and, in granting the second motion, that the losing party has continued his improper conduct despite the earlier court order to discontinue such conduct. Again, by ruling against the losing party, the court is making a finding that that party has abused discovery—i.e., his conduct has been improper and absent a showing on his part of some justification, he must pay the cost.

Finally, rule 37(d) authorizes the award of fees, absent a showing of substantial justification, when a party fails to appear for a deposition; fails to serve answers or objections to interrogatories; or fails to serve a written response to a request for inspection under rule 34. In each of these instances, the defaulting party has not only abused the discovery process, he has flouted the court and exhibited a disregard of proper procedure by totally ignoring his obligation under the rules. Again, this conduct establishes a *prima facie* case of wrongdoing. Requiring the wrongdoer to justify his conduct is not at all improper.

In short, in each case where an attorney fee award becomes potentially available under rule 37, the court has already found that the party, who may be subject to the award, has violated some rule of court governing the orderly conduct of a lawsuit. The violating party has abused discovery, or failed to abide by a court order, or totally ignored his obligations to his opponent and the court. It is fair to assume from this conduct that it was not justified; therefore, it is appropriate to presume that the party ought to pay his opponent's expenses. And, under the terms of the rule he must pay unless he comes forward and carries the burden of showing that his conduct was justified in the circumstances.

In addition to the conceptual difficulties with using a discovery sanction in the context of awarding fees for an entire case, there are two other specific faults in the rule 37 scheme—the “substantial justification” standard itself, and the burden it imposes on the Government. The term “substantial justification” is not defined in the rule, nor is there a clear definition in the case law. It appears to be used as a subjective standard. Under rule 37, the standard requires some colorably good reason for resisting discovery, something more than the mere absence of bad motive. When applied to the entire case, as does S. 265, the substantial justification standard does not sufficiently focus the relevant issues. It invites a retrial of the merits, putting at issue the reasonableness of the underlying claim or defense, and its factual foundation. Moreover, this inquiry would take place before a judge who had already determined that the Government's position was not a winning one. This could result in the requirement that the Government pay fees not where its conduct was arbitrary or unreasonable, but rather where it had made an honest mistake or misjudgment regarding the facts or law in a given case.

The second problem with the approach taken by S. 265 is the burden of proof imposed on the Government if it loses. The proposal would create a statutory presumption that the position of the Government was not substantially justified where the Government loses. In carrying its burden of persuading the judge that its position was substantially justified, the Government, in each case it lost, would be required to come forward with evidence to defeat an award of attorney fees. Given the imprecision of the substantial justification standard, his requirement of affirmative proof would significantly lengthen such cases. But more important, it is unsound public policy and legal procedure to impose this burden absent the implicit finding of misconduct present in the discovery situation.

A presumption arises in the law either because of the probability that the presumed fact is true when the facts on which it is based are established, or because of the difficulties in proving the presumed fact. The presumption that the position of the Government was not substantially justified when it loses, is not based on either of these factors. In fact, there has existed throughout our history a common law presumption that supports a contrary conclusion—public officials perform their duties lawfully and in good faith. This presumption is an integral part of the body of case law governing Federal administrative and official actions. “The presumption of regularity supports the official acts of public officers and, in the absence of *clear evidence* to the contrary, courts presume that they have properly discharged their official duties.” *U.S. v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15 (1926) [emphasis added].

Moreover, the officers and attorneys of the executive branch are held to a high standard of conduct in executing their duties, as manifested in their oaths of office. Section 544 of title 28, United States Code, for example, requires United States attorneys and assistants to take an oath faithfully to execute their duties.

S. 265 would have the effect of setting aside two centuries of practice and would overrule this common law presumption. Without any basis in fact, it would substitute a new and contrary presumption applicable when the Government loses its substantive case. The well-developed body of law underlying the existing presumption is founded on both principles of judicial economy and the likelihood that the presumed fact is true. The years of experience of the Federal courts have reinforced rather than weakened the presumption of official good faith and lawful conduct in executing governmental functions, whether the Government wins or loses. To establish a presumption, as does S. 265, that the Government's position was not substantially justified when it loses, and therefore not lawful or taken in good faith, would be without foundation.

We submit it would also be extremely unwise as a matter of policy since the "chilling effect" of such a change cannot be assessed, nor can its costs be projected with any degree of reliability. This latter point is highlighted by a recent case before the United States Court of Appeals for the District of Columbia Circuit, *Copeland v. Marshall*, No. 77-1351 (D.C. Cir. Oct. 30, 1978), which illustrates the potential costs of a proposal like S. 265, in judicial resources, attorney time (both private and Government) and the direct impact on the public fisc. The district court awarded \$160,000 in attorney fees to the successful plaintiff in an employment discrimination case against the Federal Government. The court of appeals reversed and remanded for reconsideration of the amount of the award, discussing at length the kind of evidentiary showing required by the party requesting fees, and the detailed analysis which the judge must make in arriving at a just figure. A reading of the opinion reveals the complexity of the issue of determining "reasonable fees," and indicates the extent of the inquiry which might be required under S. 265.

In addition, the court expressed itself strongly to the effect that the beneficiaries of the attorney fees statutes were not the parties pursuing the important social goals, but the parties' attorneys. The decision highlights the court's concern that the legal profession views the Federal Government as a "deep pocket" in these cases, and requests fees at unreasonably high rates unwarranted by either the quality of service or results achieved. The court cautioned that "[i]f the Federal fisc is not protected by the judiciary against unreasonable encroachment by fellow members of the legal profession, there may be a public and congressional reaction against allowing attorneys fees to the party prevailing against the Government in title VII actions." *Id.* at 21. If this court is correct, S. 265 may very well result in generating new cases spurred on, in part, by the legal profession's expectation of high remuneration.

The impact of requiring the losing agency to pay the attorney fees of its opponent would have a far-reaching effect on all aspects of Government activity. The most recent report of the Administrative Office of the U.S. Courts reveals the broad range of civil litigation in which the United States is a party. In fiscal year 1978, 46,811 civil cases were commenced in the Federal district courts in which the United States was a party. The subject matter of these cases varied widely. Seventy-nine percent of them involved only six categories of cases: real property actions (including land condemnation proceedings) (23 percent), social security matters (21 percent), prisoner petitions (12 percent), contract disputes (11 percent), tax cases (6 percent), or tort actions (6 percent). The remaining caseload included forfeitures and penalty actions (6 percent), labor matters (4 percent), civil rights (3 percent), environment cases (1 percent), and antitrust cases (.09 percent). By excluding tax and tort cases, S. 265 would affect 88 percent of this caseload.

During the same fiscal year, 34 percent of the cases filed with the U.S. Courts of Appeals involved the United States as a party in a civil suit (21 percent) or administrative proceeding (13 percent). Of the civil cases, the United States was the appealing party only 14 percent of the time. The largest number of administrative appeals came from the NLRB (796), followed by INS (257), the Tax Court (211), the Federal Energy Regulatory Commission (81), FCC (74), CAB (37), FTC (20), and SEC (19).

Without a sophisticated study, it can only be assumed that the distribution of cases lost by the Government is proportionate to the distribution of total cases. Thus, the impact of awards of attorney fees under the S. 265 approach would

affect all areas of Government business—from enforcement of civil rights to land condemnation, from management of Federal institutions to procuring government contracts.

On March 13, 1978, Deputy Assistant Attorney General Paul Nejelski presented testimony on behalf of the Department of Justice before this subcommittee regarding S. 2354 (95th Cong.), the predecessor of S. 265. We understand that the sponsors of S. 265 no longer propose legislation as broad as the old S. 2354, but the cost analysis of the latter bill is pertinent to our consideration here.

On the basis of a very limited sampling of representative cases, our earlier analysis attempted to identify the cost impact of a proposal that would award fees to all prevailing parties (other than the United States) in suits against the Government, excluding tort cases. It concluded that a general fee-shifting proposal such as S. 2354 would prove exceedingly costly, conservatively reaching a total of one half billion dollars annually.

This analysis started with the 55,000 cases involving the Federal Government that were terminated in 1977 in the district courts, Tax Court, Customs Court, and Court of Claims. It assumed that the "party" definition in the legislation, practically speaking, would include almost all parties who currently litigate in Federal courts against the Government. On the basis of the experience of the Court of Claims, the Tax Division of the Department of Justice, and the U.S. Attorney for the District of Columbia, it was estimated that the Government lost between 15 percent and 25 percent of the cases in which it was involved, or between 8,300 and 14,000 cases for fiscal year 1977.

Given the paucity of available data it was virtually impossible to make any precise calculations regarding the amount of attorney fees that might be involved in these cases. A figure of \$16,000 per case was used, based on the average of the Government-paid attorney fees awarded in the District of Columbia for fiscal year 1977. Using these figures, the Department concluded that the cost of the S. 2354 fee shifting approach would go between \$130,000,000 and a quarter billion dollars annually. That represented only court-adjudicated cases.

The number of agency adjudications was far greater than court proceedings, numbering in excess of one hundred thousand. There was no data on which to estimate the percentage of these cases in which the Government lost, or how much a private party might have expended in attorney fees. The testimony concluded that it could safely assume that the costs would be at least equal to the costs in the trial courts. Accordingly, the total cost of awarding fees to prevailing parties was estimated to be one half billion dollars annually.

Since the above data was developed, information concerning case terminations in the Federal courts for 1978 has become available. As had been expected, the number of terminations increased substantially. In the district courts alone there were nearly five thousand more terminations than in the previous year (a 14 percent increase). The Customs Court also reported a sharp increase. For the year, a total of approximately 54,000 cases were terminated, excluding tax and tort cases and those cases which currently have fee-shifting provisions. Using the same process outlined above, the cost to the Government, if it were required to pay attorney fees whenever it lost, could range from \$129,600,000 to \$216,000,000 per year at the trial level only. As noted above, we would expect the cost at the agency level to be at least as much as the cost at the trial level. Thus, the total cost could very well exceed \$430 million.

This estimate, however, does not include other costs such as those incurred on appeal and other expenses which may be awarded such as expert witness fees and the cost of analyses, studies, tests and reports. The latter items are not at all insignificant. The Land and Natural Resources Division has estimated that in land condemnation cases these costs would be equal to the costs for attorney fees. Accordingly, based upon 1978 data, and excluding tort and tax cases as well as those cases where fee awards are already authorized, an estimate of half a billion dollars per year is not at all unreasonable. That estimate, of course, applies only if the Government would have to pay fees in every case which it lost.

The current proposal, S. 265, differs from last Congress' bill in that it would not require that fees be shifted in all circumstances whenever the private party prevailed, but only when the Government was unable to show that its position was not substantially justified. We have no basis on which to estimate accurately the potential number of cases that might be involved. As we have indicated, the uncertainty of the substantial justification standard presents difficult problems of proof and may inject the underlying merits of a case into the determination of

whether to award fees. If we assume that the Government's position was found to be without substantial justification in 25 percent of the cases it loses, in 1978 S. 265 might have cost \$125,000,000.<sup>3</sup>

Given the ambiguity in the substantial justification standard, it does not seem unrealistic that the courts or agencies might find that the Government had failed to meet its "substantial justification" burden in as many as one-fourth of the cases which it lost. This 25 percent figure provides a useful benchmark against which to assess potential cost. Obviously, this estimate cannot be taken as a concession by the Government of how many of its cases are "substantially justified." Instead, it is an estimate of how agencies and courts might apply a near-unworkable standard and unwarranted burden of proof. Indeed, if the vast majority of Government cases are viewed as substantially justified, the figure would be lower. On the other hand, if honest mistakes of law or fact are not viewed as substantial justification, the figure would be higher.

This \$125 million estimate does not take into account any of the substantial ancillary costs associated with S. 265. For example, it does not begin to assess the indirect costs of Government overhead and attorney costs entailed in litigating additional issues of whether the Government's position was substantially justified, and if not, the amount of fees which are "reasonable." Nor does the figure attempt to estimate the impact of the new caseload anticipated by both S. 265 and the Department's proposal. For all of these reasons, the estimate of \$125,000,000 does not appear to be at all alarmist. Indeed, it very likely understates the probable cost. Given this broad potential cost and impact on Government operations, the Department urges that any reduction in the immunity of the Government from an award of fees be approached with caution.

We submit that the *Christiansburg Garment* standard, which our proposal adopts, is much more suited to solving the problem S. 265 seeks to remedy. The meaning of the "arbitrary, frivolous, unreasonable or groundless" standard is delineated by the Supreme Court decision and underlying case law. The standard we developed to award fees to the prevailing defendant where the plaintiff's action had been unreasonable or unfounded. It is this very type of conduct by the Government which S. 265 apparently attempts to correct. In his written statement introducing S. 265, Chairman DeConcini expressed the bill's objective as giving "the individual and small business at least a fighting chance to challenge the unreasonable exercise of government power." 125 Cong. Rec. S. 889 (daily ed. Jan. 31, 1979) (introductory statement by Sen. DeConcini). The *Christiansburg Garment* standard provides a familiar basis on which to meet this objective. It is a sensibly higher level of performance for Government action than the common law standards governing private suits. Moreover, it provides a well-defined standard by which the Government can be judged. Whatever the difficulties of estimating costs under either of these proposals, we can safely assume that the *Christiansburg Garment* standard, coupled with the burden placed rightfully on the party seeking fees, would result in significantly lower costs.

S. 265 carries with it another cost, possibly more serious than actual dollars. This cost would result from the "chilling effect," previously referred to, which enactment of this bill could have on the Government's enforcement of the law.

Until now, when Congress has authorized the award of attorney fees to a party, it has done so to encourage private citizens to advance the interests of specific, important social goals. Of course Congress has also properly relied on the officials of the executive branch to advance all the Government's legislative goals. If passed, S. 265 would work to defeat the objectives of both these long-standing policies. The proposed legislation would authorize the award of fees regardless of the social importance of the interest being vindicated by the private party; and, further, it would call into question congressional confidence in the ability of Government officials competently to enforce its policies, and in the process impair that ability.

Mr. CALAMARO. If S. 265 were modified in two small, but important respects, we believe it can go a long way towards achieving three worthy goals.

<sup>3</sup> The significance of the amount of this cost estimate becomes clear when it is compared to the cost for operating the court system. The total budget authority for all district courts and courts of appeals for fiscal 1978 was just under \$418 million. Administrative Office of United States Courts, 1978 "Annual Report of the Director" 28 (1978). Thus the cost of S. 265, in 1978, would have been 30 percent of the cost for the operation of virtually the entire court system.

The first goal that it can achieve is to deter the Government from acting unreasonably when it conducts actions against individuals and businesses of limited means.

The second goal is to afford relief to such individuals and businesses by permitting them to recover costs, including attorney fees, from the Government.

The third goal is to remove the Government's statutory exemption from ancient common law principles like the one that permits awarding attorney fees against the party who acts in bad faith. Part of this also is to impose on the Government the same obligations during pretrial discovery that are imposed on all other litigants.

The two main changes we recommend are these.

The first is to let the prevailing party have the burden of proving that it is entitled to attorney fees rather than requiring the Government to prove the negative; and second, instead of the standard of substantial justification which is presently in S. 265, we hope the test could be whether the Government's conduct was arbitrary, frivolous, unreasonable or groundless. These are the most important changes.

In addition, we would like to recommend lowering the eligibility limits below the \$1 million and \$5 million for an individual and a corporation to \$250,000 and \$1 million, respectively.

Also we would like either to recommend or agree with you that fee awards be paid from the agency budgets.

With those changes, Mr. Chairman, the Justice Department and the administration will support S. 265.

Senator DECONCINI. Thank you, Mr. Calamaro.

Did I understand you correctly that you do favor the proposal of having the fee taken from the agency's budget?

Mr. CALAMARO. Yes.

Senator DECONCINI. That's a departure, I think from previous—

Mr. CALAMARO. It is different from what we thought our policy would be this year.

Senator DECONCINI. That's a welcome one, believe me.

Let me also thank Attorney General Bell and your department for its fine cooperation in this bill, as well as many others. It may be backscratching time for us, but it's been indeed a pleasant experience for the staff and our committee to work with you and be able to do some of the things that we have, and your reasonableness on this bill is appreciated immensely.

Lowering the eligibility limits that you mentioned as a recommendation, is that based primarily on the cost savings or is there some other reason?

Mr. CALAMARO. Primarily, on policy. We think that there are a lot of different considerations. Obviously, cost is one of them. But in this instance, we realize that this is a departure, the beginning of a departure, from a long-established principle known as the American rule on attorney fees, and we think this departure can be justified on the grounds of fairness and also on the grounds of affording special, extraordinary relief—extraordinary as a matter of precedent—to small businesses and individuals of limited means. Just as a matter of policy, we'd like to see it lowered, but we realize that this is a judgment call.

Senator DECONCINI. Do you have any figures available in your research—maybe Mr. King does—what this would amount to, as many

people would be involved, what kind of a reduction would we have in the number of cases?

Mr. KING. As far as businesses are concerned, whether they be incorporated or partnerships, it probably wouldn't make too much difference. The most recent information we have available indicates that in excess of 95 percent of all corporations and businesses have a net worth of \$1 million or less. Only a few of the remaining 5 percent were in the \$1 million to \$5 million range. As a practical matter, as far as businesses are concerned, whether they be corporations or partnerships, it would not be a large number of organizations, I don't think. As far as individuals are concerned, we don't have much information available with respect to that. We just have no feel for what effect it would have in terms of numbers.

Senator DECONCINI. Mr. Calamaro, does the Justice Department have a set of standards that is used by the district attorneys and Washington staff in determining whether or not to proceed with litigation when it is referred to you from a governmental agency?

Mr. CALAMARO. I think I'll defer on that one to Professor King, who was in that office. I think he might be able to answer that.

Professor KING. There are two responses to that, Senator.

First, as you know, the Justice Department is not the litigating authority for the Federal Government in every instance.

Senator DECONCINI. Yes, I know that.

Professor KING. In some instances, the Justice Department is. In other instances, it is the agency.

Senator DECONCINI. I am referring to the ones that do come to you to file litigation. I realize that is outside of the administrative procedures within that agency. I am just interested in knowing what the Justice Department's criteria is now, when it's brought to you and they say to you: We think you should litigate in district court.

Professor KING. The Department has a U.S. attorney's manual which is applicable principally to U.S. attorneys, but to the litigating divisions as well.

There are some general principles set forth there. It's always difficult, in any type of guideline, to be thoroughly specific as to what one ought to do in a particular case. These guidelines are relatively general. The instruction, however, to the attorneys is that they should proceed when the case is a reasonable one. In some instances, there are strong disputes between the Department and the agencies about proceeding with a case. Very often, the Department will refuse to proceed with the case.

Senator DECONCINI. Do you have any off-the-top-of-your-head estimation?

Professor KING. I really don't. I would think that someone who is doing a lot of litigating involving agencies, either a U.S. attorney or someone in one of the litigating divisions, could have some feel for that. But I think it's not inaccurate to say that it is not uncommon for the department to either refuse to pursue a litigation or pursue it in a way that the agency wants it pursued.

Senator DECONCINI. Are you familiar with the manual itself?

Professor KING. The manual is about 8 volumes long, Senator. There are parts of it that I am familiar with, and there are parts I am not at all familiar with.

Senator DECONCINI. Are you satisfied that the district attorneys and their deputies are familiar with it?

Professor KING. I simply can't answer that.

Senator DECONCINI. One of the questions I had, do you know off-hand if there is in the manual a mandate or a strong directive to attempt to compromise, attempt to negotiate, attempt to sit down prior to filing the litigation?

Professor KING. I can't specifically recall such a provision. I would be surprised if something essentially to that end were not included. Any lawyer, whether it be a government lawyer or private attorney, knows it is in the best interests of his client and of the court to negotiate and to settle the matter, to the extent they can, as early as possible, in the interest of saving their client's money and the court's time.

I would expect that something like that is in there. I can't say for sure that it is.

Senator DECONCINI. Mr. Calamaro, a little bit off the subject. On the basis of litigation, is it the Department's position that all litigation ought to be under the Department of Justice rather than in the several agencies that have their own right to file?

Mr. CALAMARO. Mr. Chairman, this is a subject that is being very much debated within the administration right now. It is a very difficult question.

I think it's fair to say that the Department of Justice itself very strongly believes that it should be the litigator for the U.S. Government. In fact, the Attorney General last year gave a lengthy, and I think very scholarly and well-reasoned, argument for why the Attorney General should be the one lawyer for the Government, and the advantages to that.

I can't say though that the agencies that feel differently have no point of view.

Being an official at the Department of Justice, I naturally am inclined to agree that the Department of Justice should be the Government's lawyer, and I think to the extent that the problems we discussed today bear on this question, I think it tends to support our point of view. But I can't really give an administration position, because it's something that the administration is looking at in its reorganization effort.

Senator DECONCINI. The Justice Department favors that?

Mr. CALAMARO. I think that's fair to say. Yes. I would be delighted to provide a copy of the Attorney General's historic and up-to-date policy on the subject for the subcommittee.

Senator DECONCINI. I would like to see that. I have some particular interest in that, having been a county attorney and constant attempts from various agencies to have the right to have their own attorney not subject to the designated legal representative of the county.

Referring back to S. 265, what agencies would you think would be most affected by this bill?

Mr. CALAMARO. Probably, I think the ones that we hear about most—certainly, OSHA. The Federal Trade Commission might generate a lot of activity under the bill. Obviously, S. 265 would likely affect a lot of the administrative work of the Government departments as well.

Do you have any more to answer on that?

Professor KING. I think that S. 265, at least at the court level, as it applies to cases in which the United States is a party, would not apply to the agencies, as much as it would just to general litigation.

There are some 4,000 to 5,000 contract actions each year, for example, which cover all sorts of different agencies, but those cases are not so much of an agency problem; they're basically contract problems. The Land and Natural Resources Division is involved in several thousand real estate matters every year. I think last year there were 7,000 land condemnation cases filed. There are tort cases. Of course, the bill excludes tort cases. There are civil rights matters again that may affect an agency. But as a practical matter, it's kind of a Governmentwide type of application.

Senator DECONCINI. That's provided in the law, is it not, for attorneys' fees?

Professor KING. Well, some civil rights cases, are; but some civil rights cases are not. For example, an employment discrimination case would be included under the fee provisions of the Civil Rights Act of 1964, but a suit by a prisoner, for example, against the warden of the Atlanta Penitentiary would not be. The 1976 Civil Rights Attorneys' Fee Award Act does not require the Federal Government to pay attorney fees, except in that one small portion that deals with tax matters. Excepting employment discrimination, the 2,000 or 3,000 civil rights cases that are filed in the Federal courts each year involving the United States as a party would be included within S. 265.

I note that with OSHA, for example, there were only some 100 cases that made their way into the courts in 1978. On the other hand, there were 10,000 or 12,000 social security cases, thus the Government as a litigator is more than just an enforcer of regulations. It is a defender in contract disputes. It is a defender when a mail truck runs into your neighbor's car. It's a plaintiff in some civil rights matters. It's a defendant in other civil rights matters. To say which agency is most affected by S. 265, at least at the court level, is difficult to determine. At the agency level, however, obviously all of the agency portion of the bill would affect agencies, essentially, in their regulatory role, because S. 265 deals with agency adjudications only.

Senator DECONCINI. Do you want to add anything?

Mr. CALAMARO. Only just to add that in our estimation, when we looked at the cost of the bill, we estimated an equal cost coming up from administrative proceedings as from court proceedings, so we see it distributed roughly, at least from the point of view of guessing, roughly over both equally.

Senator DECONCINI. If this bill had a frivolous standard instead of the substantially justified standard, what effect would that have on the overall effectiveness? Would you care to venture a guess? Has anyone from the Justice Department ever assessed that?

Mr. CALAMARO. Just "frivolous"?

Senator DECONCINI. And I don't mean just in the litigation.

Mr. CALAMARO. You mean, as a standard for attorney fees?

Senator DECONCINI. That's right.

Mr. CALAMARO. As you know, our standard was taken from the *Christiansburg Garment* case, and it gave an extremely cogent explanation of why we need a standard like this. The one word that was not

in the *Christiansburg Garment* case was "arbitrary." That's one that we added to it.

The others in our standard include frivolous, unreasonable, and groundless. Is the Senator suggesting that the standard might simply just be "frivolous"?

Senator DECONCINI. Do you want to ask the question?

Dr. ROMANI. Mr. Calamaro, I was curious as to whether, if the Justice Department's standard were adopted, you could provide the committee with an estimate as to under our standard and your standard, how many cases would be captured and alternatively what the two levels of cost might be using those different standards, so that we can gauge what the real impact of those two standards might be in practical terms?

Mr. CALAMARO. We have tried that. It is understandably a guess. Our cost estimate works through all the way down in a way that applies to both, and then the last step is where you can see the difference between S. 265 and our proposal.

Our estimate is that, under S. 265, possibly 25 percent of the cases that are resolved against the Government would have attorney fees assessed. That's a quarter.

Our estimate is that, under our proposal—

Senator DECONCINI. The case the Government loses.

Mr. CALAMARO. That's right. The case the Government loses. As I say, if you follow it all the way down, under our proposal we estimate it might be about 5 percent, so we are talking about a difference of 25 over 100, as opposed to 5 over 100.

Dr. ROMANI. Does that mean that your cost estimate would decrease by a like amount and therefore would be approximately \$50 million, rather than \$200 million, or 20—if it's a hundred now, I'm not sure what your final estimate is as to costs under our litigation.

Mr. CALAMARO. That's right. Our estimate is \$125 million for S. 265 as presently drafted, and \$25 million under the standard that we propose. We are prepared to concede that much of this is estimation, but we have an obligation to estimate as best we can.

Senator DECONCINI. I have no further questions. Thank you very much, gentlemen, for your testimony. We appreciate it.

Our next witness is Frank Swain, legislative counsel for the National Federation of Independent Business.

#### STATEMENT OF FRANK S. SWAIN, LEGISLATIVE COUNSEL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. SWAIN. Thank you very much, Senator.

First of all, I'd like to express my appreciation for your having the National Federation of Independent Business appear this morning. As you know, I am legislative counsel based in Washington, but we are more than happy to come out here and appear in strong support of S. 265, which you have worked so hard on, along with Senator Domenici from New Mexico.

NFIB feels there are great regulatory problems these days. We feel that the best and most efficient solution to these problems can start at the individual level and that's the level that S. 265 would encourage, to contest the Government in regulatory actions in which individuals and small businesses felt the Government actions were not justified.

Senator, I had some remarks somewhat prepared this morning. I think I'll just summarize them and comment, if I may, on a couple of the points raised by Mr. Calamaro and also by Mr. Robb.

Basically, one point that I wanted to emphasize is that, both in yesterday's hearings and in the prepared statement presented by Mr. Calamaro, one of the suggestions was made that this legislation, S. 265, is possibly not necessary in light of some other regulatory reforms now being considered by the Congress. I think it's important to draw a distinction here. If you admit that regulation is a problem, you have to go one step further and ask: Who is it a problem for?

In the first case, it's certainly a problem for the Congress and the people Congress represents.

When the Congress sets national policies and sets national priorities, they establish administrative bodies and give them a certain degree of discretion to flesh out and formulate these policies and implement them.

If these policies are set in conflicting ways by different agencies or if they are overly complex, if they don't reflect the will of the Congress, then the only appropriate remedy to these problems is a review and reform of the agencies from the top, at the congressional level. As the Senator is well aware, several proposals are pending this year both before the Senate Judiciary Committee and Senate Governmental Affairs Committee. The President has a comprehensive regulatory reform proposal, as does Senator Ribicoff. There are several other regulatory proposals introduced. Many of them have a great deal of merit. Many of them have very good ideas. The NFIB encouraged careful studies of all of them.

But there is a key difference between basically fiddling with the regulatory mechanism which is what S. 262 and S. 755, the President's regulatory reform proposal would do in order to achieve better policies and regulations—a difference between that and providing a mechanism to check overzealous and unjustified enforcement of regulations, regulations which themselves may be perfectly proper, but whose application may be unjustified or erroneous in particular situations.

S. 265 would finally make regulators accountable for unjust enforcement of the regulation. That's a key difference. It was mentioned yesterday and alluded to again in the statement of Mr. Calamaro that the various proposals relating to public participation in the rulemaking process might remedy some of these same problems. NFIB is not convinced this is the case at all. The public participation would apply at the rulemaking level in Washington, when the rules are promulgated, not at the enforcement level here in Arizona. Several agencies have, on their own, instituted public participation funding, and NFIB is not aware—and I am not sure that anybody else is aware either—that these programs have resulted in any significant changes in the enforcement records of these agencies and whether they are bothersome or burdensome for the particular businesses and individuals which they pursue.

In summary on this point, I want to emphasize that NFIB does not believe that public participation funding is any part of an answer to the very important issues which you are seeking to address in S. 265.

The second major point brought up by the Justice Department is one of cost. Basically, they argue that, if this legislation is passed, it would be so expensive that the taxpayer would not tolerate this massive expense of Government reimbursement.

I'd like to put this in a little different way. If you try and estimate the cost of all the instances of all the cases in which the Federal Government has brought substantially unjustified actions, and then you take out all the large business actions, all the actions relating to businesses, in other words, that are worth more than \$5 million—the standard in your bill—and you also eliminate all actions in which the IRS participates, because that's also eliminated from your bill, and you also eliminate all actions in which the private parties persist in any particular dilatory tactics, because the bill authorizes the awards to be held up or minimized on that basis, and then you take the sum from that, you are still left with the total cost of \$125 million by the Justice Department's own estimate, that unjust Government enforcement of the civil cases is costing small business. They estimate that one out of every four cases they bring against small businesses are substantially unjustified, and the cost of those cases is \$125 million. And I must say this morning that I hope the Justice Department continues to make this argument, because I think it's the best argument for this legislation that we have. This is a deplorable situation, and if you agree that the policy as it is made in Washington is improperly applied and if you agree that this is a deplorable situation, then you have to pass this legislation regardless of the financial cost.

The third major point that I would like to briefly address this morning is a suggestion made by Mr. Calamaro and also contained in his draft bill that the legislation would be acceptable to the Justice Department if the presumption is shifted; that is, if there is a change from the wording of S. 265 in which the Government has an opportunity to justify its litigation and therefore eliminate its reimbursement responsibility.

If that presumption is shifted and the private litigant is forced to justify its defense, basically what you are saying is that he has to prove that the Government was particularly vexatious or arbitrary in prosecuting him. That is really the key to the bill.

I think it would be interesting to go through the thought process when you have a small businessman going and consulting with his attorney and getting his attorney's advice over whether to pursue a case.

Under S. 265, if, let's say for instance, an OSHA inspector comes and fines a small businessman \$2,500 or \$4,000 and the businessman does not feel that this fine is justified, he can go to his attorney and say: What does it cost to fight this case? The attorney can give him a cost estimate, and most likely it will be several thousand dollars. Then the attorney will say: And if you can win this case, then the Government might be able to pay my legal fees. But they won't pay it if it's a close case, because that way the Government has a way out. The Government can prove that it's a substantially justified case. If it's not a close case, then maybe you will get my legal fees paid by the Government. The small businessman is faced with a very difficult decision in that case, whether to go on and litigate. Government reimbursement is hardly a sure thing even under S. 265, because the Government has a very significant way out of that.

Now, under the Justice Department's proposal that scenario is altered slightly, and what the attorney will have to say is: If you can win this case and then I have to go and prove again that the litigation

against you was substantially unjustified—in other words, I not only have the burden of winning the case, but I have the burden of proving that I should have gone to court in the first place. This is really an intolerable decisionmaking process for the small businessman, for the private litigant faced against the U.S. Attorney's Office or against the general counsel of the particular agency.

I feel it would be no remedy at all, and the NFIB is strongly opposed to the Justice Department's shifting the burden of proof and would find S. 265 unacceptable under that change.

I would like to comment on just one other point that was raised concerning business size. Mr. Robb, representing the Arizona Chamber of Commerce, suggested that he would prefer to see the size limit increased or entirely eliminated.

Mr. Calamaro on behalf of the Justice Department suggested decreasing the size limitation from \$1 million of gross assets to \$250,000 of gross assets as far as the business is concerned.

The Commerce Department publishes periodically its census figures which indicate, as best they can determine, the numbers of small businesses and the last publication was the Statistics of Income, 1974.

I'm sorry, this is from the Internal Revenue Service on business income tax returns. They indicate that the total number of active corporations is approximately 1.9 million. Factoring out those corporations which don't report any assets at all, which they report as 97,000 corporations, and also factoring out those corporations which report assets between \$1 and \$99,000, because these are truly very tiny businesses which would be subject to very little in the way of direct Government interference that would be covered by that bill. There are over one million businesses. If you only take into account these businesses, the corporations which the IRS reports have between \$100,000 and \$1 million in assets, that comes out to 686,000 corporations approximately.

I'll be glad to submit these figures for the committee.

Senator DeCONCINI. Is that net assets?

Mr. SWAIN. Total assets, according to the IRS figures—686,000 corporations between \$100,000 and \$1 million in assets. There are under 98,000 or nearly another 100,000 between \$1 million and \$5 million in assets.

I think I misspoke previously. Your cutoff point in the bill is \$5 million for total assets, and the Justice Department proposes cutting this down to \$1 million. Basically, what the Justice Department is doing, according to these IRS statistics, is cutting out approximately 15 percent of the corporations which might be assisted by this bill. I would suggest here that that's a fairly significant cut and also that those 15 percent of the corporations are probably those corporations which are in their most active phases of growth. They would probably like nothing better than to be above that \$15 million mark and be in the big business leagues. There is a very key stage of growth for small businesses, when they reach the stage of just starting to get off the ground. They have expanded their production and employment. This is the key part where they can have unjustified legal expenses forced upon them.

I would feel that the change made by Mr. Calamaro is at the very least deserving of further significant study, and we don't feel that it's justified without a strong showing from the department.

I'd like to very briefly comment also on the comments made by Mr. Robb relating to business size and to his hope that the bill covers all types of businesses.

We share Mr. Robb's and the chamber of commerce's concern that Government litigation forces costs upon all types of businesses, and of course the costs are never justified in an improper case, whether the business is Exxon or whether the business is Joe's Body Shop.

But I think there is a very real concern, particularly for the small businesses, and this is not just an anecdotal concern because of the people that we are going to hear this morning or the people that you have heard in other hearings. Statistics put together by the Federal Trade Commission and other Government agencies indicate that small businesses have a particularly low profit margin.

Therefore, any type of unjustified Government enforcement directed against them has a particularly aggravating effect, and I'd like to cite the Federal Trade Commission figures for 1976 after-tax profits, which are the last figures available. The Federal Trade Commission did a report, and it indicates that the profits of manufacturing corporations with less than a million dollars of assets, which is under the Justice Department's proposal, the after-tax profit per dollar is 1.4 cents—1.4 cents on the dollar for corporations with less than a million dollars in assets.

Now, those large corporations between \$1 million and \$5 million have an exorbitant profit of 2.5 cents on the dollar. We are still in the small ranges, because when you compare that to the universal set, all manufacturing corporations have a profit of 5 cents on the dollar. So you can see that even the corporations included in your bill, Senator, those with less than \$5 million in assets, have an average after-tax profit of less than half of the national margin.

Truly, small businesses are much less able to absorb legal expenses than large businesses. It's a deplorable situation when any legal expense is unjustified, but the small businesses are particularly in need of assistance, and your bill goes in that direction, and we applaud it. That's the end of my presentation. If you have any questions, I'll be happy to answer them.

Senator DECONCINI. Thank you very much. You have been extremely helpful. Let me pose one question to you for the record.

Do you see any danger that, under S. 265, that this bill would unduly burden the courts by increasing the number of suits that would be brought by small business?

Mr. SWAIN. Well, I'm not really qualified to say how many suits would be increased or whether the courts would be burdened or not. I think that is a question that should be addressed to the judges and court administration people.

I don't believe that, just because something would unduly burden the courts doesn't mean that it's improper on the merits. The courts after all are an adjudicatory mechanism and are set up to resolve disputes among and between segments of the American society, and if those disputes are present, then they ought to be resolved. If we have to create more courts and judges, so be it. I'm not convinced that that would happen.

There have just been 150 some odd new judges created, as the Senator is well aware, and I am not sure the courts would be very much more tied up than they are now by your bill.

Senator DECONCINI. Do you think any potential risk along that line is certainly worth taking?

Mr. SWAIN. Very much worth taking. I might add one thing, and that is, as the bill is written now, there is a 3-year sunset provision. I think this is a valuable provision. It allows us 3 years to judge the effect of the bill. If the effects of the bill are bad in one way or another and changes are in order, then it may well be that the bill might have to be altered somewhat in 3 years.

Really, what we have now is a 3-year trial period. This is very valuable. If there are bad effects on the courts or the limits or size limitations should be changed somewhat, then we should make that decision in 3 years.

Senator DECONCINI. Thank you very much. Our next witness is William Quarles, vice president of Sunkist Growers, accompanied by Ralph Bodine, citrus grower.

Welcome, gentlemen. It is nice to see you once again. If you have any prepared statements, we will put them in the record. If you would care to highlight them for us, please proceed.

#### STATEMENT OF RALPH BODINE, CITRUS GROWER, PHOENIX, ARIZ.

Mr. BODINE. My name is Ralph Bodine, born and raised in Arizona, live in Phoenix, Ariz.

[The prepared statement of Mr. Bodine follows:]

##### PREPARED STATEMENT OF RALPH E. BODINE

My name is Ralph E. Bodine. I live at 551 West Tam-O-Shanter Drive, Phoenix, Arizona 85023. I am a citrus grower with production in Maricopa County and a member of Sunkist Growers, Inc., a citrus marketing cooperative. With me is William K. Quarles, vice president, government affairs, of Sunkist.

I am here to urge support of Senate bill S. 265 and to urge amendment of it to make it applicable to agricultural cooperatives. I am particularly interested in these objectives because of my membership in Sunkist. Sunkist is a nonstock, nonprofit agricultural marketing cooperative which consists of approximately 6,500 citrus growers in Arizona and California. Most are family farmers who farm only an average of 35 acres of citrus.

Sunkist and its predecessor, the Southern California Fruit Growers Exchange, has been in existence since 1893. It was initially formed by its member-growers to market their fresh citrus collectively in domestic markets. Prior to that time, the individual citrus grower had been at the mercy of produce buyers who controlled all access to valuable Eastern markets. The isolated individual grower had little control over wild fluctuations in sales prices and shipping volumes which resulted from the buyers' speculation.

As the sales agent for its member-growers, Sunkist established sales offices throughout the United States and Canada. It was therefore able to eliminate the middleman to the extent practicable and give the member-growers better communication with the retailer and consumer. This benefits both growers and consumers.

Approximately 60 years ago, Sunkist's member-growers began to use the cooperative to process the citrus they could not market fresh. Since then, the member-growers have turned to their cooperative association to perform export marketing, transportation, and research and development functions because it can do so more efficiently and economically.

About 2 years ago, the Government commenced an attack on the farmer cooperative system by lodging a complaint against Sunkist and requesting that the cooperative be broken approximately in half. In our view, the Federal Trade Commission is simply testing a legal theory conjured up by its staff; namely, that some agricultural cooperatives are too large. The problem with this is that, even if Sunkist successfully defends against this assault, which we fully expect it to do, the member-growers still lose. So far, we have spent over \$1 million in defending against this attack. Conservative estimates of the proposed expendi-

tures for the calendar year 1979 are approximately \$900,000. All of this comes right out of the pocket of the member-farmers of the cooperative. As Sunkist is a nonprofit cooperative, the litigation costs cannot be deducted. They can only be subtracted from the returns from the sale of the members' fruit before it is distributed back to the members.

It has been my observation over the years that the Federal Trade Commission, the Justice Department and perhaps other Government agencies have been successful in wringing consent judgements from small businessmen and others due to the coerciveness of the Government's financial resources compared to that of the small businessman. In short, the Government uses the staggering costs of litigation to coerce small businessman defendants into submission.

Sunkist's cost of litigation this calendar year are expected to amount to a substantial portion of its operating budget. This is outrageous even for a normal stock corporation, a corporation which could deduct litigation costs from profits. However, when the attack is on a collection of small citrus growers that make up the Sunkist membership that cannot deduct the litigation costs, the pervasiveness is magnified many times over.

Further, the impact of the suit includes an additional insidious element. It is our belief member-growers are being forced out of Sunkist merely because of the suit. Since the FTC investigation which led to the filing of the suit began in 1975, Sunkist membership has declined by 16 percent and acreage committee to Sunkist by its members has decreased by 19.5 percent. We are unaware of any circumstances other than Federal Trade Commission proceedings against us which would explain the dramatic decline in membership and acreage.

It is our belief this FTC attack on cooperatives is one sterling example of the unfairness of the current system. It is time to rectify it! At the bare minimum, if the Government is unsuccessful in its suit against a small businessman, it should have to pay the litigation costs of the small businessman. Otherwise, in many instances the small businessman could well win the suit and wind up bankrupt! For the same reason, since nonprofit agricultural cooperatives are only made up of its member farmers and a suit against the cooperatives must be financed by each of the member-growers, it is believed appropriate to amend S. 265 to make it applicable to agricultural cooperatives.

Now, if the subcommittee please, I will ask that further definitive comments be presented by Mr. Quarles. We will be pleased to stand for questions after Mr. Quarles' comments.

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I am a citrus grower with production in Maricopa County and a member of the Sunkist Growers, Inc., a citrus marketing cooperative.

I am here to urge support of Senate bill S. 265 and to urge amendment of it to make it applicable to agricultural cooperatives. I am particularly interested in these objectives because of my membership in Sunkist.

Sunkist is a nonstock, nonprofit agricultural marketing cooperative which consists of approximately 6,500 citrus growers in Arizona and California. Most are family farmers who farm only an average of 35 acres of citrus.

Sunkist and its predecessor, Southern Arizona Fruit Growers Exchange, has been in existence since 1893. It was initially formed by its member-growers to market their fresh citrus collectively in domestic markets. Prior to that time, the individual citrus grower had been at the mercy of produce buyers who controlled all access to valuable eastern markets. The isolated individual grower had little control over wild fluctuations in sales prices and shipping volumes which resulted from the buyers' speculation.

As the sales agent for its member-growers, Sunkist established sales offices throughout the United States and Canada. It was thus able to eliminate the middleman to the extent practicable and give the member-growers better communication with the retailer and thus consumer, thus benefiting both growers and consumers.

Approximately 60 years ago, Sunkist's member-growers began to use the cooperatives to process the citrus they could not market fresh. Since then, the member-growers have turned to their cooperative association to perform export marketing, transportation, and research and development—all functions which Sunkist can do so more efficiently and economically.

About 2 years ago, the Government commenced an attack on the farmer cooperative system by lodging a complaint against Sunkist and requesting that the cooperative be broken in half. In our view, the Federal Trade Commission is simply testing a legal theory conjured up by its staff; namely, that some agricultural cooperatives are too large. The problem with this is that, even if Sunkist successfully defends against this assault, which we fully expect it to do, the member-growers still lose. So far, we have spent over \$1 million in defending against this attack. Conservative estimates of the proposed expenditures of the calendar year 1979 are approximately \$900,000. All of this comes right out of the pocket of the member-farmers of the cooperative. As Sunkist is a nonprofit cooperative, the litigation costs cannot be deducted. They can only be subtracted from the return back from the sale of the members' fruit before it is distributed back to the members.

It has been my observation over the years that the Federal Trade Commission, the Justice Department and perhaps other Government agencies have been successful in wringing consent judgments from small businessmen and others due to the coerciveness of the Government's financial resources compared to that of the small businessman. In short, the Government uses the staggering costs of litigation to coerce small businessmen defendants into submission.

Sunkist's cost of litigation this calendar year are expected to amount to a substantial percentage of its operating budget. This is outrageous even for a normal stock corporation, a corporation which could deduct the litigation costs from profits. However, when the attack is on a collection of small citrus growers, that make up the Sunkist membership that cannot deduct the litigation costs, the pervasiveness is magnified many times over.

Further, the impact of the suit includes an additional insidious element. It is our belief that member-growers are being forced out of Sunkist merely because of the suit. Since the FTC investigation, which led to the filing of the suit, began in 1975, Sunkist membership has declined by 16 percent and acreage committed to Sunkist by its members has decreased by 19.5 percent. We are unaware of any circumstances other than the Federal Trade Commission's proceedings against us which would explain the dramatic decline in membership and acreage.

It is our belief this FTC attack on co-ops is one sterling example of the unfairness of the current system. In our opinion, it is time to rectify it.

At the bare minimum, if the Government is unsuccessful in its suit against a small businessman, it should have to pay the litigation costs of the small businessman. Otherwise, the small businessman could well win the suit and wind up bankrupt. For the same reason, since nonprofit agricultural cooperatives are only made up of its member-

farmers and a suit against the cooperatives must be financed by each of the member-growers, it is believed appropriate to amend Senate bill 265 to make it applicable to all co-ops.

Senator DECONCINI. Now, if the subcommittee please, I'll ask Mr. Quarles for a few comments.

### STATEMENT OF WILLIAM QUARLES, VICE PRESIDENT, SUNKIST GROWERS

Mr. QUARLES. Thank you, Mr. Chairman. We have provided a prepared statement for the record. I have an additional copy if necessary.

Senator DECONCINI. It will appear in the record.

[The prepared statement of William Quarles follows:]

#### PREPARED STATEMENT OF WILLIAM QUARLES

S. 265 is a bill designed to allow individuals and small businesses to have better access to our Federal courts by awarding them attorneys fees and other court costs under certain circumstances. The underlying purpose of the bill is in keeping with the current move toward Government deregulation. Sunkist fully supports the conceptual underpinnings of the act. Sunkist recommends passage of S. 265 with an amendment that would make it applicable to agricultural cooperatives. This can best be accomplished by adding the following language to the end of the definition of a "party" under sections 3(a) and 4(a) of the bill: "However, a cooperative association as defined in the Agricultural Marketing Act (12 U.S.C. § 1141j(a)), may be a party regardless of the amount of its net assets."

#### STATEMENT

1. *Background of Sunkist Growers, Inc.*—This statement is submitted on behalf of Sunkist Growers, Inc., a nonstock, nonprofit agricultural marketing cooperative organized under the California Food and Agriculture Code, division 20, chapter 1. Its membership consists of approximately 6,500 citrus growers in Arizona and California. Most are family farmers who farm an average of 35 acres of citrus. They produce oranges, lemons, grapefruit, tangerines, and limes. Sunkist's principal place of business is located in Sherman Oaks, California.

Sunkist or its predecessor, the Southern California Fruit Growers Exchange, has been in existence since 1893. It was initially formed by its grower-members to collectively market their fresh citrus in domestic markets. Prior to that time, the individual citrus grower had been at the mercy of produce buyers who controlled all access to valuable Eastern markets. The isolated individual grower had little control over wild fluctuations in sales prices and volumes which resulted from the buyer's speculation.

As the sales agent for its grower-members, Sunkist established sales offices throughout the United States and Canada and utilized sales agents abroad. It was thus better able to develop market opportunities and give the grower-members better communication with the retailer and consumer and eliminate the middleman to the extent practicable.

Approximately 60 years ago, Sunkist's grower-members also began to use the cooperative to process the citrus they could not market fresh. Since then, the grower-members have turned to their cooperative association to perform or arrange for export marketing, transportation and research-development functions because it can do so more efficiently and economically.

2. *Sunkist versus a typical corporation.*—The majority of Sunkist's grower-members are family farmers with relatively modest operations. They are not mere investors in the cooperative as a stockholder is in a corporation. Rather, they are participants in the business. In fact, they are the participants in the business. The products marketed through the cooperative are their products. All benefits and risks assumed by the cooperative are shared equitably by each of the grower-members. Sunkist, unlike a corporation, has no "deep pocket" to permit it to sacrifice short-term profits. All receipts on sale of their fruit (less expenses) must be returned annually to the grower-members. Sunkist and other

agricultural cooperative associations are in essence an extension of their grower-members. The net operating result of a nonprofit cooperative must be brought to zero at the end of each fiscal year. Any deficit must be made up by billing the member-growers on a pro rata basis of their fruit sold by the cooperative. Similarly, any excess must be returned to the members on a pro rata basis. Co-ops act as a conduit and agency through which the farmers act together in processing and marketing their member products.

As will be discussed in more detail, it is the individual grower-member who is assuming the expense of the present FTC litigation. As Sunkist cannot make a profit, litigation costs cannot receive the tax treatment they receive in a profit-making enterprise. Every cent of litigation cost comes out of the pocket of the member-grower. In other words, Sunkist's net returns to its members must be reduced by 100 percent of the costs of litigation. The great majority of growers would meet the definition of "party" contained within S. 265, and under the present language of the bill would be eligible for attorneys fees and related costs, but for their affiliation with a cooperative association.

Voting control in an agricultural cooperative is not based on the amount of investment as in a stock corporation. Rather, it is based on membership or business done with the cooperative. Sunkist's grower-members make their own decisions with respect to planting and harvesting. They need not commit all of the acreage to Sunkist. They are free to leave the cooperative annually. When a grower-member leaves Sunkist, production capacity goes with him and he immediately becomes a competitor of the cooperative.

3. *Purpose of the legislation.*—As currently drafted, S. 265 applies to certain individuals, partnerships, small businesses, associations and other organizations whose assets do not exceed a certain amount. It permits these "parties" to have better access to the Federal courts by awarding them attorneys fees, expert witness fees, and court costs in litigation with the United States. Such an award can be made if the party prevails in any civil action brought by or against the United States unless the court finds that the Government's position was "substantially justified." If the action is one for review of an agency adjudication, fees and expenses accrued during such adjudication can also be awarded.

The legislation is designed to correct the imbalance created by rising litigation costs coupled with an expanding Federal bureaucracy which makes it exceedingly more difficult for the average citizen to contest excessive, arbitrary, or unreasonable regulatory action. Its drafters also hoped the bill would make the bureaucracy more responsive to its citizens' needs and more accountable in the exercise of its regulatory powers.

Because of the nature of an agricultural cooperative, an action by the Government against a cooperative is in reality an action against the individual grower-members. In recent years farmers and their cooperatives have come under increasing scrutiny and pressure from agencies of the Federal Government. The Internal Revenue Service has challenged certain accounting and tax practices of cooperatives. In several of these cases, the cooperative prevailed in lengthy and costly litigation. In fact, we are not aware of any logic for supporting the exclusion from the bill of cases arising under the Internal Revenue laws and urge that this exception be eliminated.

There is also the specter of future attacks on agricultural cooperatives arising out of the recent report of the National Commission for the Review of Antitrust Laws and Procedures. The Commission recommended, *inter alia*, that consideration be given to modifying the antitrust treatment of cooperatives. The Commission even suggested that jurisdiction over cooperatives be removed from the Secretary of Agriculture.

The Federal Trade Commission has investigated various aspects of agricultural cooperatives over the past several years. In 1975, the Commission decided to investigate the citrus industry. Their investigation ultimately focused on Sunkist as will be mentioned in detail later.

4. *In the matter of Sunkist (Docket 9100).*—The FTC's action against Sunkist amounts to a direct attack on farmer cooperatives and challenges their very survival. Sunkist's grower-members believe that this is exactly the sort of action the sponsors of S. 265 contemplated. Thus, Sunkist's farmer-members are a part of the American citizenry that the bill was designed to assist.

The FTC complaint, issued in 1977, alleges monopolization in violation of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and of section 7 of the Clayton Act, 15 U.S.C. § 18. The FTC's theory appears to be that Sunkist is in violation of the antitrust laws simply because its members account for 60 percent to 70 percent of the citrus produced in Arizona and California. Many people

familiar with agricultural cooperatives have concluded that Sunkist has been singled out by the FTC as a "guinea pig" to test the theory that size alone is sufficient reason to break up a successful agricultural cooperative (exhibit A). This theory first became apparent to us through an FTC staff report entitled "A Report on Agricultural Cooperatives," dated September 30, 1975. The report targeted 10 so-called "dominant" cooperatives in the fruit, vegetable and nut industries, including Sunkist. The following day, on October 1, 1975, the FTC announced an "Investigation of the Citrus Fruit Industry," which was noted in an FTC budget report as an investigation of Sunkist. During this investigation, Sunkist furnished over 26,000 pages of documents and substantial time of employees for interviews and testimony over the next many months. A complaint followed against Sunkist in May of 1977. In addition to challenging Sunkist's size, the FTC is attempting to determine the nature and extent of its jurisdiction, if any, over agricultural cooperatives. Thus, on one level the Commission is forcing the grower-members to absorb the costs of this exercise.

On another level the FTC is seeking to strip farmers of the specific rights promised them by Congress through section 2 of the Capper-Volstead Act of 1922 and section 6 of the Clayton Act. Those statutes carved out a specific, but limited, exemption for agricultural cooperatives from portions of the antitrust laws and gave the Secretary of Agriculture (not the FTC) jurisdiction to determine if a cooperative's activities amounted to monopolization or a restraint of trade. By virtue of the exemption from the antitrust laws contained in those statutes, it was in fact assumed that agricultural cooperatives might lawfully acquire significant market power, even include as members 100 percent of the growers of a particular commodity.

Sunkist's grower-members believe that the FTC's actions constitute a major assault on the congressional intent behind these acts, which was to encourage the growth of agricultural cooperatives. This congressional policy is as valid today as it was when these statutes were passed. The specific reference to Sunkist in the legislative history of both of these acts as one of the organizations the statutes were designed to protect is also significant. Both agricultural cooperatives and the American consumer will be the losers if the FTC prevails against Sunkist. Because of the massive litigation costs, Sunkist will be a loser in any event unless it would be willing to capitulate to the FTC.

It has long been recognized that the strength of American agriculture emanates from a viable family farm system. In today's economy there are only two realistic methods of sustaining this important sector of our economy. One involves direct subsidies from the Government and the other is the system of agricultural cooperatives which allows the family farmer to keep his independence and at the same time enjoy the economies of scale offered by agricultural cooperatives for marketing his products and securing his supplies. It is unthinkable to seriously consider granting subsidies when self-help through cooperatives has worked so well.

Adoption of this legislation, with the suggested amendment, will help cooperatives defend themselves against unnecessary governmental intrusions. Substantial erosion of cooperatives can only result in significant inroads by giant corporate enterprises and it is difficult to imagine how this turn of events will be in the interest of the consumer. This fact was emphasized in a recent speech by Secretary of Agriculture Bob Bergland in which he called for a national dialogue to discuss the future of American agriculture and the family farm (exhibit B). The importance of the family farmer was also stressed in an address by President Carter to the Missouri Farmers Association on August 14, 1978, during which he voiced support for the Capper-Volstead Act which is the legislation that provided agricultural cooperatives with limited antitrust exemption (exhibit C).

[Exhibits A, B, and C appended to the statement.]

5. *Cost and impact of the litigation on Sunkist's grower-members.*—Sunkist is not asking the members of this subcommittee to rule on the merits of its defense against the FTC's attack. However, the litigation is relevant to the bill pending before this subcommittee because it is a tangible example of the sort of excessive, unreasonable and harassing regulatory action which its drafters hope to curb. The costs to Sunkist's individual grower-members of fighting for the survival of agricultural cooperatives will be enormous. The FTC has been investigating Sunkist since 1975. Formal administrative proceedings before the FTC have been ongoing for nearly 2 years. Sunkist filed a motion to dismiss the FTC complaint for lack of jurisdiction which was denied. Sunkist then sought to enjoin the FTC from taking further action against it in Federal dis-

trict court. The district court recently denied Sunkist's motion for injunctive relief. Sunkist has appealed. The matter is currently pending before the Ninth Circuit Court of Appeals.

To date, attorneys fees and other direct costs associated with this litigation are in excess of one million dollars (\$1,000,000). Direct costs for 1979 are projected at nine hundred thousand dollars (\$900,000). Based on the first 3 months of this year, the estimate is conservative. It is the individual grower-member who suffers from the great expense of this suit, not Sunkist. This is because Sunkist operates on a nonprofit basis for the benefit of the FTC proceeding via a per-carton assessment of all fresh fruit which it sells. In other words, the grower is directly bearing the costs of this litigation.

The impact of the FTC litigation transcends direct dollar costs of defending the suit. Sunkist's membership and member-acreage have been relatively stable in the years preceding the investigation and litigation. However, since 1975, when the FTC investigation began, Sunkist's membership has declined by 16 percent (1,290 members) and acreage committed to Sunkist by its members has decreased by 19.5 percent (63,000 acres). Sunkist is unaware of any circumstances, other than the Federal Trade Commission proceeding against it, which would explain the dramatic decline in its membership and acreage.

The pervasiveness of the suit is well illustrated by a recent series of events in Arizona. Two citrus packinghouses joined Sunkist Growers, Inc., in late 1978. These packinghouses were served with lengthy subpoenas from the Federal Trade Commission soon after joining Sunkist. None of the several other independent packinghouses in Arizona or California were served with these subpoenas, leaving one to believe that these two packinghouses were being singled out because of their affiliation with Sunkist. At a cost of approximately \$5,000 in attorneys fees, these two packinghouses were successful in having the subpoenas quashed in their entirety. However, the Commission staff has recently filed a Motion for Reconsideration with the Administrative Law Judge and is now seeking to enforce the subpoena as to various requests for documents. Once again, the packinghouses are faced with the alternative of expensive litigation or giving in to the Commission's unreasonable demands.

6. *Potential for additional suites.*—There are currently 17 agricultural cooperatives in the State of Arizona and approximately 300 in the State of California representing an aggregate membership of over 60,000 growers. Cooperatives exist in other parts of the United States as well.

The misplaced notion that agricultural cooperatives are the recipients of undeserved special treatment under our tax and antitrust laws appears to some to be gaining momentum. The FTC's complaint against Sunkist and the findings of the National Commission for Antitrust Review suggest that other cooperatives may face the prospect of a heavy financial burden similar to that currently being borne by the members of Sunkist Growers, Inc. If present or future actions by one or more Federal agencies are not found to be "substantially justified", it will certainly be unjust if the grower-members are forced to absorb the tremendous financial burden triggered by governmental action.

7. *Proposed amendment to S. 265.*—Sunkist's grower-members recommend that the definition of a "party" contained in sections 3(a) and 4(a) of the Act be amended by adding the following language: "However, a cooperative association as defined in the Agricultural Marketing Act (12 U.S.C. § 1141j(a)), may be a party regardless of the amount of its net assets."

This amendment would expand the bill's coverage to a unique type of entity and would recognize the reality that cooperative associations within the context of the Agricultural Marketing Act are a mere extension of their grower-members. The requirements for meeting the proposed definition of a cooperative association are that the association is operated for the mutual benefit of the members, that no member is allowed more than one vote because of the amount of stock or membership he may own therein or that the association does not pay dividends on stock or membership capital in excess of 8 percent per annum, and that the association does not deal in farm products, farm supplies and farm business services with or for nonmembers in an amount greater in value to the total amount of such business transacted by it with its members. In substance, the amendment would encompass only legitimate self-help associations formed by farmers.

The present experience of Sunkist's grower-members confirms that they are the type of citizens who need the protection which this legislation is designed to provide. They are involved in costly litigation which is creating an immense

strain on their financial stability and which is threatening the ability of the agricultural cooperative to fulfill one of its major responsibilities: the survival of the family farm. As Barbara Schlei, Administrator, Agricultural Marketing Service, U.S. Department of Agriculture, stated in a recent speech: "I believe that the failure of cooperatives would be the end of the family farm system of agriculture."

#### CONCLUSION

We appreciate the opportunity to present our views to this subcommittee. We urge the passage of S. 265 with the amendment we have suggested.

We believe the time for this type of legislation has arrived. Duplicative and conflicting governmental programs and policies have been challenged in the context of the President's anti-inflation program. The inflationary impact of Government regulations has also been brought into sharp focus in connection with the fight against inflation. Legislation which will ultimately cause governmental agencies to make prudent and thoughtful decisions prior to initiating action that may result in litigation is entirely consistent with this thrust.

We will be happy to furnish any additional information that may be helpful.

## Exhibit A

SACRAMENTO BEE  
Tuesday, March 13, 1979

# Co-Ops On The Defense

By Al Calais  
Bee Staff Writer

The strategy that the nation's farm cooperatives are developing to counter an "assault by some zealot hotdogs" in the Federal Trade Commission and at the Department of Justice was laid out for the representatives of 72 California co-ops who were meeting at Monterey this past week.

The "zealot hotdogs," as they were called by Jack Shepherd, the outgoing president of the Agricultural Council of California, want cooperatives to lose the antitrust immunity they were given by Congress and they want the cooperatives to pay taxes.

This, the cooperatives maintain, is contrary to the Capper-Volstead Act of 1922, which was specific in its language exempting farmer cooperatives from antitrust prosecution as long as the co-ops represented growers who were joining together to market their particular product. The act also contains language that precludes price enhancement and established the procedures to discipline organizations that do so.

The FTC has gone into court claiming it has the authority to prosecute. It also claims that seven of the nation's largest cooperatives are in California and that the seven are guilty of market dominance. The FTC has singled

out Sunkist for prosecution and the matter will soon be in the US Ninth Circuit Court of Appeal, where Sunkist will argue that a lower Federal Court erred in saying the FTC has jurisdiction.

At the Monterey meeting, Gov. Brown in rather strong language, said that cooperatives were a bulwark against the large farm corporations who stand in the wings, ready to pounce on the consumer if the FTC action is allowed to proceed. He said co-ops are necessary to market goods.

"You can't have every individual farmer, big or small, traipsing off to the market trying to get a fair price. He wouldn't stand a chance and we'd have a losing economy," he put it at one point.

"I assure you that California will take whatever step necessary to see that the cooperative law isn't weakened," he told the Council delegates. He left no doubt where he stood on this issue.

But the strategy outline came from Donald E. Graham and a panel of four lawyers who have joined to defeat the FTC effort.

"Our enemy isn't the consumer, it isn't Ralph Nader, it is not the Consumer Federation of America. Rather they are our allies and we should seek their support. Nader is a strong believer in co-ops and he is keenly aware that we afford protection on price to the consumer, at the same time permitting a fair return to us," Graham said.

"And our greatest ally, who we must seek out, is labor. The Capper-Volstead Act permits us the same privilege of seeking and bargaining a fair price for our product as the Norris-LaGuardia Act affords them the right to bargain for a fair wage. If we lose, it won't be long before they will see their privileges eroded, too. And they know that cooperatives insure their members, the consumers living on wages alone, the opportunity to

buy farm products at a fair price," he said.

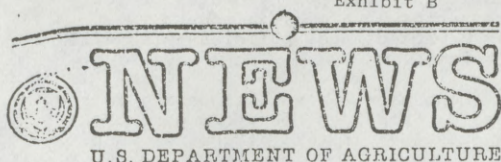
"We will need labor and consumer support, we will need Ralph Nader and others to present our message to Congress because only 20 of the 435 members of Congress come from purely agricultural districts. The rest have partially urban or entirely urban components with their districts," he said.

"I know we will win in the courts in the Sunkist suit, because the courts have sustained Capper-Volstead on several occasions. The FTC effort is merely a transparent attempt by bureaucrats at the FTC to pervert the

purpose of Capper-Volstead and to give to themselves the authority that Congress said they should not have. Those who have incited them to commit this perversion will then go to Congress, which is where the final battle will be waged," he said.

He identified the three groups as the Tax Equality Association, the National Association for Milk Marketing Reform, and the National Fertilizer Solution Association. He said the tax group was made up of big corporations determined to force taxes on co-ops, even though co-ops only represent individual farmers at one point of the production, sales. He said the milk reform group represented four or five milk firms in the East.

Exhibit B


 Keys  
 McDavid

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B.

## BERGLAND URGES DIALOGUE ON FUTURE OF FAMILY FARM

KANSAS CITY, Mo., March 12--Concerned over the trend toward fewer but larger farms, Secretary of Agriculture Bob Bergland today called for a national dialogue to discuss the future of American agriculture and the family farm.

In remarks prepared for delivery before the National Farmers Union's annual convention here, Bergland said he does not want to see an America "where a handful of giant operators own, manage and control the entire food production system."

"Yet that is where we are headed," he said, "if we don't act now."

He said control of production is becoming more and more concentrated on fewer and fewer farms, noting that today 200,000 of the nation's 2.7 million farms control nearly two-third of all farm output.

Bergland said the administration's present food and farm policies and programs which serve a production system that is the envy of the world are "remarkably well geared to the realities of this era."

He said the U.S. farm production system has not only fed America and the rest of the world at reasonable costs, but has been a stabilizing influence in global politics and the world economy, and generally has yielded a fair return to farmers.

But Bergland questioned if the farm policy decisions that both government and the private sector have made in modern times--and the programs that implemented those policies--are still in America's long-term best interests.

"I am deeply concerned about what I see is happening to the structure of agriculture," he said, "and I am concerned most of all with the desperate need to ask ourselves if this is what we want, or what the nation truly needs."

Bergland said, "If we want to save the family farm; if we want to preserve the diversity of American agriculture...then we must all begin the serious consideration of a farm policy that would be committed to an agricultural structure in America that is in the...interests of the family farm operator."

He said he was concerned about the regressive distribution of benefits from many farm programs, and tax and credit policies which inadvertently contribute to the trend toward fewer and bigger farms.

"I see the benefits of many farm programs going not to improve the incomes of those rural families needing help, but contributing, instead, to higher and higher land prices," Bergland said.

Bergland said he had given much thought to the problems, and was asking for a national dialogue to help develop policies and programs to preserve the family farm system.

He said it should be evident that high and rising land values work to the decided advantage of the big farm operations at the expense of young farmers, small farmers and tenant farmers.

Bergland said the national dialogue should also include a full discussion of the nation's tax laws. He said present law encourages high income taxpayers--who can use investment credit, capital gains, accelerated depreciation and other devices--to pay more for land than its productive worth, because they will still realize a benefit from the tax structure.

"This virtually denies individuals who have small or no incomes to begin farming," Bergland said.

A guaranteed 100 percent of parity program is not the answer to the problems of the family farm, Bergland said. He said such a policy would price American farmers out of export markets that are vital to farm income and the trade balance, and drive land prices even higher than they are today.

"This," he said, "would accelerate the trend, resulting in even fewer farms owning even more of the land and controlling even more of the production."

# # # # #

EXHIBIT C

President Jimmy Carter  
Remarks to Missouri Farmers' Association  
August 14, 1978

"America's agricultural productivity and the family farm structure are among the greatest accomplishments of western civilization. But our agriculture will remain the wonder of the world only so long as we remember a basic fact -- the person most competent to make a farmer's decision is not a bureaucrat in Washington or anywhere else. It is the man or woman on the farm. That is why I will always protect the Capper-Volstead Act of 1922, the basis for this organization."

Mr. QUARLES. S. 265 is a bill designed to all individuals and small business to have better access to a Federal court by awarding them attorneys fees and other court costs under certain circumstances. The underlying purpose of the bill is in keeping with the current moves toward Government deregulation. Sunkist fully supports the intent of the proposed act and recommends passage of S. 265 with an amendment that would make it applicable to agricultural cooperatives. Our recommended language for accomplishing this amendment is included in our prepared statement.

Now, Mr. Bodine has provided some background on the structure of Sunkist. As was indicated, it is a nonprofit, nonstock agricultural cooperative. Its members are farmers. They are not investors in the co-op as a stockholder is in a stock corporation. They are simply the participants in the business.

The citrus marketed through Sunkist is the citrus of its member-growers. All benefits and risks assumed by the cooperative are shared equally by each of the member-growers. Sunkist, unlike a normal stock corporation, has no "deep pocket" to permit it to sacrifice short-term profits.

The books of a nonprofit cooperative must be brought to zero at the end of each fiscal year. Any deficit must be made up by billing the member-growers on a pro rata basis. Similarly, any excess must be returned to the member-growers on a pro rata basis.

As was earlier indicated, since Sunkist cannot make a profit, litigation costs cannot receive the tax treatment they receive in a profit-making enterprise. Every dollar of the litigation costs comes out of the pockets of the member-growers. The great majority of growers in a cooperative would meet the definition of "party" contained within S. 265, and under the present language of the bill, would be eligible for attorneys fees and related costs but for their affiliation in a cooperative association.

As was earlier indicated, the FTC's action against Sunkist amounts to a direct attack on farmer cooperatives and challenges their very survival.

We wanted to particularly bring this to the attention of the committee simply as an example of how Government action affects nonprofit co-ops. This attack began with a theory which became apparent to us from an FTC staff report entitled "A Report on Agricultural Cooperatives" dated September 30, 1975. The FTC's theory appears to be that Sunkist is in violation of the antitrust law simply because its members account for something in the order of 60 to 70 percent of the citrus produced in Arizona and California.

Along with Sunkist, the report targeted 9 other so-called dominant cooperatives in the fruit, vegetable, and nut industries.

The next day, the day after this report was issued, the FTC announced a so-called investigation of the citrus fruit industry. This investigation of the citrus fruit industry was incidentally noted in an FTC budget report as an investigation of Sunkist. The filing of the FTC complaint against Sunkist followed in May of 1977. In addition to the "dominant" cooperative theory, the FTC is attempting to carve out some jurisdiction over agricultural cooperatives that was originally granted to the Secretary of Agriculture under section 2 of the Capper-Volstead Act, which is the enabling act for agricultural cooperatives that was passed in 1922.

Sunkist member-growers believe the FTC's action constitutes a major assault of the congressional intent behind the Capper-Volstead Act which was to encourage growth of agricultural cooperatives. This congressional policy is as valid today as it was when the statute was passed. However, the FTC has never accepted the traditional interpretation of the Capper-Volstead Act and, we believe, has selected Sunkist as the "guinea pig" with which to test their theories.

As Mr. Bodine indicated, Sunkist fully expects to defend against this attack. However, in the meantime, its growers will still be the big losers. As was indicated, the litigation costs are enormous. The costs associated with the investigation and litigation to Sunkist are projected to go over \$2 million by mid-1980.

Sunkist is funding the defense of the FTC proceeding by way of a per-carton assessment of all fresh fruit which it sells in the same manner as it assesses for all of its other operation costs. In other words, the growers are directly bearing the costs of this litigation.

Of course, an alternative to bearing these costs is simply to knuckle under to the FTC and accept a consent judgment, no matter how wrong it might be, not only for Sunkist, but certainly for the whole cooperative community. As was indicated, Sunkist membership has declined dramatically since the FTC investigation was commenced and the complaint initiated. With the staggering litigation costs facing Sunkist, it's believed that many member-growers are simply refusing to bear that burden. If S. 265 becomes law, the impact will be a very beneficial one for the small businessman, including farmers, as it will provide them with an alternative to simply caving in to a Government complaint merely because of heavy potential litigation costs.

If it's my interpretation of Mr. Calamaro's comments correctly, the Justice Department is admitting that 25 percent of the cases the Government loses were not substantially justified in the first instance, and that's to me quite an indictment and certainly underscores the necessity of S. 265.

S. 265 will hopefully result in a more considered decision by the Government before filing cases against small businessmen and farmers. It would undoubtedly cut down on the number of unjustified cases initiated solely to build precedent for a new theory through consent judgments obtained by economic coercion. Sunkist's member-growers are precisely the type of citizens that need the type of protection that this proposed litigation is designed to provide. They are currently involved in costly, arbitrary, and unfair litigation which is creating an immense strain on their financial stability which is threatening the ability of the agricultural cooperative to fill one of its major responsibilities to assure the survival of the family farm.

We urge the passage of S. 265 with the amendment to make it expressly applicable to agricultural cooperatives.

Mr. Chairman, we appreciate the opportunity to present our views to this subcommittee, and we will be happy to stand for questions or otherwise furnish any additional information that the committee might desire.

Senator DECONCINI. Thank you, Mr. Quarles. Let me ask you a couple of questions about the cost of litigation.

When, under your cooperative, these expenses are passed on to the

member-growers, can they deduct any of those expenses themselves?

Mr. QUARLES. No.

Senator DECONCINI. They cannot?

Mr. QUARLES. No.

Senator DECONCINI. In the course of this litigation with the FTC or any other litigation, are sometimes your members brought in individually?

Mr. QUARLES. Sunkist, Senator, is a federated cooperative. It has within the system all of its 85 packinghouses. They are separate and distinct business organizations—some of them, cooperatives themselves. We also have within the system approximately 15 district exchanges that are agricultural cooperatives themselves and act as a liaison between the various packinghouses and the marketing organization.

Senator DECONCINI. How does that work?

Mr. QUARLES. We have to explain the Sunkist system. It's kind of like a triangle. We have approximately 6,500 member-growers. They all have—they are all members of Sunkist, the marketing organization, but they must all have their fruit picked and packed by one of approximately 85 packinghouses within the system.

Senator DECONCINI. Who owns those, Sunkist?

Mr. QUARLES. Each one of those, some of them are businesses for profit, some of them are agricultural co-ops themselves. None are owned by Sunkist. They are only affiliated with Sunkist. Then there is a line of district exchanges whose function, each of the packinghouses belongs to a district exchange. The function of the district exchange is to take orders developed by Sunkist for the fruit and distribute them equitably and equally to their various packinghouses. So within the Sunkist system—all of the district exchanges, incidentally, are agricultural co-ops, nonprofit agricultural co-ops. They all have their own bottom line. The answer to your question is "yes." Each one of these district exchanges and all of the packinghouses have been brought into the litigation.

Senator DECONCINI. OK. Very good.

Do you have any questions?

Ms. ELDRÉD. What other kinds of litigation would you foresee being involved in with Government besides the antitrust area?

Mr. QUARLES. At this point, we are somewhat blinded by the FTC activity that we are involved in right now. However, there are tax matters. The Internal Revenue Service does in many instances challenge cooperatives from a tax standpoint.

If you are interested in the details of those matters, I'll be very happy to submit further information, specific information, on the kinds of cases we have available and we have been involved in.

Ms. ELDRÉD. Thank you.

Senator DECONCINI. I have no further questions. Thank you, Your testimony is helpful. We will give consideration to your request.

Our next witnesses are a business panel consisting of Barbara Zachariae, a rancher, and John Brantingham, a businessman.

Would they please come forward, please.

Good morning.

**STATEMENT OF BARBARA ZACHARIAE, RANCHER, YOUNG, ARIZ.**

Ms. ZACHARIAE. I am Barbara Zachariae. How do you do?

I shall be very brief. I'm in support of your bill. I realize how unwieldy and impractical it would be to do anything other than an actual adjudication in the court. I would like to point out one particular case of a friend of mine. It has not gone to court yet. It probably will. It is not a businessman. He is getting ready to retire in my hometown of Young. He bought 150 acres, and the Forest Service has cut off his access. It's rather a problem. He has already spent about \$3,000, and he has just started.

I understand, from reading your bill, that it would have to go to court and he would have to be awarded, the decision would have to be rendered in his favor before these fees would be possible.

But I am very much in favor of it, because a very arbitrary local ranger, so to speak, has made this decision. He is having to go to Albuquerque to fight it, probably to Washington.

We'll be calling on you by the way, Senator.

That's just about all I have to say.

Senator DeCONCINI. Do you have a number of areas where you have been plagued by governmental agencies or rules, whether it's BLM or Forest Service? Have you had to go to court?

Ms. ZACHARIAE. Not yet, because the cost is exorbitant.

Senator DeCONCINI. That's my next question. Is one of the major reasons for not going to court the fact that you don't feel you can afford it, you'd rather give in?

Ms. ZACHARIAE. Very definitely.

Senator DeCONCINI. Has that happened to you in your ranching business?

Ms. ZACHARIAE. Well, not yet.

Senator DeCONCINI. Do you know of individuals that have?

Ms. ZACHARIAE. Have gone to court? No.

Senator DeCONCINI. Do you know of individuals that have decided not to go to court just for the reasons you expressed?

Ms. ZACHARIAE. This one in particular, yes.

Senator DeCONCINI. Are there others?

Ms. ZACHARIAE. Yes. There was a gentleman who was having difficulty in transferring a cattle permit. He did settle it by going to his Congressman and was successful working through him. This is normally how we do it in certain cases. There are likely to be some in the next 3 to 5 years, because of the threatened cuts in cattle permits. This I think is going to be a very real possibility. Someone is going to sue.

Senator DeCONCINI. Thank you.

Mr. Brantingham?

**STATEMENT OF JOHN BRANTINGHAM, BUSINESSMAN, PHOENIX, ARIZ.**

Mr. Brantingham. Thank you, Senator. I am very pleased to be here this morning.

I am very much in favor of your bill, S. 265. Normally, I am sort of a private person, but this morning I would like to share some very

private things, because I think it would serve to the benefit of our country.

My mother passed on in the year 1972 and left an estate of approximately \$750,000 which was split equally between her three sons.

My father had passed on in the year 1954 in the State of Massachusetts, and he had left an estate at that time that was in trust to the three boys that my mother had life use of.

The IRS in investigating the trust determined that it was in fact a life trust and there had been a fluke in the situation from the point of view at that particular time, when my father passed on, the laws regarding trusts—and I'm not an attorney in any way, shape or form—that dealt with the way this trust was particularly worded, had lapsed in Congress, and there was a period, I believe, of approximately 6 months before the new legislation had been enacted.

Based upon this information, the IRS denied my mother the marital deduction out of the trust and consequently, at that point in time, because she was solely dependent upon the income from my father's trust, she had to tighten up her belt because at that time his trust was only worth about \$200,000.

Out of loyalty to her three children and in the spirit of what the IRS had put upon her, she very diligently got together with her attorneys and with some very dear friends of hers that were accountants and stock consultants, and she set the trust up, and she maintained that trust until the day she died. In fact, she improved the value of the trust during her lifetime.

About 1960 she inherited a large sum of money from her parents, so at that time she was no longer under a financial strain.

When she passed on in 1972, the IRS once again took a look at the situation—excuse me—her part of the estate was worth about a half a million dollars or a little less.

In determining the taxation, the IRS reversed its own decision that was made in 1954 and included my father's trust into her estate, and therefore, we have been double-taxed on this particular situation.

I currently have this with an attorney on a contingency fee basis in Minneapolis, and it will be heard starting in May of this year, but it is going to cost us approximately \$40,000 in attorney fees if we win the case. We feel—as the executor of the trust and the estate—we feel this is an undue burden, because we, as the people involved, have felt that the Government is due its money, and we tried to argue through our original attorneys to state that, if you want your money today—which is in excess of \$100,000—go back and give us the marital deductions that we were deprived of originally plus the interest.

We have never denied the Government its right to proper taxation. We have told them to take it one way or the other. Either give us back our \$100,000 or go back and give us the marital deduction from 1954 with the interest charges that would normally be applicable.

The IRS elected to totally ignore us, and they wouldn't even negotiate with us. They totally said: "Thumbs down. This is the way it's going to be, and that's it."

This brings me briefly to Mr. Calamaro's comments about reducing the level at which this should take place. I am really quite appalled. I can appreciate his stance, because obviously, he is looking at it from the bureaucratic point of view and would like to conserve the Govern-

ment money as much as possible. But at the time, if you were to use his limits, our case would be thrown out or be outside of your bounds. In light of the high cost of litigating today—and I think that this is the part that is very unrealistic—is the fact that, when you consider the high cost of litigation, a \$1-million personal estate is nothing. It would cause a great deal of burden to create cash, take fixed assets and make liquid assets that could handle such a problem.

I am a small businessman. In addition to this particular personal problem that I have, I operate a business that has assets of approximately \$290,000. For me to come up with the cash out of my current cash flow or to borrow the money to handle this type of litigation would be absolutely prohibitive, and if it were strictly a burden on my own personal situation, I would have to say, I will roll over and play dead. Because the ability to get an attorney to take something on this case, of this type, without the knowledge that you can pay him if you lose, is virtually impossible.

This particular time we happen to have a case that's a very strong case, and we feel we have a good chance of winning it, and that's why he took it on a contingency fee basis.

Had he not had that feeling, and I desired to push it through, which I would have had to do in conscience, I would not have the liquid assets to do it and still maintain a small business.

I would also like to comment on the fact that I had another experience as a small businessman with the EEOC, where I asked for information from them in order to defend myself. As a matter of fact, I was found guilty in the case, but the person that had brought the charges, because of the shakiness of the case, the EEOC would not sue me on his behalf.

They have an escape clause in their profile that says that, if the case is not strong enough, they will put the burden of suing on the person that brought the complaint. So this person was put into that category, where the EEOC would not sue me on his behalf, but he had to go find an attorney on his own to sue me. The case was once again strong enough in my favor that no attorney would touch it. There is a 90-day lapse clause that, if he does not sue within 90 days, I have in fact won the case and I am absolved of all financial responsibility, which is what happened in this case.

The point I would make in behalf of your bill is that, under the Freedom of Information law, I am aware that I can be reimbursed for my legal fees for suing the EEOC for the information they refused to give me. But because of the time that it would take me out of the business that I could not afford, that I would not be reimbursed for, once again, I elected to roll over and play dead, because I could not afford to take the time out of my business to work with the attorney to do the things that were necessary to sue the EEOC to get the information that I originally wanted.

I think we are in a stage of our society and our development in our country where right now the regulatory pyramidism, if you want to use that terminology, is growing so strongly that if we do not bring in reasonable checks and balances into this maze of conditions, we will destroy the small businessman and we will destroy the ability of the individual person in the country to get his just due under the Constitution.

I certainly applaud you and the other gentlemen for bringing this bill forward, and I certainly hope it can be passed.

Senator DECONCINI. Mr. Brantingham, thank you very much. You give a very precise statement of the problems that arise under IRS, and believe me, from my experience as an attorney, I believe you, that that is exactly what happened.

Do you think that, if S. 265 were on the books at the time, that the Internal Revenue would have at least sat down and negotiated or talked to you?

Mr. BRANTINGHAM. Senator, I cannot help but feel—and that brings up the point you had asked previously—I believe it was of the representative from the National Federation of Businessmen—whether this law would increase the burden on the courts or not.

It's my candid opinion, as a layman, that it would decrease the burden on the courts. Because I think that by your wise decision to put the burden of payment on the budget of the individual department, it will cause the director of those departments to become much more judicious.

I have personally no feeling in my mind whatsoever but that we will win our case. I think if your bill had been on the books, the IRS would never have done it in the first place, and therefore, it would never have gotten to the courts.

Whether it's intentional harassment or unintentional harassment, whatever the motivation is, intentional or unintentional, I really wouldn't want to delve into that.

I think that the overall effect of your bill, rather than being an increased problem will be a decreased problem, because I cannot think of a director sitting in a responsible position, because people that get in responsible positions are not dummies to start out with. I cannot believe that your bill will not have a positive effect from the point of view that it will reduce the burden, particularly in the case of the IRS, because I think that the IRS motivation is to get every dollar they can for the Government. Right now, with the laws written as they are and the legal thing as it is, it's very easy for them to get the marginal or questionable dollar, such as in my case. I think that, because of my original representation from the original attorneys, they felt we would roll over and play dead.

Senator DECONCINI. This bill, S. 265, does exclude the Internal Revenue, but part of the purpose of these hearings is to explore whether it should be included.

It is the intention of this Senator at least to include the Internal Revenue. That's why your testimony is very important to us because it relates to a specific example that will give us the justification we may need.

Thank you.

Mr. BRANTINGHAM. If you would like documentation on this; I meant to bring it with me. It is in Minneapolis, but I will be happy to secure it for you.

Senator DECONCINI. If you can, it would be helpful to us in our arguments.

Mr. BRANTINGHAM. I'll be glad to do it.

Senator DECONCINI. Do you have anything?

Ms. ZACHARIAE. Yes; I'd like to add my voice to his. Concerning this \$1 million for an individual or private person—As you know it doesn't

take a very large ranch to be, dollarwise, worth over 1 million. If we, 2 to 4 years down the line, have to do something with the Forest Service regarding our cattle permits, the net assets of our ranch far exceed that.

Under the terminology of this, that would exclude me; is that correct?

Senator DeCONCINI. Yes; it's \$1 million of net assets for an individual; \$5 million of net assets for a corporation.

Ms. ZACHARIAE. Could you consider the possibility of farmers and ranchers who have no liquid assets whatsoever, but they do have the land? It's not very liquid. If you sell your land to fight the court costs, court battle, then you have nothing to fight for.

Senator DeCONCINI. Are you indicating that the net assets are above \$1 million?

Ms. ZACHARIAE. Yes; especially in my county where real estate values are going so high. It doesn't take very many acres to get about there.

Senator DeCONCINI. To get there based on the full cash value?

Ms. ZACHARIAE. Yes; I would urge you to consider that.

Senator DeCONCINI. Thank you very much for your testimony. Our last witnesses are Bruce Meyerson, a prominent public interest attorney in Phoenix, and Mr. Jay Dushoff, a prominent private attorney.

Gentlemen, thank you for waiting. I'm sorry to keep you. I appreciate your coming down and pulling away from your practices as the case is and giving us your thoughts on S. 265. Mr. Meyerson, please proceed.

#### STATEMENT OF BRUCE MEYERSON, ATTORNEY, PHOENIX, ARIZ.

Mr. MEYERSON. Thank you very much, Senator DeConcini. I appreciate the opportunity to again be before the subcommittee with respect to some of the important questions regarding the operations and functioning of the judiciary in this country.

I'd like to make some preliminary comments which would indicate my perspective with respect to S. 265. I'd also like to talk a little about the title of the bill, "Equal Access to Justice."

It raised in my mind a continuing problem that I see as a public interest lawyer in Phoenix. When we talk about equal access to justice, we should not forget that there are a great number of claims that citizens are simply not able to assert concerning other private parties, not necessarily the government.

I'm sure Mr. Dushoff can attest that in Phoenix, as well as in many other communities, people with claims of \$300 or \$400 or \$500 cannot get access to the courts whatsoever. So my comments simply are to remind the Senator and the subcommittee that, since there is an awareness of the need for equal access to the courts and to justice, I think that we should not restrict our inquiry to simply litigation involving the Federal Government.

I think we have got to look at the broader problem of giving equal access to the courts.

As you know, Senator, I am a public interest lawyer, and our firm attempts to represent the point of view of unrepresented interests in the judiciary and before administrative agencies.

We do not find ourselves defending persons who are involved in litigation with the Government. We are generally bringing litigation

on behalf of individuals and groups whose financial interest in the particular issue is so small that they cannot retain private counsel. But for the existence of our firm, they could not have their claim presented to the courts. With that perspective in mind, let me comment on S. 265.

The first part of the bill, the section that deals with participation in adjudicative proceedings, I think is fine as far as it goes. I think, and the Senator will recall our previous discussions with respect to the issue of public participation in proceedings, that the bill is limited to adjudicative proceedings, thus does not address what I think is a broader question and an equally important question; that is, a mechanism to assure public participation in the rulemaking process.

I recognize this is under consideration in other legislation, and I certainly hope that the Senator will keep that vital issue in mind in conjunction with the important purpose served by S. 265.

I think it might be argued that, if we had greater participation in the rulemaking process, perhaps the adjudicative process would be improved if the quality and the caliber of the rules that were underlying the adjudicative decisions were likewise improved.

I'd like to talk now about the second feature of the bill, and that is the procedures with respect to reimbursement of costs and attorneys fees in litigation with the Federal Government. Let me give you two examples of cases I am involved in with the Federal Government, and I'd like to evaluate the bill with respect to the opportunity to recover fees in these two cases.

Our firm represents several individuals who are private river-runners. They like to go down the Colorado River on their own. They are members of a small, but growing group of people who prefer not to use the commercial concessioners, but who are able to navigate the river using their own expertise. The National Park Service has adopted a policy which restricts approximately 90 percent of the usage of the river to persons using a commercial service and less than 10 percent to my clients and people like them. The result has been, because of the growing interest in river-running, that it is virtually impossible for people to navigate the river on their own, and they are in effect forced to use the service of a commercial operator. We feel the implications of this policy are disastrous with respect to public usage and enjoyment of our national parks. Theoretically, the Park Service can restrict usage of the Colorado River essentially to commercial services. Conceivably, they could restrict walking down into the Canyon to using a commercial guide or restricting camping in the park or eliminating camping and saying you would have to stay in the lodge.

The point is, in our view, America's national parks ought to be enjoyed by people on their own terms, and there ought to be free choice.

That case has been in litigation for several years. It is now in the ninth circuit court of appeals, and we are going to argue it in May.

Another case that our firm is involved in is that we represent persons with epilepsy who have been denied employment with the U.S. Postal Service. It appears to us that the Postal Service has a national policy that attempts to arbitrarily exclude persons with epilepsy for employment. We filed class action against the Postal Service on behalf of two named plaintiffs and on behalf of a class of persons with epilepsy to attempt to change this policy.

The question is what effect if any would this bill have on our ability to litigate these claims, and if it does have any effect, should it?

I would suggest to you that the standard which would avoid payment of attorneys fees by the Federal Government to the prevailing party in cases where the Government's position is substantially justified could probably in effect defeat any claim for attorneys fees in these cases.

In one case, we are challenging the application of a policy which is based on Federal statute. That's the river-runners case. In another case, we are also challenging a policy of the Postal Service based on statute.

Arguably, there can be substantial justification asserted in defense of both of these policies. I would suggest then probably in neither of these cases could we have recover fees. That's not so critical with respect to our firm, because our firm is set up to deal with these issues, although, as you know, fees are essential if we are to continue. The existence of this bill would not, in my opinion, have permitted a private lawyer to bring these cases.

I say that, but let me question whether that's so bad. I wonder whether or not we want to retain some justification on the part of the Government to show in any given case whether or not its actions are justified.

I'm not so sure in all circumstances we would want to make the Federal Government liable for fees. Let me then suggest to you how I think you should make a distinction in your bill.

The bill presently now does not distinguish, the way I understand it, between a person who prevails as a plaintiff and a person who prevails as a defendant. It wouldn't seem to me that you might want to distinguish between those circumstances in which a person prevails as plaintiff and prevails as defendant. I would suggest that, if a person is a defendant in Federal litigation, I think that we might want to make it perhaps more difficult in my opinion to recover fees.

I think there has got to be some discretion left with the Federal Government to take enforcement action to vindicate Federal policy. I don't think we want to have a chilling effect on the ability of the Government to enforce existing laws and regulations, so I would suggest to you to make it more difficult for the prevailing defendant to recover fees.

On the other hand, when a person is a prevailing plaintiff and prevails against the Federal Government, it seems to me that that person is fulfilling a substantial public policy, because that person has proven and established in court that the Government was wrong, that it should never have done what it did at the outset, that either the Federal law was unconstitutional, or the agency regulation illegal.

So I don't think the same type of chilling effect that we might have in imposing substantial fees against the Government when it's a plaintiff exists in the situation where we are litigating against the Government as a defendant.

I think my major criticism of the bill then would be to distinguish between those situations where a person is a plaintiff in action against the Government and those situations in which the person is the defendant.

I have talked to Mr. Dushoff this morning and I know he has some excellent ideas about this bill.

I'll defer to him and allow him to comment.

Senator DeCONCINI. Mr. Dushoff?

**STATEMENT OF JAY DUSHOFF, ATTORNEY, PHOENIX, ARIZ.**

Mr. DUSHOFF. Thank you, Mr. Meyerson. I believe S. 265 is a good start, but only a start, on a problem that to any thoughtful observer has long been a problem.

I would like to comment, Senator, on some of the comments that I have read in the Congressional Record and other sources pertaining to this bill, because I think I disagree, even though I am in support of the bill. I disagree with some of the comments made, because the commentary makes it seem as if this bill is some fantastic leap forward and almost an unparalleled step in American jurisprudence. That's nonsense.

Because when the Congressional Record statements and the others speak of the "American approach," let me tell you what that is excluding. That is excluding the reality that, in a host of business transactions, the American businessman and the American consumer take it for granted that there is a provision that says: "In the event of litigation, the prevailing party gets his reasonable attorneys fees."

So if John Q. Public borrows from a bank or credit union or engages in a host of commercial transactions, that clause is there, so that presently existing in a huge range of private litigation not involving the Government, it is taken for granted that attorneys fees are paid to the prevailing party.

I throw that out to you certainly not in criticism, but to help the committee in pointing out that S. 265 is not the great leap forward. It is simply bringing in—

Senator DeCONCINI. Extending what is in the commercial world?

Mr. DUSHOFF. Already there, to a remarkable degree.

Senator DeCONCINI. That's a good point.

Mr. DUSHOFF. Second, let me point out, as an Arizona lawyer, we had sort of a great leap forward in 1978. It didn't go far enough, but let me advise you of it on the record.

Prior to 1978 and excluding those occasional, unusual situations where attorneys fees may be recoverable as a damage item, basically the courts in Arizona said: Unless there is a contractual provision for it, each party bears their own attorneys fees. In 1978, the legislature passed a very interesting law, Arizona Revised Statutes, title 12, section 341.01. It said—and I am certainly not going to read it, but I will quickly paraphrase it—that in any litigated action which arose out of a contract, express or implied, the court may, and it made it clear it was discretionary, award the successful party reasonable attorneys fees. That made it clear that it applied whether there was a contractual provision or not, so that was a tremendous extension. It is in effect saying: We are going to be paternalistic and help those poor slobs who may have signed a contract on their own, where they didn't know they could have bargained for and obtained a contractual provision giving the prevailing party attorneys fees.

Subparagraph (C) of that statute then goes ahead and says: In any contested action—and it doesn't restrict it just to contract actions—upon clear and convincing evidence, the court may award attorneys fees if a claim or defense is harassment, groundless and not made in good faith.

To a certain extent that codifies some of the common law, and it's a good codification. I don't think that statute goes far enough because, No. 1, it's still discretionary with the court as to whether the prevailing party gets fees. No. 2, subparagraph (A) that I referred to only refers to contract actions, and there is a whole bunch of litigation that are not contract actions.

I have done some rapid legal research, knowing I was going to be coming down here. There is nothing in the statute that indicates that the State is excluded. As a matter of fact, it is my belief, since there is no case ruling on it, that the State is included, because in a section dealing with taxable costs, which is a few provisions later in the Code in ARS 12-345, the governmental bodies are exempted from court costs, and that's still on the books and was also amended in 1978.

Therefore, my interpretation is that, if the Legislature had intended to exempt the State or its political subdivisions from this attorney fee provision, they would have said so at that time. Yet I confess there has been no ruling on it.

Senator DECONCINI. The same argument would be that they could collect attorneys fees if they brought the action on a contract?

Mr. DUSHOFF. That's right. Let me comment and tie in with things that some of your prior witnesses and Bruce have said.

Let me speak to the issue: Are people deterred? You bet your sweet life they are; I am speaking as a trial lawyer on the broad range of litigation and not just against governmental bodies. The cost of attorneys fees many times becomes the deciding factor of whether somebody is going to file a suit on a justifiable claim or whether they are going to put up a defense where they feel they have a justifiable defense.

Nothing hurts me, as a lawyer and as a member of the general citizenry over the years, when you have to turn people away because we are not a Legal Aid Society; when you have to turn people away who have a viable lawsuit or a viable defense simply because they know they are going to have to bear their own attorneys fees. Now, I would point out contingent fees: In certain types of cases, including certain types of cases against the government, a lawyer, if he perceives that there is a chance of monetary recovery and if he perceives that there is a relatively good chance, may take a case from an impecunious plaintiff or defendant with a counterclaim if a contingent fee basis is appropriate.

Let me say something that may have already been said. I suspect deep in my bones that opponents to your bill are going to at some point or another say: This bill is just to enrich the lawyers. That's also nonsense. Why? Let's take the contingent fee case.

If I take a contingent fee case against the Government where my fee is going to be 40 percent of what is collected, and I collect \$100,000 for my client. And \$100,000, by the way, is what the judge or jury decides is appropriate. They don't add anything on because of attorneys fees. I receive \$40,000 for my fee. I have fairly earned that fee. Who is

being hurt by the present law? Not the attorney, who is paid in any event. The person for whom I have brought the action is the "victim."

Therefore, in the contingent case, it's nonsense to say that this bill helps the attorneys. We are already getting paid. The person who is being hurt under the existing law is the client who has collected his just desserts, and then has to fork part of it over to the attorney. So he is not receiving a fair award. He is receiving a fair award less the cost of suing the Government to get it.

In those cases where lawyers do not take it on a contingent fee, yes, it's possible and probable that the existence of this bill would induce lawyers to take cases they wouldn't otherwise take. And even there, there would be a contingency if they are representing the impecunious client, because they would be taking a risk that maybe they could prevail and yet not get an award of an attorney fee at all or not an award of a sufficient attorney fee.

I did want to point that out. This is not an attorneys relief bill. It's to help the clients of attorneys, and there is a significant difference.

Would this bill deter Government litigation? I know that it deters private litigation whenever you have attorneys fees. When you are advising a client who is about to be sued, and you say: "Hey, Joe, are you aware that, if you refuse to pay the \$30,000 and we go to court and lose, you are going to have to pay \$30,000 plus attorneys fees?" He gulps three times and all of a sudden becomes more reasonable in the bargaining process.

I don't think it will have the same impact on governmental bodies simply because it's not their money and because they think they have an endless supply of money appropriated by the national Congress.

It will have some impact, and in any event, it's almost the embarrassment factor, as I see it. It is a psychological factor, because under your bill not only will there be an award of attorneys fees, there will be a certification by a judge which says that the actions of the governmental body were not substantially justified. And I would suggest to you with a smile, but a serious one, that that may hurt some governmental agencies more than the award of money, because then they have been branded forever that in that particular case they were unreasonable.

Why did I say I think your bill is a good start, but it doesn't go far enough? I agree with the woman who was saying before that in a remarkable number of cases the dollar limitation is going to create problems.

I would tell you for whatever it's worth that I have never seen an attorneys fee provision in a private commercial contract which has a dollar limitation. It doesn't say that, if you happen to be the president of a bank, that then you cannot obtain your attorneys fees if you are the prevailing party.

I would point out that the Arizona statute I referred to has no dollar limitation, and I don't think there should be a dollar limitation. Ironically, I would suggest that the dollar limitation, if we're concerned about burdening the courts, conceivably does create a burden. The bill, on page 7, says that you make an application to the courts for attorneys fees.

Well, it doesn't say what then happens. Does the Government then have the right to contest it? In all fairness to the Government, I think they should have the right to contest it.

Do you then start taking depositions on the question of attorneys fees? Does he just decide the issue of attorneys fees without a hearing, or do you then create another hearing? Because what may happen is the Government may say: "Well, we agree that Mr. Dushoff's client would normally be entitled to attorneys fees, but we think it doesn't apply because he has assets of over \$1 million."

What do we then do? Do I, on behalf of my client, just accept their denial or statement about the assets, or do we now wind up with a minitrial, where the court is going to have to make a determination on what the net worth of my client is?

Having been involved in enough cases, condemnation cases, divorce cases, other litigated cases where valuation is an issue, that's not a easy issue to decide, because I may have a balance sheet which shows a net worth of \$300,000, but the Government says: No. It's \$1 million.

I'm only pointing out that the dollar limitation does not comply with the Arizona statute of a similar nature, and does not comply with the commercial clauses, but it also creates procedural problems at the trial level.

The other comment which I would like to make is this. I disagree with Bruce Meyerson. I don't think there should be any distinction between the plaintiff and the defendant. That gets you into the interesting dispute comparable to "did Israel invade Egypt in 1967 because they were about to be invaded, or did they start the war?" Who wants to decide that?

Senator DECONCINI. Many times that's exactly what happens. It's almost a showdown to see who is the first to go to court to file the action.

Mr. DUSHOFF. I don't think the question of attorneys fees should be dependent on that. I think you have built enough discretion in S. 265 so that a judge, in awarding attorneys fees, could take into account the type of issues Bruce mentioned.

You require that, before the private party be granted attorneys fees, one, he not only prevail, but, two, that there be a finding that the Government was not substantially justified.

That again is an extra step not found in the Arizona statute and an extra requirement not found in commercial contracts.

I have not found any clause in private contracts which awards attorneys fees only if the losing party did not have a position which was substantially justified.

Now, I'm really not condemning your bill by making these comments. I'm trying to be helpful in this sense. Hopefully, my testimony will be seen as indicating that this bill gives just a pale reflection in litigation with the Government that we take for granted under the Arizona statute and that we take for granted in commercial litigation where there are contractual clauses. That being said, how anybody can be opposed to the bill, unless you are opposed to it in that you want it strengthened, is beyond me. It is a good bill; it is a fair bill; and I hope it passes.

Senator DECONCINI. Mr. Dushoff, thank you. The point is well taken as to the standard set there from facts of law, that you are absolutely right. I never have seen a standard set. It's also in the Arizona statute—probably has no sunset provision as we do. In the Federal level, because of the influence of the Federal legislation when they are passed and

the filtering effect of the legislation, we started on the basis that this ought to be an experiment, and to counter the testimony from the Justice Department in opposition that it's going to cost half a billion dollars or maybe twice that much. We attempted to structure it in some manner to soften that criticism so we could get it flowing and operative.

Let me ask you a couple of questions, both of you. The bill sets forth a maximum attorney fee of \$75 per hour. My question is: Do you think that's adequate, or do you think it's better to use general language "that the court shall award reasonable attorneys fees?"

Mr. DUSHOFF. It's an excellent point you're asking about. The lead-in language there refers to fees, "based upon prevailing market rates for the kind and quality of the services furnished."

I would stop there. Because when you go ahead and say "attorneys fees shall not be awarded in excess of \$75 per hour," ironically you are not hurting lawyers in Arizona so much as you are hurting lawyers in Washington, Boston, and New York where I can tell you just from general knowledge, for a variety of economic reasons, that hourly rates at any given time are higher.

Second, there is going to be a tremendous range of attorneys fees dependent on whether you are talking about a sophisticated antitrust action or an EEOC matter or condemnation matter or on and on and on.

The \$75 limitation, although agreed you have modified it at least at the agency level by referring to an upgrading in the event of cost of living, I think that makes it more cumbersome, and I would recommend that you just rely on the agency's discretion or the judge's discretion to set those fees based on prevailing market rates.

Senator DECONCINI. Bruce, do you care to comment?

Mr. MEYERSON. Thank you, Senator. I agree with Jay. I would add one thing, however, and I suspect that this is implicit, but you might want to make it clear in the bill. For example, our firm, we do not charge fees. We are prohibited from doing so in order to maintain our tax exemption, and obviously, we would not want to be prohibited from recovering fees on that basis. I know you are aware of the many cases throughout the country that find that, even though you do not charge fees, you are still entitled to recover fees. You might want to address that actually in the language of the bill.

Senator DECONCINI. The reference you make, Jay, to the attorneys fees, you point out that it varies from place to place.

What is your reaction to having the agency, administrative branch of the agency, setting that fee after they have found that their agency is not reasonably justified?

Mr. DUSHOFF. I believe I would be more willing to trust a district court judge who is sitting there as a referee, if you will, between the Government and the private litigant.

Senator DECONCINI. I would too.

Mr. DUSHOFF. When you get to the agency, I'm a little worried about how fair they are going to be in terms of setting of the fees, and then of course you run into the very limited judicial review that S. 265 provides.

On the other hand, I can understand your policy considerations in S. 265 because you don't want the district courts to be flooded with

appeals on the inadequacy of attorneys fees, and you want to make it discretionary. But I would be skeptical as to how generous the agencies are going to be.

Senator DECONCINI. Do you think it would substantially improve the bill if, under the agency provision, we had a mandatory rather than a discretionary standard, while in court proceeding you would leave the decision to the discretion of the court.

Mr. DUSHOFF. I think that would be excellent.

Senator DECONCINI. At least, it would be a guideline to the agency director that we are supposed to come up with an award and we have discretion to go higher. They wouldn't be able to say: "Yes, the Government was unjustified, and here's a dollar for attorneys fees."

Mr. DUSHOFF. Yes.

Senator DECONCINI. Thank you, Bruce, you mentioned about the dual standards for plaintiffs and defendants.

What standard would you suggest in this bill in place of what we have?

Mr. MEYERSON. Let me first begin by responding to Jay's comments with respect to the disagreement, and I think in the course of doing that, I can answer your question.

I think it's well established that there can be different standards for a prevailing plaintiff and a prevailing defendant. I heard one of the other witnesses mentioning the *Christiansburg Garment* case. Of course, many of the public interest lawyers and the public interest community were very concerned about the outcome of that opinion, because at one point it was felt that the court was going to find that the standard for a prevailing defendant ought to be the same as the standard for the prevailing plaintiff, and as you well know, in the *Christiansburg Garment* case, in order for a prevailing defendant to recover fees in title 7 litigation, and I think by implication this means to other statutes, there has to be a finding that the action was frivolous or brought in bad faith. So I think there is a solid basis for making a distinction. I think that perhaps that might be an appropriate standard. I think there ought to be. The standard of substantial justification should not exist with respect to a prevailing plaintiff in actions against the Federal Government. I think that would be an impossible standard virtually to meet, as I suggested before. Most of these cases you'll be challenging statutes and regulations, and I think it would be very difficult to prove there is no substantial justification for the enactment.

Mr. DUSHOFF. Let me comment on that. I think Bruce and I disagree. I was not bothered by "substantially justified," because—think back to our law school days. There were cases, I seem to remember *Universal Camera* was one of them that we studied, where on the issue of judicial review of the administrative decision, the question was: Was there, quote, some evidence, end of quote, in the record to justify the ruling of the NLRB.

If you recall, what we learned in law school was that, at some earlier time, the courts actually adhered to that standard. They abandoned it later, because they learned that there is virtually never a record where there is no evidence that will sustain the administrative agency. So they started saying "when we review the administrative agencies, we will look to see whether there is significant support in the record taken as a whole."

Let me use that as a parallel reference. To me, your language of "substantially justified" doesn't mean that the Government will be able to get out from under the attorneys fees on the ground that maybe, well, if you look under the door and through a periscope, you will see a legal angle which shows they might have prevailed.

On the other hand, I am scared to death of words like bringing an action frivolously or in bad faith, because a Government agency can be wrong as all get-out and be dead wrong, and yet in truth have brought it in good faith.

To find that you are frivolous or in bad faith, that is a standard which I find hard to meet in the normal case.

Senator DECONCINI. Gentlemen, thank you very much for your testimony this morning.

[The committee will stand at recess.]

# EQUAL ACCESS TO JUSTICE ACT OF 1979, S. 265

SATURDAY, APRIL 21, 1979

U.S. SENATE,  
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,  
OF THE COMMITTEE ON THE JUDICIARY,  
*Albuquerque, New Mexico.*

Present: Senators DeConcini and Domenici.

Also present: Pam Eldred, counsel, Subcommittee on Improvements in Judicial Machinery.

Senator DeCONCINI [presiding]. The hearing will come to order.

## OPENING STATEMENT OF SENATOR DeCONCINI

If we could have your attention, I've been asked by the library staff to remind you that smoking or beverages are not allowed in the auditorium.

Let me introduce myself. I am Dennis DeConcini, chairman of the Senate Subcommittee on Judicial Improvement and Machinery, and to my right is Pam Eldred, counsel on that subcommittee. I understand Sally Rogers is here, who is with Senator Thurmond's staff. Senator Thurmond is the ranking minority member of the Judiciary Committee. This hearing is authorized by Senator Kennedy, chairman of the Judiciary Committee, and my thanks to him and Senator Thurmond.

The subcommittee will come to order. I'm very pleased to be here in Albuquerque to hold our third day of hearings on S. 265, a bill that is pending before the Subcommittee on Improvements on Judicial Machinery.

S. 265, the Equal Access to Justice Act, represents a vital weapon in our struggle to tame Government regulations.

Senator Domenici has been the prime sponsor and promoter of this legislation in the U.S. Senate. I want to take this opportunity to commend him for his work on the bill and his tireless efforts on its behalf and that of his staff. It was because of the persuasive arguments from Senator Domenici that I first became interested in this legislation about 2 years ago, and now I believe that the hearings have shown that the bill merits serious consideration and hopefully can be passed by the U.S. Senate in this Congress.

Again, I welcome all of you to this hearing. I also want to thank in particular the many witnesses who have given up their time and traveled many distances to give us their viewpoint on this legislation.

As you may know, under this legislation when a party prevails against the Government, the Government would be required to pay the attorneys fees and other court costs for such litigation. This is a major departure from the American rule that each party is to pay their own attorneys fees.

It is, however, of great interest that Senator Domenici has come forward with this concept, one that is very appropriate in today's overregulation of our society and our small businesses. The concept simply is that if the Government has acted improperly, that the cost will come out of the agency's budget that loses the case. There is some discretion provided in the bill for the judge to determine whether fees will be awarded. We're pleased to have our first witness this morning, Senator Domenici, the sponsor of the bill.

Senator DOMENICI. Thank you very much, Dennis. Let me first say to my friends here from New Mexico that when I first went to the Senate, I had not heard of my esteemed colleague who is my neighbor here in the Southwest, but let me say at the outset, I'm really pleased that he's chairman of this committee, and he is a United States Senator, and I think the great State of Arizona is already proud of him and when he finishes his career, whenever he chooses, they will, indeed, see an admirable record in the United States Senate.

[The opening statement of Senator Domenici follows:]

#### OPENING STATEMENT OF SENATOR DOMENICI

Mr. Chairman: Today marks the seventh time I have either made statements on the Senate floor or before a committee regarding the Equal Access to Justice legislation.

As I have already made my zeal for this bill known, and at considerable length, I will refrain from a long-winded discourse.

I would merely insert in the record today a brief statement of the purpose of the bill and its background, and then review some of my previous remarks.

#### PURPOSE OF THE BILL

The amended bill rests on the premise that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. The purpose of the bill is to reduce the deterrents and the disparity by entitling prevailing parties in specified situations to recover an award of attorney fees, expert witness fees and other costs against the United States unless the Government action was substantially justified. Additionally, the bill insures that the United States will be subject to the common law exceptions to the American rule regarding attorney fees. This change means a court in its discretion may award fees against the United States to the same extent it may presently award such fees against private parties.

Senator DOMENICI [continuing]. Dennis is right. I was arguing for this legislation on the floor of the Senate by way of an amendment to the bill that provides a legal assistance to the poor of America, and I didn't intend to bring this issue down there, because historically, they were not the same thing, but we didn't have Dennis in the chairman position on the subcommittee, and so we couldn't get any hearings on this concept of having the Federal Government reimburse American citizens, principally small businessmen and average Americans, when they fought their Government and won, but couldn't get hearings on that, so I offered that on the floor of the Senate and it passed.

That was a kind of historic day, because nobody really wanted to vote against this concept, because as they heard about it, it was good, but everyone kind of wanted it to disappear because it was something new, where Government agencies would have to be more careful in drafting regulations and in pursuing litigation, recognizing that in many instances, for Americans, they were losing even if they won against their Government, because if they won, it would cost them more than it was worth to prove a point; so they were giving in instead of litigating. They were settling or paying fines or refusing to challenge.

My concept, Senator, and I know I don't have to tell you again, because you've heard me testify before, and I talked about it on the floor, my concept is that we have to do many things to thwart regulation and arbitrary bureaucracy and that one way to do it is to say to American people, not very wealthy and not the big corporations, because they'll do it anyway, because the average American and small businessman and woman, we have to say to them, "We're going to make it worthwhile to fight your Government, because if you win, under many circumstances, you will collect your attorneys fees and costs back," so you will be challenged more to fight with this bureaucracy and the arbitrariness of big government. That's basically the premise.

Over the past 2 years, this concept has evolved, as the chairman has indicated, and I'm confident that while it is expensive to fight with your Government, that it need not be, and that in many instances, if the Federal Government was forced to reimburse when citizens won, agents of big government would be more responsive, more careful, less arbitrary, and more concerned about the American people and in that context, I would ask that an indepth statement—which includes the history of work on this bill and the summary of the purpose of the bill—be made a part of the record, and I thank you, Senator, for coming to our State.

I hope the hour and a half you spend with our people further convinces you to stand tough on this issue and we will get it to the floor of the Senate, because I think if we do, it will pass. Thank you very much.

Senator DECONCINI. Thank you, Pete. Let me ask you to join me here for the balance of the hearing and be open to questions of the witnesses. I am committed to the bill and due to Senator Domenici's tenacity and insistence I am convinced this is right, as indeed, it is. The argument we have heard that it is going to cost money, from the Government's point of view, only substantiates the need. If in fact the Justice Department is correct that there may be a cost of hundreds of millions of dollars, it is only greater reason for our bureaucratic regulators to be more careful before they file complaints and take our citizens into court.

The purpose of the bill, Pete, as you know, is not to stop the Government from functioning or doing legitimate regulation, but to ask and demand, rather, that those agencies be careful and that they file good cases.

Our first witness this morning after Senator Domenici is Judge Howard Bratton, U.S. district judge. Judge, thank you for letting us impose on your Saturday, although if you're like all the Federal judges I know, you'd be down at your office working on opinions anyway.

## STATEMENT OF JUDGE HOWARD BRATTON, U.S. DISTRICT JUDGE

Judge BRATTON. Senator. Would the Senators care for copies of my prepared statement?

Senator DECONCINI. Please. We would be very pleased to have them and they will appear in the record. You may proceed when you care to, Judge.

[The prepared statement of Judge Bratton follows:]

### PREPARED STATEMENT OF JUDGE HOWARD C. BRATTON

Mr. Chairman, I appreciate the invitation to appear here today to offer comments on S. 265, 96th Congress, from the perspective of the judiciary. My remarks will be very brief.

In the last term of Congress Judge Carl B. Rubin of the U.S. District Court for the Southern District of Ohio appeared before this subcommittee as a representative of the Judicial Conference of the United States to express its views on bill S.2354, 95th Congress. That bill addressed itself to the same subject matter as S. 265 and adopted a substantially similar approach. Judge Rubin stated that the Judicial Conference of the United States had taken the position that the subject matter of that bill was a matter of public policy determination for Congress and that it would be inappropriate for the Federal judiciary to express any opinion on the merits of the bill.

The Conference has taken no further action on the subject, so that remains the position of the Judicial Conference of the United States. Therefore, my comments will not be addressed to the wisdom or desirability of the goals S. 265 seeks to achieve. However, there are two aspects of the bill which will be of concern to the Federal courts if it becomes law.

Of primary concern is the potential impact of this legislation on the time and attention of the Federal courts. One purpose of the bill is to deter the filing of harassment suits by Government agencies against private citizens and small businesses. At present most cases involving small amounts do not come to trial, for the private citizen or small businessman will normally pay a small claim rather than incur the cost of defending against it. It is possible that S. 265 will encourage a person who thinks he or she has a legitimate complaint to proceed to trial, and this would involve an expenditure of judicial time not heretofore devoted to such matters. Also, the court's discretion to review attorney fees awarded by the particular agency involved in a given dispute is likely to consume additional judicial time. On the other hand, insofar as the act might deter a Federal agency from pursuing court action where the agency stands to become obligated for attorney fees if it should lose, it could result in some decrease of court filings.

It is difficult to assess what the actual impact will be on the operation of the Federal courts. While one could speculate that the overall effect of the bill will be to increase the Federal courts' workload, it would involve some guesswork to estimate the size of any such increase.

In that connection, I would offer two comments. First, the primary concern of the bill is to offer access to the courts to anyone having a meritorious claim or defense vis-a-vis a government agency, and quite rightly the potential burden on the Federal courts is of secondary importance to that. Second, there is at least one way to offset any possible increase in the Federal courts' workload that is desirable, not only for this purpose, but as a matter of principle. There is presently pending before the Senate S. 679, 96th Congress, cosponsored by Senator Domenici, which would abolish diversity jurisdiction as it relates to actions between citizens of different States. While I recognize that there are divergent views on this proposal, with respected authority in opposition to it, I consider this proposal to be a long-overdue reform in regard to Federal court jurisdiction. Some time ago I wrote a law review article entitled "Diversity Jurisdiction—An Idea Whose Time Has Passed." I think that title sums up the position of those who would favor the passage of S. 679. In my judgment whatever historical justification there may have been for diversity jurisdiction has long since ceased to be viable, and the time is overripe for its abolition. All of the judiciary are united on this—not only the Judicial Conference of the United States, but also the Conference of Chief Justices of the State Supreme Courts. The passage of S. 679 would substantially reduce the caseload of the Federal courts and free us to devote all our attention to the burgeoning area of Federal question matters. I would urge that S. 679 be given careful consideration.

Turning last to the provisions relating to the payment of attorney fees and expenses to the private party who prevails against a Government agency, I would like to suggest that an award for legal services, at least at the Federal district court level, should be a matter basically within the discretion of the judge. General guidelines such as those in the proposed amendment to § 2412 of title 28 are helpful, but the setting of a maximum dollar figure is a limitation that may well prove unworkable, requiring future amendment to the law. Further, I would suggest that often a maximum figure becomes in practice the minimum as well, so that it becomes the rate for all such services in all parts of the country. Omitting a maximum hourly rate from the bill, especially since congressional guidelines remain for the court to consider in determining attorney fees, would provide enduring flexibility.

Thank you, Senators, for your attention.

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Judge BRATTON. Mr. Chairman, I know that all of us here join Senator Domenici in expressing our appreciation to you for coming to New Mexico to hold hearings on this very significant legislation.

Personally, I appreciate the invitation to appear here today, to offer comments on S. 265, from the perspective of the judiciary. My remarks will be brief.

In the last term of Congress, Judge Carl B. Rubin of the U.S. District Court for the Southern District of Ohio appeared before this subcommittee as a representative of the Judicial Conference of the United States to express its views on bill S. 2354, 95th Congress. That bill addressed itself to the same subject matter as S. 265, and adopted a substantially similar approach. Judge Rubin stated that the Judicial Conference of the United States had taken the position that the subject matter of that bill was a matter of public policy determination for Congress and that it would be inappropriate for the Federal judiciary to express any opinion on the merits of the bill.

The Conference has taken no further action on the subject, so that remains the position of the Judicial Conference of the United States. Therefore, my comments will not be addressed to the wisdom or desirability of the goals S. 265 seeks to achieve. However, there are two aspects of the bill which will be of concern to Federal courts if it becomes law.

Of primary concern is the potential impact of this legislation on the time and attention of the Federal courts. One purpose of the bill is to deter the filing of harassment suits by Government agencies against private citizens and small businesses. At present, most cases involving small amounts do not come to trial, for the private citizen or small businessman will normally pay a small claim rather than incur the cost of defending against it. It is possible that S. 265 will encourage a person who thinks he or she has a legitimate complaint to proceed to trial, and this would involve an expenditure of judicial time not heretofore devoted to such matters. Also, the court's discretion to review attorney fees awarded by the particular agency involved in a given dispute is likely to consume additional judicial time. On the other hand, insofar as the act might deter a Federal agency from pursuing court action where the agency stands to become obligated for attorney fees if it should lose, it could result in some decrease in court filing.

It is difficult to assess what the actual impact will be on the operation of the Federal courts. While one could speculate that the overall

effect of the bill will be to increase the Federal court's workload, it would involve some guesswork to estimate the size of any such increase.

In that connection, I would offer two comments. First, the primary concern of the bill is to offer access to the courts to anyone having a meritorious claim or defense from a Government agency, and quite rightly, the potential burden on the Federal court is of secondary importance to that.

Second, there is at least one way to offset any possible increase in the Federal court's workload that is desirable not only for this purpose, but as a matter of principal. There's presently pending before the Senate S. 679, cosponsored by Senator Domenici, which would abolish diversity jurisdiction as it relates to actions between citizens of different States. While I recognize that there are divergent views on this proposal, with respected authority in opposition to it, I consider the proposal to be a long overdue reform in regard to Federal court jurisdiction. Some time ago, I wrote a law review article entitled "Diversity Jurisdiction—an Idea Whose Time Has Passed." I think that title sums up the position of those who would favor the passage of S. 679. As I am sure the subcommittee is aware, all of the judiciary are united on this, not only the Judicial Conference of the United States, but the Conference of Chief Justices of the State Supreme Court. The passage of S. 679 would substantially reduce the caseload of the Federal courts and free us to devote all our attention to the burgeoning area of Federal question matters. I would urge that S. 679 be given careful consideration.

Turning last to the provisions relating to the payment of attorney fees and expenses to the private party who prevailed against a Government agency, I would like to suggest that an award for legal services, at least at the Federal district court level, should be a matter basically within the discretion of the judge. Generally, guidelines such as those in the proposed amendment are helpful, but the setting of a maximum dollar figure is a limitation that might well prove unworkable, requiring further amendment.

Further, I would suggest that often a maximum figure becomes, in practice, the minimum as well, so that for all practical purposes, it becomes the rate for all such services in all parts of the country. Omitting a maximum hourly rate, especially with detailed congressional guidelines for the court to consider in determining fees would provide enduring flexibility. Thank you, again, Senator DeConcini, for coming out to visit us in New Mexico from our neighboring State. We appreciate and I appreciate your attention, Senators.

Senator DECONCINI. Thank you, very much. If you don't mind, I'd like to just have your opinion on a couple of other thoughts relating to the bill.

The bill calls for the awarding of fees unless the Government can demonstrate substantial justification of their case. My question to you is, you could give me an opinion of whether or not you believe that standard might be too severe on the Federal Government or if it strikes you in any other way that you would care to comment on?

Judge BRATTON. As I said, Senator, I had not considered the bill in depth from the detail of the merits of it, in view of the position of the Judicial Conference.

Senator DECONCINI. I realize that and will honor that.

Judge BRATTON. Perhaps that particular standard could be set out further in the committee's judgment, if it believes that further detailed guidelines for the judiciary are needed. I'm sure it would be appreciated.

Senator DECONCINI. The original bill, I believe Senator Domenici introduced in the 95th Congress, had mandatory awarding of fees to be set by the court. Here, we have the idea of setting a standard for the awards, do you think it's better to try to establish some standard for the court to permit awards or just have the law say if you lose, you pay, and then the judge determines how much?

Judge BRATTON. Personally, I would believe that the more flexible approach might have some merit to it, Senator. There are, at present, some instances, as you are well aware, in which attorney fees might be awarded where they have a standard of bad faith or other standards.

Senator DECONCINI. Civil Rights Act?

Judge BRATTON. Yes. If that were the concept, some similar concept adopted in this bill, I know that the courts would appreciate any detailed guidelines the Congress might give on that subject, because as you know very well, when the litigation comes into the courts, everybody is urging on each side what the intent of Congress was.

Senator DECONCINI. The more specific we can be, the better it is?

Judge BRATTON. The more we appreciate it.

Senator DECONCINI. Thank you. One other quick question. With your experience on the Bench, do you feel that Federal judges, as a whole, have any reluctance in awarding attorney fees? Is that a problem with judges or is it no more a problem than any other decision that is discretionary by statute?

Judge BRATTON. I know of no problem in that regard.

Senator DECONCINI. It doesn't leave any bad taste with judges to set fees rather than having them set in the statute?

Judge BRATTON. Well, if they were set by somebody else, that would be preferable, but our responsibility is to make the decisions entrusted to us, Senator, and if that's one that's entrusted, that's it.

Senator DECONCINI. Your point is well taken, Your Honor, on the setting of a maximum hourly rate as the bill presently calls for, and we will look very carefully at altering that. I thank you very much.

Senator DOMENICI. I would have just a couple observations and then a question. Judge, I, too, appreciate your testimony and I understand how the Federal judges and the judges of the United States looked at this problem, concluded that it was, one, a matter of public policy and therefore, the substance wouldn't be a subject matter to comment on. I believe, and while I have great respect for the U.S. Attorney General and I know my colleague, the Senator of Arizona, has a lot of difficulty with his bill because they don't want to push attorney fees too far; the U.S. Attorney General, they think it will cost the Government too much. I believe that for a period of time, even if we had something set, I believe a period of time when it was almost mandatory that Government pay attorney fees when they lose, that the public policy issue would clearly justify that, because the resources are so lopsided, when you look at the Federal Government now, and their agencies are filled with personnel and attorneys and issues and it's pretty easy for them to go on and take out after citizens, build limits to help the small businessman and average citizen,

not the huge corporations, and I would have thought if we force them to pay on a more arbitrary standard, if they lose, they pay, I think the gamut would come back to the middle. Then it wouldn't be so much litigation, regulating, taking citizens on. You may get an added caseload because it's the small fine, the small regulation that becomes the standard, and if nobody challenges it, it just gains strength with each week.

The next person says, "It's obviously a good regulation; last week somebody paid a fine on it." I think we would be better off, as a nation, if we made them justify more of these more often, and the money would be well spent, but from your standpoint, that might, instead, cause more litigation, is that not correct? That approach, from what you've observed?

Judge BRATTON. Yes, and I concur with you wholeheartedly that the small claim is the one that's often paid, because it's so much easier and cheaper to pay it than to fight it, and if you make it viable to contest that, it will result in a certain amount of increased Federal court activity.

As I pointed out, though, that fact or factor is of purely secondary importance. The importance is the merits of the bill; the impact on the Federal courts is a matter that I'm sure, as with all legislation in Congress, consideration and thought overall provides the necessary resources for the courts to handle those matters that are entrusted.

Senator DOMENICI. I would make one other observation, both for you, Judge, and for Senator DeConcini. About 3½ or 4 years ago, I sent the first rough bill to every lawyer in New Mexico, and as one might assume, they were pretty enthusiastic about it.

What I would report is that hundreds of them commented with real clarity on problems that the first draft presented and they raised a couple mental issues; will it cause the Government not to enforce some of its rules, and I want to say to you, at that point, I was very pleased at the bar for being objective in a bill that obviously was to their benefit, and it's drawn basically to make sure they get paid, as they take on even a small issue, and that's all I have, Senator. Thank you.

Senator DECONCINI. Thank you, Judge.

Judge BRATTON. I appreciate the privilege of being here.

#### STATEMENT OF PROF. JOSEPH GOLDBERG, UNIVERSITY OF NEW MEXICO LAW SCHOOL

Senator DECONCINI. The next witness is Prof. Joseph Goldberg, University of New Mexico Law School.

Mr. GOLDBERG. Senator DeConcini, Senator Domenici, I'm Joseph Goldberg. I teach at the University of New Mexico Law School. I'm pleased and I feel privileged to be here testifying at this hearing. I want to thank Senator DeConcini for inviting me to this hearing and Senator Domenici for informing me of the bill and asking me to look at the bill.

I speak here today in support of S. 265. Before I get to the major points of my testimony, I'd like to make an aside. The major point of my testimony is to urge the committee to accompany the bill with a very detailed and comprehensive committee report. Before I get to that, I agree with the comments of Senator Domenici with respect

to what I call the double-deterrent purpose of the bill: (1) to deter the harassment and overregulation by agencies and (2) to deter the intimidating effect—economic intimidating effect—of litigating against the Government for small business and private individuals.

I would like to offer a third reason to support this bill and the primary reason why I support the bill. I teach in the government regulation of business area, primarily labor law and antitrust law. I teach administrative law at the University of New Mexico and I've also, for the last decade, done extensive litigation, primarily in the area of litigating against State and Federal Government agencies.

It has been my experience that when a private individual litigates against the Government, either in agency or in the courts, the private individual is playing an important part in the refinement and formulation of public policy. That person is not only representing his or her own vested interests, but in the process of doing so, that person is refining and formulating public policy. It seems to me fundamentally unfair that in engaging in that public function, the private person has to bear the entire cost of doing it.

That is the primary reason I support the bill. I am not as convinced that governmental agencies engage in substantial overregulation or engage in substantial harassment. I am convinced that economic barriers pose a substantial hurdle for small business and individuals in litigating against the Government.

Turning to the main points of my testimony, I would suggest that this bill be accompanied by a very comprehensive and detailed committee report. I commend to this subcommittee the report that accompanied the Civil Rights Attorney's Fees Award Act of 1976, title 42 of the United States Code, section 1988. I believe that this bill, if enacted, will have a profound impact on the legal process, and I believe such a detailed report will aid in the construction and application of the act.

Before I came here I did a brief survey to find out what the litigation had been under the Civil Rights Attorney's Fees Award Act. I have found that since 1976 there have been over 330 cases just considering and applying that statute, which is somewhat more categorical and somewhat less indeterminate than this proposed legislation.

Yet there have been substantial problems in the administration and application of the civil rights fee statute. I have engaged in litigation under the 1976 act. It was my experience in that litigation and it is my opinion from my research that virtually every major opinion under the 1976 act, including the U.S. Supreme Court's decision in *Hutto v. Finney*, has had recourse to the committee report.

I think the bill is very well thought out and drafted, but as with all legislation, I think there are areas of ambiguities and uncertainties that could very easily be addressed in the committee report and which would assist the judiciary, the agencies, and the private parties in ascertaining the congressional intent. I would raise several of these for you today.

This list is not intended to be exhaustive and represents my own personal prejudices. First, there is the question of the retrospective and prospective effect of the bill. This issue has been a matter of considerable controversy under the 1976 act, involving literally dozens of cases. It is not a major concern—only a transitional problem—but it tends always to be a real problem. The issue was addressed in the

Committee Report to the 1976 act, and persuaded all of the U.S. circuit courts that considered the question. The committee report was followed with respect to that question. While I have my own personal view on the issue, I agree with Judge Bratton that this is a matter of policy for this committee to decide as to the prospective or retrospective effect of the act. I would only suggest to the committee that the report address that problem and answer it.

I don't think it has to be in the statute; but I think if it's in the report, that would be persuasive on the judiciary.

The next issue concerns what to do with intervening parties in agency adjudication. As I read the language of the bill, I think that intervening parties would be eligible for attorney fees, just as are necessary parties, parties who were brought before the agency, although this is not expressed in the bill.

The bill, in defining "party," adverts to the Administrative Procedures Act. The definition of party in the Administrative Procedures Act, as construed by the courts, includes intervening parties.

If it is the committee's desire that intervening parties be equally eligible for attorney fee awards along with necessary parties, I think this could be made clear in the committee report and again, I think it would be persuasive.

Third, the question arises whether attorney fees should be awarded to compensate attorneys for the time devoted to litigating the attorney fees issues. This has also been a matter of very considerable controversy under the 1976 act. Virtually every circuit which has addressed the question under the 1976 act has said yes to that question.

The U.S. Supreme Court, as I read the Court's opinion, consciously decided not to consider that question at that time, and has not. This again is a matter of policy for the committee.

I raise these matters for the committee's attention. I foresee extensive litigation over the application of the bill over whether there are going to be attorney fees or not. The Civil Rights Attorney's Fees Award Act is virtually universal and categorical. This bill necessarily is not. It contains indeterminate standards, as Senator DeConcini mentioned, with respect to whether the agency action was substantially justified. It has the limitation of application only to individuals and small business; what is a small business which may involve litigation? It allows attorney fees for section 554 hearings under the Administrative Procedures Act. As my research indicates, that is not a matter that is clear. There is considerable litigation as to whether a hearing is a 554 hearing. All these matters can generate considerable litigation.

I can foresee a lawyer representing someone before an agency, working up \$3,500 in fees, let's say, in representing that individual, and then spending \$7,000 or \$8,000 worth of time litigating over whether attorney fees are appropriate, and what the amount of those attorney fees should be.

If the committee determines that they do or do not want these issues and the time spent by attorneys in pursuing these issues, encompassed within the attorney fees award, it seems the committee ought to make it clear in the committee report. Again, I think the committee report would be persuasive on the agencies and the judiciary considering, construing and applying the bill.

Senator DOMENICI. Can I interrupt and ask a question? In light of one of those goals of this legislation, which is to encourage certain

kinds of Americans to fight with the Government, litigate with it, wouldn't it be better to try to determine, as often as possible, in advance, whether attorney fees were going to be recovered or at the earliest possible point in time?

Mr. GOLDBERG. I appreciate the question. That's a tough question, Senator Domenici. I think you're absolutely right. I see a tension of policy in advancing the goal of encouraging private citizens to contest their Government and thereby not only advance their own interests but also assist in the refinement of public policy. I think that policy would be advanced by an advanced determination of availability of attorney fees. I think that could be done under the present language of the statute. The committee might want to reword the statute to make and express the availability of an advanced determination of fees. On the other hand, that has to be balanced against the competing interest. I don't think anyone wants to see the bill become a lawyer's relief act, and I think that that may be a competing tension. If a lawyer knows in advance that he will be getting his fees paid under the act, this may encourage the lawyer to inflate the fees or time spent. It's going to remove a natural restraint on the part of the lawyer. So I see a balance here, and how the committee resolves that tension is basically up to the committee and deliberations of the Congress.

My final point with respect to the committee report is the application of this bill to situations where the agency, although it is a nominal party to the adjudication, is really either a stakeholder or acting merely in an adjudicatory capacity.

It seems to me in reading the bill and reading Senator Domenici's precursor to the bill, the committee report under S. 2354, rather, and the hearings under S. 2354, that the scenario that is envisioned and which formulates the basis of this bill, is where a governmental agency drags a person before it, beats him up, kicks him out, and fines him. That's not uncommon, and is a typical agency proceeding. I see Mr. Hertzler is here and will describe his experiences to the committee in vivid detail.

Senator DOMENICI. He already has.

Mr. GOLDBERG. There are, of course, other types of agency proceedings. I will use one I'm relatively familiar with, the National Labor Relations Board, as a model. Concerning unfair labor practices under section 10 of the Labor-Management Relations Act, the Board is clearly a nominal party to the proceedings, but it seems to me, from my experience, both in teaching and representing parties before the NLRB, the Board acts in an adjudicatory capacity. What happens is an employer files an unfair labor practice charge against a union, the Board investigates to determine whether there's reasonable cause to proceed. If it does, the Regional Director on part of the General Counsel of the Board proceeds with prosecuting the charge. Typically, the employer—the charging party—intervenes and takes a very active part in the proceeding.

The Board basically is acting as an adjudicator. The private dispute is formed substantially between the employer and union, and the Board adjudicates.

As I read the bill, these proceedings are clearly covered by the bill, and if the Board rules in favor, let's say, of the union, which is the defendant in the unfair labor practice proceeding, there will be a pre-

sumption under the bill that attorney fees should be awarded to the union.

I think, clearly, that is what the bill provides, as presently written. Now, let's take it that the intervening party, the employer, appeals to the Court of Appeals for the Tenth Judicial Circuit, which, correctly or incorrectly, overrules the Board. As I read it, under the bill, as presently drafted, the intervening party, that is the employer, is also presumptively entitled to attorney fees.

Who get's the attorney fees in the case? Do they both; is the Board paying both? Does only the employer get it, notwithstanding the fact the agency, which is a primary focus of the bill, ruled in favor of the union. I think it's unclear under the bill and can be clarified in the committee report.

I am a law professor. I have to admit I can see ambiguities where they may not exist; certainly where judges may not see ambiguities lurking. As I read section 3(a), amending section 504(c)(1), it may be that if a court reviews the underlying agency decision of the adjudication, fees and other expenses may be made only pursuant to 2412(d)(3). That may mean, and I think the court very reasonably could construe that to mean that if there is an appeal from the agency adjudication, the agency ought not to make an award until the appeal route is completed. I don't think the language necessarily compels that construction. It seems to me that this is, again, something that can be addressed in committee report and made clear, and I think that the judiciary would follow.

Senator DOMENICI. Senator DeConcini, as the one that wrote the bill, I'm going to comment. Clearly, it's my intention in that case that it needs to be covered, and I'm going to work on that a little bit, because you've just given us one example, but you see my standard is that neither of those were the Government's. It's union A and citizen Q, and we ought to fix that up.

Mr. GOLDBERG. I did some research. It's very clear that the section 10 hearings before the NLRB, that is the unfair labor practice hearings, are section 554 hearings. If that is the Senator's intention, it seems to me that not only does the committee report have to deal with it, but the language of the statute might have to.

Equally important, certain representation hearings under section 9 are also 554 hearings, and the committee might want to address that.

I will try and finish up my remarks. I work as a law teacher. I work on a biological clock of 50 minutes instead of 20, but I will close my remarks quickly.

I notice that this bill, and I think it is very innovative and good as a matter of public policy, has a sunset provision to it. I think the bill also asks the Administrative Conference to make reports to the Congress with respect to certain aspects of the bill, which I also applaud. There are two other areas of study that I would commend to the committee that I think the committee might either, through the language of the statute or in the Committee Report, ask for study and perhaps even ask for appropriation to cover the costs of the studies.

First, I am terribly concerned, as a lawyer and as an interested observer and participant in the legal process, of the inflationary aspects of this bill. I don't mean only that it's going to cost the Federal Government a lot of money, because I am not convinced it's

going to cost the Federal Government a whole lot of money, but I mean inflationary aspects on attorney fees.

I'm terribly concerned, certainly what this bill is doing is making the Federal Government a third-party payer of attorney fees.

Well, as the Senate is well aware in other professional areas, what happens when the Government becomes a third-party payer. Of course, I refer to the medicaid, medicare area, and what that has done for physicians' fees. Again, I think that's secondary and I don't think that, in any way, ought to undermine the value of the bill, and it doesn't undermine my support for the bill. Given the sunset provision, it seems to me that the committee ought to be concerned about studying any possible inflationary aspects, and this bill provides a perfect opportunity to do that study. Because of the time frame, one can do a baseline survey and then do a field experiment survey after the bill is enacted. I would strongly recommend to the committee that the committee study that.

Second, the bill is limited in application and is not universal. I have my own views whether the bill ought to be limited to small business or ought to be a universal bill, but not being written as a universal bill, one of the fears that the committee, I'm sure, has, is that one of the results of the bill will be not to end agency overregulation and harassment, but merely to redistribute agency overregulation and harassment. That seems to be another area that would be worthwhile of studying during this 3-year time frame for the bill.

Again, I appreciate the opportunity to make my remarks to the committee. This is my first opportunity to testify before a congressional committee. I enjoy it because I get to have the final word over the judges, which is unusual. Thank you very much.

Senator DECONCINI. Thank you for your expert testimony, and I would like to impose upon you to let us contact you concerning this section 554 point you bring out, and some others, and I can assure you that as far as this Senator is concerned, we're going to keep you in mind for future testimony before committees in various areas.

I would like to just pose a couple of questions to you. The bill as drawn up now, not Senator Domenici's original bill, excludes the Internal Revenue Service. It is not my own belief that it should be excluded. I wonder if you have any comments about the Internal Revenue Service?

Mr. GOLDBERG. I read the hearings from the previous bill. I went to my experts on the Internal Revenue Code and Service, a professor—soon to be a dean from the law school—who has worked both for the IRS and Department of Justice, and asked him about it. He did not seem to be nearly as concerned as the Department of Justice was and the IRS was with respect to that. Of course, both my comments, and I'm sure Professor Desiderio won't appreciate me saying it, and his comments are, in the pure sense, irresponsible.

I have to admit my comment comes from a perspective that I am not terribly concerned about the cost to the Government. I read the Department of Justice representative's testimony as to the previous bill, and it was pretty draconian. I am not as convinced, from my own experience, that the cost to the Government is going to be that substantial, and even if it were substantial, I believe Senator DeConcini pointed out that cuts both ways. If there is going to be a half a billion

dollars that is going to be involved, that is a half a billion dollars that is being borne by the private sector. The cost is not going to go away because we close our eyes to it.

Senator DECONCINI. One of the witnesses yesterday in Phoenix, an attorney, brought out a point that this should not be viewed as an attorney's relief act. His rationale for that was that, in fact, the way it is now, the taxpayer has to hire an attorney, and if he or she does succeed in either getting money back or not having to pay money to the Government, they have to pay the attorney out of that. If it's IRS, it may be trying to get money back and the case is often taken on a contingency and the contingency is 30 or 40 percent. That means the taxpayer gets that much less money. What's your reaction to that argument?

Mr. GOLDBERG. Well, my representation has been primarily in the areas where, although I am litigating against the Government for private individuals, there's not any real money involved. Any money involved, I wouldn't touch, because it would, in fact, infringe on necessary money for my client.

I represent poor people, mostly. I certainly do not view representing someone before the Social Security Administration as an opportunity to take a contingent fee. That's an oblique answer to your question, but I think you get the flavor.

Senator DECONCINI. But the public or the citizen is really paying for it now, because there is no possibility.

Mr. GOLDBERG. That's absolutely right.

Senator DECONCINI. For the wronged party to pay for it.

Mr. GOLDBERG. Also, it's clear to the committee, and it ought to be clear to all interested observers of the bill, that there are some people who just because they can't afford attorneys, and because attorneys don't see a fee down the line, don't get attorneys. I view attorneys as providing a valuable service to society and not as impediments to the legal process. This bill will encourage attorneys to participate in the administrative process.

Senator DOMENICI. I think any comparison of this limited coverage of attorney fees with medicare or medicaid in terms of its inflationary impact of the service, we use the word draconian, and since you used that, we won't, because it's limited in terms of the litigation in this country for which lawyers are being paid as compared with medicare and medicaid, which you know is way up there like 25-30 percent of all the aid in the country, but the kind of cases that prompted to get me in this were cases in which an attorney was actually advising a client not to proceed because it was going to cost more in attorney fees to litigate then go ahead and pay, and that's a different kind altogether that we're talking about. The client calls the lawyers and says, "They're in here and they insist on such and such," the guy's got a little book and says, "I've done eight things wrong," and he says he wants \$25 for each one. He's an idiot and I shouldn't pay these, but he turns each sheet and says, "There's 25 here," and he calls the lawyer and he says, "Add that up," and says, "8 times 25 that's 200. Jim, you know it's going to cost you \$500 in court. Pay the guy."

That ought to get a little static and it ought to go all the way up on arbitrariness. That has been preordained, the funds to come in and say, "There it is, it's a light bulb and says, \$25." No history of how

good an operation he has or work. The guy wants to fight and challenge if they should even have done that, which is your idea that he's making public policy, if a fella fights.

A lawyer is not charging him anything, and saying, "Don't do it, because it costs more for me than if you do." If they go ahead and litigate, and win, and the lawyer gets paid, is that relief, Attorneys' Relief Act?

Mr. GOLDBERG. No. I don't, and I agree with the Senator, I think the primary purpose of the bill is applaudable and any effect of the bill in becoming a Lawyer's Relief Act would be in an unintended and derivative one. I don't agree with the Senator in having substantial doubts of the ability of lawyers to turn it into a Lawyers' Relief Act.

I would point out, going back to the medicare-medicaid analogy, gerontology, which is, of course, the medical study of the aged, became a recognized medical specialty coincidentally at the exact time that the Congress passed the Kerr-Mills Act, which is the precursor to medicare.

I don't think it is a matter of concern. It doesn't diminish in the slightest my support for the bill. What I commend to the committee is that the committee use the opportunity to study the possible effects of that.

Senator DOMENICI. Within the 3 years?

Mr. GOLDBERG. Within the 3 years of the sunset provision. It doesn't diminish at all my support for the bill.

Senator DeCONCINI. Thank you very much.

Mr. GOLDBERG. Thank you.

#### STATEMENT OF E. W. CANNON, CPA, CARLSBAD, NEW MEXICO

Senator DeCONCINI. The next panel witnesses are certified public accountants. Are they here, if they would come forward? I think that's Mr. Cannon. Is there another CPA here? Mr. Cannon, thank you for being with us this morning and sharing with us your comments.

Mr. CANNON. Thank you, Senator DeConcini and Senator Domenici. I thought there would be another certified public accountant here from El Paso. He was more or less to represent the larger type firm. I practice in Carlsbad, and for those of you who are not acquainted with the town, Carlsbad is approximately 30,000 people. It's a town that has seven large potash mines and the rest is made primarily of farmers and small businessmen. My practice is primarily the small farmers and small businessmen, and I really appreciate the opportunity to present my views on behalf of bill S. 265.

Over the past 20 years I have been practicing there, I have seen many cases where private citizens have not been able to protect their interests just because of the cost. If they did win their case, they lost financially, and that is why my feeling on this case is very strong.

Should this bill pass and awards to claimants be charged against the budget of the agency, I feel that this is going to make the agency more responsible in their final assessment.

We don't see many cases going to the court, in my type of practice, but we do see a lot of agency action.

As you know, the Internal Revenue Service has now stopped the informal conference, and we now go to the appellate conference.

While this was not a great change in their policy, it does add additional cost because of the formalities.

One question I have on the bill is under paragraph 504(a), it says that the agency itself will determine whether they will pay costs involved, and I'm a little bit concerned about self-determination by the agency. I'm also concerned at what level of the agency this determination going to be made. Is it going to be at the local level or is it going to be at a higher level?

It also says under paragraph 504(c)(2) if the claimant is not satisfied with the determination made by the agency, that they can file suit in court. I can see that this could possibly create filing twice, so we're doubling the cost effect in this whole situation.

While most of our cases are involved with the Internal Revenue Service, we do have an awful lot, in my type of practice, or other types of things.

For instance, a case that happened recently in Carlsbad, we had a Spanish-American farmer who owns a small farm. Adjacent to his farm, there is a large corporation-owned farm. This land was needed to build and construct a flood control dam which Senator Domenici is acquainted with.

Senator DOMENICI. Just a little old thing.

Mr. CANNON. The agency involved came in and was going to condemn his lands and offered him \$50 an acre. This farmer is not indigent, he can't use free legal services, he couldn't afford to replace his farm for \$50 an acre, and besides that, with his type of background, he said, "If my Government tells me it's worth \$50 an acre, it must be worth \$50 an acre."

The next-door neighbor, a large corporation, large landowner, was quoted \$2,000 an acre; for adjacent land.

This farmer went to one of our local attorneys there and said, "Can I fight it?" The attorney in this case told him, "You know you couldn't afford to fight it if you tried, but we're going to do something for you." We managed to take care of it at the time, free to him, but this type of inequity happens.

We see this happening with different agencies. We also see it in disability hearings, through the Social Security agency, where after going through all the administrative appeals, which is expensive no matter what you say, and they finally determine a person is not disabled, therefore, he can't work and he can't afford to pay for legal services to go to court. In matters involving the Internal Revenue Service, as far as going to the U.S. Tax Court, unless you're talking over \$10,000 in tax, there's no sense in even going, and in my type of practice, in Carlsbad, a small businessman, small farmer, does not incur this amount of liability. Therefore I feel this bill has excellent merit.

I do have some reservations about who is going to make the determinations of whether they're going to settle or not, and I would like to see more discussion in this area.

Senator DECONCINI. Thank you very much, Mr. Cannon. Let me go over a couple of specific things that trouble me. First, your point relating to the agency making the determination. I have the same problem, and I haven't resolved where to go to get someone independent or less biased once they find the agency is in error. Does the administrative law judge really have the gumption to say "By God,

you've got to pay substantial attorney fees and costs or accountants' fees." There may be some other alternatives—one is to mandate an award within an agency procedure, and leave awards totally discretionary if it's the court.

Another area that troubles me or I'd like your opinion on is the criteria set for qualifying under this. As you may know, it's \$1 million net assets for an individual and \$5 million for a corporation, organization, partnership. Is that definition adequate in your judgment to cover small enterprises?

It's been pointed out to us in Arizona that a rancher may easily have net assets of \$1 million tied up in acreage, but not more than \$5,000 or \$10,000 cash to risk on the basis of attorney fees.

Mr. CANNON. This was another problem I had in the bill, as it does say net assets in excess of \$5 million or \$1 million. Who is going to determine what the net assets are? Is this fair market or is this at cost?

We're getting into the level where many of our ranchers would be effected if you're talking about 40-50 sections of land in our type of area. The value, if you're talking about fair market value, is probably over the million-dollar mark.

Senator DECONCINI. When you do a statement, it calls for net assets. Is that an easily definable, undisputed term?

Mr. CANNON. For us, yes. We always have it at cost.

Senator DECONCINI. You always have it at cost?

Mr. CANNON. Yes. This is not true when the man takes a statement to the bank and wants to borrow money on it. Then, they're looking at fair market value.

We always prepare financial statements on cost. Parenthetically, we state what the estimate fair market value is.

Senator DECONCINI. Do you think we ought to consider something other than net assets as you have defined it? That's the way I defined it, just from the practice of law, and being with accountants, it's always at cost. Maybe we should not use cost. Do you think the statute should set forth how the value of assets should be determined?

Mr. CANNON. I believe it should. I really do feel it should be more definitive.

Senator DECONCINI. Thank you, sir.

Senator DOMENICI. I have no questions.

Senator DECONCINI. Thank you, Mr. Cannon. Our next witness is Bruce Hertzler. We're very glad to see you again. Thank you for coming last year and testifying. Your testimony was very influential, enough to get us really off to an early start, and we hope to report this bill.

Due to the time constraint, we ask if you have a printed statement or lengthy statement, you put it in the record and please proceed to highlight it.

#### STATEMENT OF MR. AND MRS. BRUCE HERTZLER, ALBUQUERQUE

Mr. HERTZLER. I would like to introduce my wife. Last time you saw my son, Eric.

Senator DECONCINI. How do you do.

Mr. HERTZLER. We have several questions. My very first question is, have you, sir, dealing with bureaucrats, ever met a bureaucrat that did not feel substantially justified?

Senator DECONCINI. Well, no. I can't say that I have. But fortunately, we don't think the bureaucrats will make that judgment. The courts will make the judgment. That's our intention here, not for them to judge themselves whether they're substantially justified, because obviously they will say they are. We hope to set specific standards where the court can say, "Wait a minute. That just isn't justified." As Senator Domenici pointed out, bureaucrats are going in and reading a book and saying, "You've got to pay \$100 fine because somebody set down the rule in Washington, D.C." I'm open to suggestions.

Mr. HERTZLER. There are other ways besides opening the book and reading things and it is those areas of bureaucratic function or operation I'm concerned with.

Senator DOMENICI. Let me say, Bruce, as you well know, the first bill that passed the Senate when I started corresponding with you told you I passed it as an amendment, and as it was introduced did not have these words that you just asked a question about.

But you also know that our good friend from Arizona, as chairman of the subcommittee, has really been beat about the head by the Justice Department and the big bureaucrats saying we've got a bill that's going to cost the Government too much money unless we narrow it down, and we want to get a bill passed, and we want to get something started in this area.

I don't think you're necessarily totally relegated to these words, but one of the reasons we have people like you is to give us some ideas on this.

Senator DECONCINI. Let me add, Mr. Hertzler, that Pete is absolutely correct. The problem I face is the bill that the Senate passed last year or last session is fine with me. I voted for it and it's great, but it didn't get anyplace. It didn't get out of the House; the administration was against it. The administration, which means the President of the United States, mentioned to me a potential veto of the bill, if it passes as it did last year. So we have attempted to come up with something moderate where we had some precedent and we could at least get a fair, impartial judge to say, "Hey, this agency was not substantially justified." But I'm not wedded to those words.

Mr. HERTZLER. We're talking about the 3 years, the 3-year period as Joe pointed out?

Senator DECONCINI. That's another reason the 3-year sunset legislation is there, to soften the opposition. I can't say they're for the bill, but they have lessened their opposition and come down from a half a billion dollars cost estimate to somewhere in the area of \$100 million. The best argument I have, of course, is that the cost simply shows how badly we need the bill. That's the reason for these words of art, and it may look like a softening position, but I'm seriously interested in your problems and your suggestions. I know you've been there.

Mr. HERTZLER. And may I suggest, as Joe suggested, that we will make suggestions to work on during the 3 years.

Senator DECONCINI. Fine.

Mr. HERTZLER. I am sure that with the wording of this thing here, that on the second page on reasonable governmental actions because of the expense in securing the vindication of their rights in civil actions and administrative proceedings, I'm sure if the bureaucrats

find themselves pinned to the wall in civil actions and administrative proceedings, they will then start a few more criminal proceedings. That's all to my benefit, you understand. If the bureaucrats want to come after me on a criminal prosecution, that is to my advantage. It is only to their advantage to hold it in civil or administrative proceedings because of the Constitution. The constitutional complications of the criminal proceedings rather than the administrative or statutory proceedings.

Senator DECONCINI. That's a good point.

Mr. HERTZLER. There's some question as to the administrative law court, law judges going to make the determination. We assume that this agency will make the determination as to whether they are going to pay me my lawyer's fees, is that correct?

Senator DECONCINI. Yes. That's correct, and that is a real problem.

Mr. HERTZLER. That's been taken out of the hands of the court. Now, not only that, but there is also a gross misunderstanding.

Senator DECONCINI. Let me interject. It's not taken out of the hands of the court from the standpoint you can appeal to the court.

Mr. HERTZLER. But which court can you appeal to?

Senator DECONCINI. To the district court.

Mr. HERTZLER. It does not say that.

Senator DECONCINI. But that's where it would come.

Mr. HERTZLER. But it would go to the circuit court of appeals.

Senator DECONCINI. Some do, yes. This would go to the Federal court having jurisdiction over the merits of the case.

Senator DOMENICI. They go both ways. Some go to district court, some go to circuit.

Senator DECONCINI. You're correct.

Mr. HERTZLER. Mine winds up going to the circuit court in Denver, and I don't want them hearing a case that should be down here. What chance would I have stood if we went through all the administrative procedures and wind up on appeal in Denver. These guys are up here, these judges up here are not concerned about what's going on in New Mexico and this is an administrative proceeding, and what do they know about OSHA laws? They're more concerned about criminal and the important things.

Senator DECONCINI. Do you think it would be helpful in the law, if the statute had a mandatory fee in the administrative area? In other words, the administrative law judge makes a determination that, yes, the agency is wrong in this procedure and then they have to pay them a fee, say, up to \$10,000. You no longer have the discretionary standard.

On the other hand, if you go to the district court right away on a tax case where you don't have administrative procedures that you have to follow, you leave that up to the judge to determine what is a "reasonable" fee, how does that strike you? Do you see any distinction?

Mr. HERTZLER. Yes, I personally would rather, I think I would rather have a local district judge make this determination. Not a Tenth Circuit Court of Appeals judge, but a district judge.

Senator DECONCINI. Far more expensive for you to go to the court of appeals than district court.

Mr. HERTZLER. But also the district, that's why we have district courts, is because the district is local. Judge Bratton knows what the social flavor of New Mexico is, considerably different than the social

flavor of Denver. I wrote down on here how would an administrative judge view my contention OSHA was operating unconstitutionally, if I had to go through an administrative law judge on this business with OSHA coming to our place. How do you think an administrative law judge would feel. He would throw it out.

Senator DOMENICI. But you went into the district court on your own.

Mr. HERTZLER. But when you go into district court, you've got to plant your feet and stand back and say, "We're going to go to war." If you want to do anything else but go to court, and you had to make such a big issue that the only way it can be resolved is through the court. They tried to get me through the administrative proceedings.

Senator DeCONCINI. In Denver.

Mr. HERTZLER. Yes, I think the Senator should also know that they have, since, trumped up another charge and are using the Department of Labor, Wage and Hour people. We have already substantially shown proof to them that their case is unfounded, then they're going to lose it, so they went to the IRS and own they are trying to get the IRS on me. We know this because we've got a notice from the IRS that says from Austin, Tex., that says that they want all of the returns of Bruce Hertzler for the years 1978, 1977, and 1976. Well, sir, there are no returns, tax returns for Bruce Hertzler. There never have been any tax returns for Bruce Hertzler. I have never signed any document, any official document as Bruce Hertzler. I am Robert B. Hertzler on my tax form, but to the Department of Labor, I'm known as Bruce Hertzler.

They are now in the process of trying to get us into an administrative law court, into an administrative proceedings from which the only appeal is to Dallas and the only appeal from there is to Washington and then the only appeal from Washington is to the Tenth Circuit Court of Appeals in Denver, so it looks like they got me. I mean, they got me caught up in their administration.

Senator DeCONCINI. You're one of the prime examples that certainly had a great deal of influence when Pete first talked to me about this bill, and your case is exactly what we're trying to get to. If those agencies are going to take the kind of action they have against you and if they lose, it's going to come out of their pocket, and that's what we're trying to do.

Mr. HERTZLER. I sure hope you succeed. Now, Donna has some questions on her own. There's another question that you must understand, sir, that I've been driving an 18-wheeler about 3,000 miles just in the last 4 days, and my head is still a little scrambled. I have a tendency to do that. I've got to take Pete out some day.

Senator DOMENICI. I thought you said your head is scrambled like mine is all the time.

Mr. HERTZLER. One of the questions I have is, it has your fees and expenses include the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the agency to be necessary for the preparation of the party's case.

Our experience in court has been that's one question which is found by the agency to be necessary for the preparation of the party's case. Our experience in court is the Government will take us in one issue and turn around and sneak something else in. Lawyers are all supposed to file their briefs and what you're going to try to do to us and they

wind up in court, and this has nothing to do with the paperwork. It was just an excuse to get into court. So as a defendant against the Government, I find myself having to cover all of the bases, plus outfield, plus a catcher's base, and try to talk to as many umpires as I can. That gets pretty expensive, but those are reasonable costs because we do not know the extent of which way the Government's going to turn, at which point they're going to change their shift, their approach, their attack.

In this present situation we have now with the Wage and Hour people, their alleged complaint and charges against me, which are trumped, are so vague that I must cover everything, everything. These are expensive, but they can claim, well, it was not germane to the issue that we were talking about.

What is germane to the issue they were talking about? They have made, they have brought up no germane issue, only these vague accusations, so my question is about that.

Senator DECONCINI. Thank you, Mr. Hertzler. We need to move on to our other witnesses this morning. Does your wife want to make a comment?

Mrs. HERTZLER. I just wanted to make one comment. I mentioned to Bruce that when we're talking about the tremendous costs this involves, that a lot of small businessmen, especially small businesses in New Mexico, their gross revenues may be only \$50,000 in a year, which is approximately what your salaries are.

How would you feel if that was your gross revenue as a business, and you had to fight one of these adjudicatory disputes with the Government, where could you cut your budget, where could you cut your household expenses and come up with that extra \$4,000 or \$5,000 that you have to have to pay just to defend yourself.

Senator DECONCINI. Well, that's a very good point, and that's why we have geared the bill toward small business and individuals. Your testimony as well as others have demonstrated that people will often pay several thousand dollars in fines rather than have to fight them when they may lose twice that much, and, in your case, maybe 10 times that much on a very marginal gross receipt to begin with.

Mrs. HERTZLER. It's a very large percentage of our gross revenue, much less than what it does to our net.

Senator DOMENICI. Bruce, what I'd do, if they did that to me, I'd take all of the three kids that are in college out of college and I'd pay for that.

Mrs. HERTZLER. The kids have to work.

Mr. HERTZLER. We feel that the IRS has no right to do this. The IRS should be pinned to the wall just the same as the rest of them.

Senator DECONCINI. I'm convinced of the same thing.

Mr. HERTZLER. Especially if they could be used as tools of other agencies.

Senator DECONCINI. Thank you, very much. We appreciate your point of view.

The next witness is Frank Swain, National Federation of Independent Businessmen. Frank has testified with us in Arizona, Pete, and has some excellent testimony that he will share with you that's in the record, and he will highlight that today for us.

**STATEMENT OF FRANK SWAIN, COUNSEL, NATIONAL FEDERATION  
OF INDEPENDENT BUSINESS**

Mr. SWAIN. Thank you, Senator, and my thanks to Senator Domenici as well, and his staff. They're very thoughtful and effective in the action of this legislation.

The principal reason that the National Federation of Independent Business sent me out here from Washington to Arizona and New Mexico is we feel this is the single most important piece of legislation that's going to be affecting the regulatory process in Washington. We're behind you all the way and I'm particularly pleased to be in Albuquerque this morning. You have some very effective witnesses. If you have as many in Washington that talk as directly as in Albuquerque, everybody's job would be a lot easier. It sort of brings home the truth of the old saying Washington's about 20 square miles surrounded on four sides by reality. The witnesses which we've heard, without a doubt, over the last 3 days, have presented very strong reasons for approving this bill.

There have been several testimonials from individuals and small businessmen on problems they've experienced, how they feel it's unjust against them. It's apparent small businesses, small businessmen and women who work 60-80 hours a week, whose profit margins are much lower than others on a comparable basis with large businesses and don't have the personal time or financial resources to sustain the lengthy and expensive process which is required when a business takes on the Government in court or is taken to court by the Federal Government.

But no testimony or information that anyone has presented to this committee better shows this than the Department of Justice's statements which they testified to yesterday in Phoenix, that such a bill might cost \$125 million a year. I don't believe it's actually going to cost this much, because I don't believe that many people are actually going to end up going to court. But the very fact the chief Federal law enforcement agency admits that unjustified Federal court cases, and not including Internal Revenue cases, cost small businesses \$125 million per year really can be no stronger reason for changing the situation and quickly passing S. 265.

We feel the need for the bill is apparent, as is the wisdom of enacting the bill the committee is now collecting information on. We feel the mechanism of S. 265, of making reimbursement of fees under the presumption which the Government may rebut, is putting the burden in the right place. Whenever the Government loses its case against the small businessmen or individual, the award of fees should be automatic. That's our basic position.

We feel the committee has been more than generous to the Government by allowing them a way out, by allowing them to prove in particular situations their litigation was substantially justified. As the Justice Department has proposed to shift this to make the individual make the showing, he wins on the merit, but also that he deserves his attorney fees, would be absolutely intolerable and would be little or no incentive to the individual or small business who is faced with the decision of whether or not to fight the Government in court.

This bill does not set up any pot of gold for the lawyers. The case is won, the attorney will receive his hourly fees, not any large con-

tingency award. To add this very significant burden of proving the Government not only wrong on the merits, but especially capricious and arbitrary presents an unworkable element of uncertainty to the potential small business litigant. This proposed change by the Department of Justice would undermine the entire purpose and effect of this bill, and we very strongly oppose it.

Likewise, I'd like to mention that we feel S. 265 should stand on its own merits as it proceeds through the Congress and especially in the Senate. There are a number of bills, as the Senators well know, now being considered by the Senate whose general intent is to open up the regulatory process to achieve more accountability and public participation. These bills cut in an entirely different direction. They seek to increase congressional and public influence over the process in which rules are made, and NFIB believes some of these bills are very good, and we think some of the proposals, particularly the public participation proposal, embodied in a section of S. 262 and S. 755 and in last year's bill S. 270, NFIB is very strongly opposed to.

But these are different types of problems and should be considered in a different context. We strongly hope the Judiciary Committee will report out a clean bill, that is, one that deals only with attorney fees, a bill which will encourage small businesses to fight the fair fight against Government agencies.

It is important to try and restore some of the individual rights which have unnecessarily been surrendered to our form of agency government.

We must change what is too often for the small businessman or woman a system of agency intimidation back to a system of impartial adjudication. Enactment of S. 265 is the only way that can be done.

Senator DECONCINI. Thank you, and we want to thank the National Federation and you for taking your time to be with us. I have no questions.

Senator DOMENICI. I want to ask, for the record, how many are in the National Federation in America now?

Mr. SWAIN. The national membership is over 570,000. Here in New Mexico, I believe we have over 5,000 members. We represent really the smallest businesses in the United States. These are the people that would be most affected by this bill. These are the people that find it almost impossible to go to court under the present system.

Senator DOMENICI. I want to say, Frank, I appreciate the federation's work, also, and from my standpoint, I'm not on the committee, but to shift the burden of proving what standards we use to citizens, instead of having the presumption on their side, in my opinion, just wrecks the bill, and I'm not going to be for that.

I hope our chairman isn't. I have one question.

The 125 estimate of Justice, is that if we have the substantially justified test in the legislation?

Mr. SWAIN. Well, just as I read their testimony yesterday in Phoenix, they put in a factor to allow for that substantially justified test. As one of the other witnesses mentioned, the Justice Department, there is really no way of predicting how much this will cost. A lot of it has to do with human behavior.

There are very important statistics on how much the Government wins or loses, and it's almost impossible to estimate how many cases are never brought to court because the poor businessman or woman

can't afford to do it, so the estimate is very difficult and justice is, I think, erring on the high side. I think it's somewhat unique to have the Justice Department come in and argue a Proposition 13 theory, that the taxpayers won't put up with it. I think it's an important public decision to be made and I think the Government ought to pay for its own mistakes and you ought to pass the bill and allow the 3 years to study the effect.

Senator DECONCINI. Thank you very much, Frank. We're now going to have a panel, and we would ask that the following people come forward. We have some problems but Senator Domenici and I do have some questions we'd like to pose. These are businessmen in New Mexico.

Ed Jory, Earl Crist, if he'd come forward, Jim Hudson, Bill Carroll, E. D. Nunns, Harold Wyler, John Collins, Troy Elliot.

We will just ask you to sit around the table here, gentlemen. Mr. Cooper will also join the panel.

#### PANEL OF NEW MEXICO BUSINESSMEN:

**ED JORY, EARL CRIST, JIM HUDSON, BILL CARROLL, E. D. NUNNS,  
HAROLD WYLER, JOHN COLLINS, TROY ELLIOT, AND DAVID  
COOPER**

Mr. COOPER. Is it possible to ask a question before I leave?

Senator DECONCINI. Just identify yourself and we'd be glad to take your question.

Mr. COOPER. My name is David Cooper. Unfortunately, I don't have a prepared statement. I feel a little remiss about that, but while I'm totally in sympathy with the intent of the bill, there are some things that concern me.

No. 1, I feel that the legal system is not operative for a number of reasons, not the least of which it's overburdened, and it seems to me that there is a very great possibility that this bill will add to that burden.

Second, one of the things that really bothers me is that the bill, as I read it, would perpetuate a myth, and that myth is that the Government is sort of a separate entity which has funds of its own and therefore, if a small businessman takes them on and they pay his fee, they have, in some way, been chastised or punished when, in fact, we are really paying both sides of the litigation. It seems to me, as I say, I'm totally in agreement with the intent of the bill, and also, I'd like to state that I'm not one of those businessmen who feels that Government should not interfere quote, unquote; I feel that the only chance of the survival of the free enterprise system is a controlled capitalism within reason, but it seems to me that what has happened is that the most powerful branch of Government has become the bureaucracy.

Far stronger than any of the other three branches of our Government. I don't know why it is that the individuals in the bureaucracy or bureaucrats cannot be, in some way, held responsible individually for harassing actions that have no merit at all.

I'm not, in any way, persuaded that taking some legal fee out of a huge appropriation will, in any way, deter a bureaucrat from bringing an action against a businessman. I don't know what it is that makes the bureaucrats now immune to such action, but it seems to me that

that should be where the thrust is. That would limit the litigation substantially, I think, and to me offers the only possibility of a viable approach to what I think is an excellent idea, that both of you have.

Senator DECONCINI. Thank you, Mr. Cooper. That's a very good point. The problem, however, in holding the individual bureaucrat responsible is that in many cases you can't do that. It doesn't mean you couldn't pass a law that would hold them responsible. You might be able to get at it through some change in civil service, so that would be held as cause for review of the person's tenure or something.

Mr. COOPER. I recognize it is a very radical concept. It shouldn't be, but it is.

Senator DECONCINI. We appreciate your comments. Gentlemen, do you have a spokesman, or does anyone want to start off here and give us an opinion. What I'm looking for, quite frankly, are some examples of what agencies bother you the most, anything that you care to say that won't complicate your lives any further. I can't give you immunity. I used to be able to do that when I was a county prosecutor, but I can't do that anymore. I'm interested in having good, sound examples so that when Pete and I get on the floor and debate those people who don't want this, that we can say, We know people who have been harassed, here's a couple of examples. That's what I'm mainly interested in, but I would take whatever you care to give us.

Mr. WYLER. Perhaps I might start off. I'm Harold Wyler, I am the vice president of the Governmental Affairs. We have about 1,000 members in the State; about 85 percent of them employ 15 employees or less, so they would fall well within the criteria of this proposed legislation.

I can give you a classic example, and I would also illustrate a question I have. One of our people was involved in EEOC determinations. They fought it all the way, got to the courthouse steps, had already expended somewhere in the neighborhood of \$30,000 to \$35,000 when the Government withdrew. Now, under this bill, would those reasonable attorney fees be compensated? He hasn't gone to court, you understand. They were at the courthouse steps, ready to walk through the door.

Senator DECONCINI. It's our intention he could do this.

Senator DOMENICI. Absolutely.

Senator DECONCINI. Because the complaint has been filed and that's where the basis starts from for the incurrence of fees. He had to get to court.

Mr. WYLER. They expended in excess of \$30,000.

Senator DECONCINI. That would be in the report language which would not permit the Government to get out by saying, "We're going to withdraw our complaint."

Mr. WYLER. The only one I have is, and it goes directly to what Mr. Cooper said, if we're going to do this on the basis of the individual agency being responsible for its own costs, will they then be permitted to next year put into their budget a proposal for that contingency or would that agency not have that provision and it would have to find the money some other place?

Senator DECONCINI. They would always have the right to ask for additional appropriations or supplemental appropriations. When they do that, that's the flag that I'm looking for, being a member of the

Appropriations Committee, and many Senators look for, who are not members of the Appropriations Committee.

We can't find out how much they spend on regulations. The reason I'm so sold on the bill is that when an agency comes before us to justify its budget, they say, "Well, we've got more cases filed and we won more cases and we settled more cases." Well, I want to know what the cost is to the taxpayer, and they don't know. This would give us something specific, when we see a line item that they lost \$35,000 because OSHA in Albuquerque, N. Mex., lost a case. They're going to have to tell us how that happened or we're not going to give them the money.

It will not prohibit them from petitioning Congress for appropriations to pay the fees. I've got to hope and pray Congress wouldn't be dumb enough to pass this and give them a blank check although we've done just as many dumb things before.

Senator DOMENICI. Doc, let me say this. I don't agree with David at all. You know, he's my dear, dear friend, but the solution to this problem is not to make the bureaucrat individually, personally liable. That's just changing the whole system of Government. That's agency law, that's immunity of the U.S. Government law.

If it's tough getting this bill through, try that one. We'll be back here 10 years from now, Bruce, with another hearing on the fifth version, but it seems to me that the 3-year sunset, which we've had to agree to, because of the uncertainties of cost, putting it into the agency so you can find out and focus on how much are they losing in cases that they are brought, that they shouldn't be bringing, that that 3 years is a good period of time to get some answers and yet bring the pendulum of arbitrariness back a little to the middle, by socking it to them a little more by citizens taking them on, so I don't think we can wait around to get an individual Federal Government person liable for arbitrary acts, because we'll never be helping the average American or small businessman with bureaucracy and you can agree with that.

Senator DECONCINI. Yes, sir.

Senator DOMENICI. It just won't happen.

Mr. WYLER. I completely agree with that.

Mr. HERTZLER. You've got a "Catch 22." If it's not costing the administration any money at the end of 3 years, we keep the bill. If it is costing them a whole lot of money at the end of 3 years, there's an obvious desperate need for the bill, so once you can get it through, we've got it made.

Mr. COLLINS. My name is John Collins, with the Kent Home Construction. Over the past 7 years, we have had 33 occupational safety and health inspections. During those 33 inspections, we've been fined over \$60,000. To date, we paid \$550, the rest have either been dismissed or are in appeal process.

Senator DECONCINI. All at your cost?

Mr. COLLINS. Yes, sir. We have expended over \$27,000 in legal fees. We strongly favor this bill.

Senator DECONCINI. That's the kind of example I'm looking for, because that just indicates the arbitrariness of the OSHA and I have examples just like that in Arizona. I'm sorry for you, but I'm glad it's not just Arizona they're picking on.

Mr. COLLINS. I wish it was just Arizona. One of the problems I perceive is a few years back, when they were reorganizing OSHA, attempting to, they came up with the idea that for any nonserious citations, less than ten found during an inspection, there would be no monetary citation. What happened immediately after that was suddenly for every inspection, there were 12 or 13 instead of less than 10.

I have enough faith in the agencies, whether it be OSHA, EMSHA, EEOC, to think that they will find a way around this or try to.

Senator DECONCINI. Around the bill.

Mr. COLLINS. I share the professor's viewpoint about what is substantially justified. I think that is an item of major concern and it should be addressed.

Senator DECONCINI. Very good. The gentleman in the back?

Mr. CRIST. My name is Earl Crist and I really think that if it's at all possible, we should include the IRS, because several of us have had some severe problems in that area.

Senator DECONCINI. I agree.

Mr. CARROLL. My name is Bill Carroll, a contractor, and as a small businessman, I feel very strongly about the Equal Access to Court Act. I think the situation has developed in the past few years in our country is we have become so overregulated that it becomes, for the small businessman, he comes to a point of losing his initiative to try to succeed in making his business successful, and I also strongly feel that the small businessman is the backbone of America. I was reading the bill, was disturbed that the IRS was excluded.

As far as I am concerned, they are the worse possible culprits of intimidating small business of all the Government agencies, and I have to deal with OSHA and all these others, too.

I get on my soapbox when I start talking about IRS, but I feel 50 percent of the cases that IRS has are involving small businessman; that over 50 percent of the cases would be won by the businessman if it wasn't the point that it costs him more to pay for his legal help than it does to settle the case, so if I sound like a person that's been harassed by the IRS, I sound right, because I have been, and once they get onto you, they never get off, and I've been audited, both personally and corporately, for the last 7 years, every year, and yet I have never paid a penny in penalties or interest or anything that they have found me wrong on, so you know you come to the point where it's a constant harassment and it costs me for the C.P.A.'s and legal fees to do this and I know that I'm not alone in this.

Once they get on you, it's a constant pain.

Senator DECONCINI. In the last 7 years, you've never had to pay anything?

Mr. CARROLL. No, sir.

Senator DECONCINI. They've never come up with anything?

Mr. CARROLL. No, sir, but they keep trying, I guarantee you.

Senator DECONCINI. That's seven good examples, I'll tell you that.

Mr. CARROLL. I feel that maybe one of these years, they could put the full-time agent they have assigned to me, they could be doing something else, because it's costing the Government.

Senator DECONCINI. May I have the name of your accountant or whoever helps you? Last year, I had to pay something.

Mr. CARROLL. But anyway, not meaning to get on my soapbox, and I'll spare you my personal problems, but I feel that's really—

Senator DECONCINI. That's a good example. Seven audits and never having to pay a thing. I don't know if you care to tell us how much money you have expended or estimated in that, but it's got to be substantial.

Mr. CARROLL. It's substantial, and all I would like is that we do get the bill through, I certainly hope you do, as soon as possible, that you get the IRS included and as far as I'm concerned, they are the worst.

Senator DECONCINI. I'm firmly convinced, after the testimony, that the bill from the subcommittee is going to include the IRS. I introduced it without IRS to get it moving quickly.

Mr. NUNNS. E. D. Nunns, a management consultant, and I own small businesses. One of them is a publishing company. I worked with the Government for 25 years. This is an important matter.

I would like to see the IRS included in the bill, because I believe they're one of the agencies that are less than objective. I think your size is unnecessarily restrictive, Senator Domenici. I think you should increase that size of assets for this. I think you should pass the bill and I believe it will be somewhat like the OSHA bill, which has been under considerable discussion.

It probably was a good idea, but it came distorted with what the Congress wanted and was unnecessarily complicated after it was interpreted. I think if you look at the OSHA regulations now, they are less restrictive, the area that they have complete jurisdiction over has been reduced and I think that eventually we will have a safety law that we perhaps can live with.

I think as I look, that there are other boards that you can appeal to and I feel in dealing with, as a consultant, with clients, that this bill will be very difficult for some of the people to interpret what their rights are.

I think that at the end of 3 years, when you rewrite that bill, you will have enough feedback in it that that problem will be cleared.

My last comment, and I appreciate the fact that the Senator of Arizona can be here today, is that I was once told you couldn't box with somebody with zero resources or infinite resources when you put them against the Government. We feel we're dealing with someone with infinite resources and there's no way to win and in my own instance, as a small businessman, I simply do not work against the Government but I do use certain things that I think might be of interest to the committee.

I will put the U.S. Government or foreign government on COD and if I feel I'm being harassed and I have a product delivered, I put them on COD. They can inspect it at my place and pay me and Mr. Jory, who has been my banker in the past, can tell you that I'm still here after 25 years. There should be some meritorious award.

Senator DECONCINI. I know we're running out of time, but I want to clarify. The bill I passed includes IRS. Dennis is trying desperately to get a bill. He's getting beat about the head that if we put IRS in, we won't get the bill.

Mr. NUNNS. Get the bill if you can and rewrite it at the end of the 3 years with the feedback.

Senator DOMENICI. We'll have a vote of the Senate in the IRS and if they leave it out on committee, we will put it on the floor and IRS is such a benevolent agency, and they can argue that if they want.

Mr. NUNNS. I think the jury should be on that.

Senator DECONCINI. Mr. Jory?

Mr. JORY. Ed Jory. I've been in the banking business for a number of years and I'm now out of it, but I've had an opportunity to talk to a lot of small businessmen and have been very active in the SBA. David Cooper mentioned something about free enterprise system. We don't have that anymore. It's a controlled, dominated enterprise system and I think this bill is excellent. It gives the small businessman a little breath and maybe gives him a little more confidence in our Government.

One thing that concerns me is what has been brought out here before, the small businessman who may have a Mom and Pop operation with 10 or 15 employees and can't afford to go to court. If he has to pay \$3,000, \$4,000, or \$5,000, he's going to do it rather than go to court.

Senator DECONCINI. That's been your experience with your customers?

Mr. JORY. Right.

Mr. HUDSON. My name is Jim Hudson. I will make this very brief. I think it is extremely important that Congress know which agencies are acting capriciously, by the size of the awards. I think that's a very, very important part.

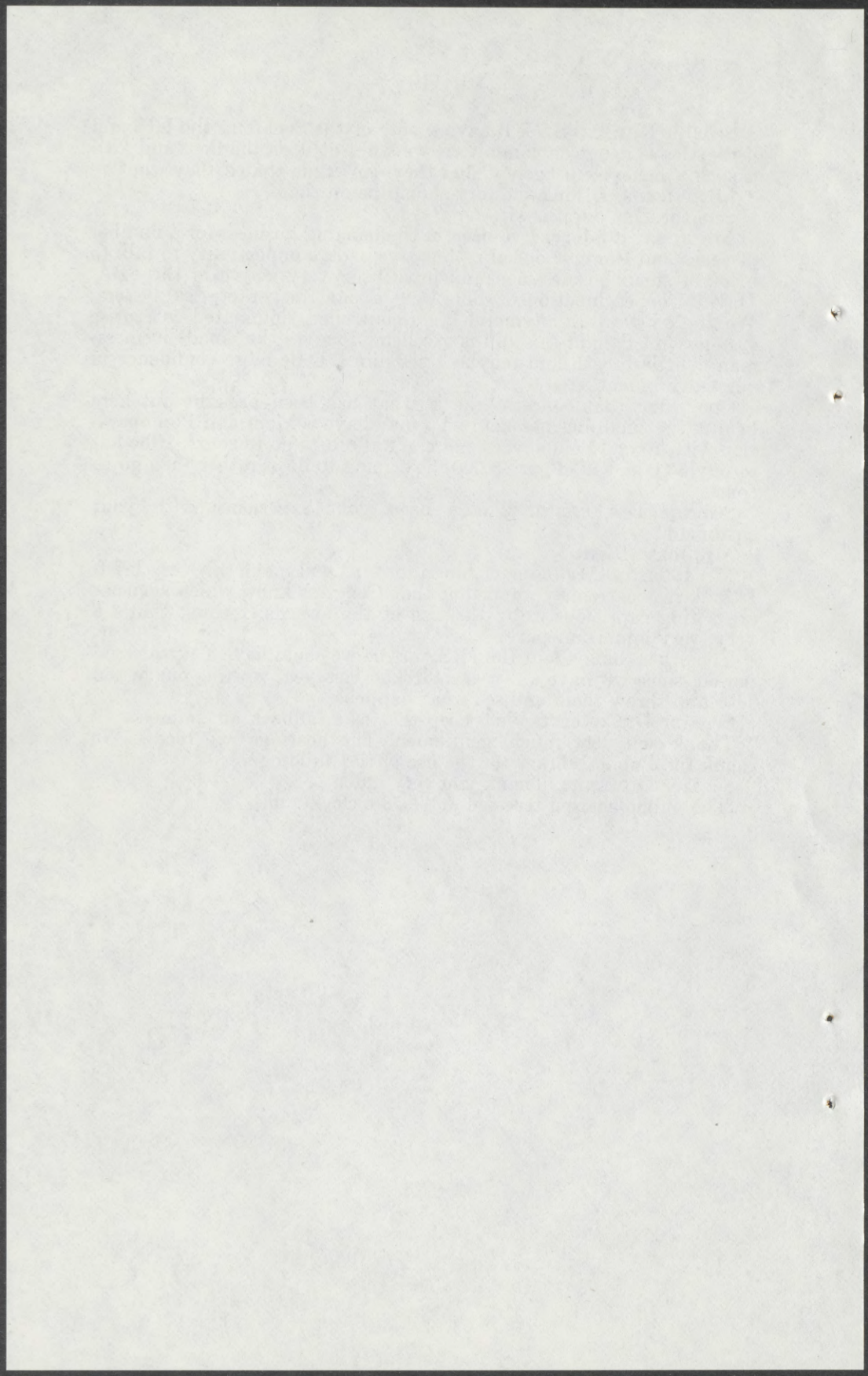
The other thing about the IRS, maybe we could have a 1-year trial period, since we have a 3-year bill. The last year we will put in the IRS and throw them and see what happens.

Senator DECONCINI. We'll keep that as a fallback amendment.

Thank you very much, gentlemen. The hearings will recess. We thank the Public Library for the use of the building.

Senator DOMENICI. Thank you very much.

[The public hearing recessed at 11:58 o'clock a.m.]



## APPENDIX

96TH CONGRESS  
1ST SESSION**S. 265**Entitled "Equal Access to Justice Act".

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## IN THE SENATE OF THE UNITED STATES

JANUARY 31 (legislative day, JANUARY 15), 1979

Mr. DOMENICI (for himself, Mr. NELSON, and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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**A BILL**

Entitled "Equal Access to Justice Act".

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*  
3 That this Act may be cited as the "Equal Access to Justice  
4 Act".

## 5 FINDINGS AND PURPOSE

6 SEC. 2. (a) The Congress finds that certain individuals,  
7 partnerships, corporations labor, and other organizations may  
8 be deterred from seeking review of, or defending against,  
9 unreasonable governmental action because of the expense

II—E●

1 involved in securing the vindication of their rights in civil  
2 actions and in administrative proceedings.

3 (b) The Congress further finds that because of the great-  
4 er resources and expertise of the Federal Government, the  
5 standard for an award of fees against the United States  
6 should be different from the standard governing an award  
7 against a private litigant, in certain situations.

8 (c) It is the purpose of this Act—

9 (1) to diminish the deterrent effect of seeking  
10 review of, or defending against, governmental action  
11 by providing in specified situations an award of attor-  
12 ney fees, expert witness fees, and other costs, against  
13 the United States unless the governmental action was  
14 substantially justified; and

15 (2) to insure the applicability in actions by or  
16 against the United States of the common law excep-  
17 tions to the “American rule” respecting the award of  
18 attorney fees.

19 AWARD OF ATTORNEY FEES AND OTHER EXPENSES IN

20 CERTAIN AGENCY ACTIONS

21 SEC. 3. (a) Subchapter I of chapter 5, title 5, United  
22 States Code, is amended by adding at the end thereof the  
23 following new section:

1 **“§ 504. Costs and fees of parties**

2       “(a) An agency that conducts an adjudication subject to  
3 section 554 of this title shall award, to a prevailing party  
4 other than the United States, fees and other expenses in-  
5 curred by that party in connection with that proceeding,  
6 unless the agency finds that the position of the agency as a  
7 party to the proceedings was substantially justified or that  
8 special circumstances make an award unjust. The agency  
9 may reduce the amount to be awarded, or deny an award, to  
10 the extent that the prevailing party during the course of the  
11 proceedings engaged in conduct which unduly and unreason-  
12 ably protracted the final resolution of the matter in contro-  
13 versy. The decision of the agency under this section shall be  
14 made a part of the record and shall include written findings  
15 and conclusions and the reason or basis therefor.

16       “(b)(1) For the purposes of this section—

17       “(A) ‘fees and other expenses’ includes the rea-  
18 sonable expenses of expert witnesses, the reasonable  
19 cost of any study, analysis, engineering report, test, or  
20 project which is found by the agency to be necessary  
21 for the preparation of the party’s case, and reasonable  
22 attorney or agent fees. The amount of fees awarded  
23 under this section shall be based upon prevailing  
24 market rates for the kind and quality of the services  
25 furnished, except that (i) no expert shall be compensat-

1 ed at a rate in excess of the highest rate of compensa-  
2 tion for experts paid by the agency involved; and (ii)  
3 attorney fees shall not be awarded in excess of \$75 per  
4 hour unless the agency determines by regulation that  
5 an increase in the cost of living or a special factor,  
6 such as the limited availability of qualified attorneys  
7 for the proceedings involved, justifies a higher fee; and

8 "(B) 'party' means a 'person' as defined in section  
9 551 of this title, but excludes any individual who had,  
10 at the time the adjudication was initiated, net assets in  
11 excess of \$1,000,000 and any partnership, corporation,  
12 association, or organization that had, at the time the  
13 adjudication was initiated, net assets in excess of  
14 \$5,000,000.

15 "(2) Except as otherwise provided in paragraph (1), the  
16 definitions provided in section 551 of this title apply to this  
17 section.

18 "(c)(1) Each agency shall by rule establish procedures  
19 for the submission and consideration of applications for an  
20 award of fees and other expenses. If a court reviews the un-  
21 derlying decision of the agency adjudication, an award for  
22 fees and other expenses may be made only pursuant to sec-  
23 tion 2412(d)(3) of title 28.

24 "(2) A party dissatisfied with an award for fees and  
25 other expenses as determined by the agency may petition for

1 leave to appeal to the court of the United States having juris-  
2 diction to review the merits of the underlying decision of the  
3 agency adjudication. If the court denies the petition for leave  
4 to appeal, no appeal may be taken from the denial. If the  
5 court grants the petition, it may modify the determination of  
6 the agency only if it finds that the failure to make an award,  
7 or the calculation of the amount of the award, was an abuse  
8 of discretion.

9       “(d) Fees and other expenses awarded under this section  
10 shall be paid by the General Accounting Office out of the  
11 general fund.

12       “(e) The Office of the Chairman of the Administrative  
13 Conference of the United States shall report annually to the  
14 Congress on the amount of fees and other expenses awarded  
15 during the preceding fiscal year pursuant to this section. The  
16 report shall describe the number, nature, and amount of the  
17 awards, the claims involved in the controversy and any other  
18 relevant information which may aid the Congress in evaluat-  
19 ing the scope and impact of such awards. Each agency shall  
20 provide the Conference with such information as is necessary  
21 for the Chairman to comply with the requirements of this  
22 subsection.”.

23       (b) The table of sections of subchapter I of chapter 5,  
24 title 5, United States Code, is amended by adding at the end  
25 thereof the following new item:

"504. Costs and fees of parties."

1 (c) Effective three years after the date of enactment of  
2 this Act, section 504 of title 5, United States Code, as added  
3 by subsection (a) of this section, is repealed.

4 AWARD OF ATTORNEY FEES AND OTHER EXPENSES IN  
5 CERTAIN JUDICIAL PROCEEDINGS

6 SEC. 4. (a) Section 2412 of title 28, United States  
7 Code, is amended to read as follows:

8 "§2412. Costs and Fees

9 "(a) Except as otherwise specifically provided by stat-  
10 ute, a judgment for costs, as enumerated in section 1920 of  
11 this title, but not including fees and other expenses of attor-  
12 neys, may be awarded to the prevailing party in any civil  
13 action brought by or against the United States in any court  
14 having jurisdiction of such action. A judgment for costs when  
15 taxed against the Government shall, in an amount estab-  
16 lished by statute, court rule, or order, be limited to reimburs-  
17 ing in whole or in part the prevailing party for the costs  
18 incurred by him in the litigation.

19 "(b) In addition to the costs which may be awarded pur-  
20 suant to subsection (a) and except as otherwise specifically  
21 provided by statute, a court may award reasonable attorney  
22 fees to the prevailing party in a civil action brought by or  
23 against the United States, in those circumstances in which  
24 the court may award such fees in such suits involving private  
25 parties.

1           “(c)(1) Any judgment against the United States for costs  
2 pursuant to subsection (a) shall be paid as provided in sec-  
3 tions 2414 and 2517 of this title and shall be in addition to  
4 the compensation, if any, awarded in the judgment.

5           “(2) Any judgment against the United States for fees  
6 and other expenses pursuant to subsections (b) and (d) shall  
7 be paid as provided in sections 2414 and 2517 of this title  
8 unless the basis for the award is a finding that the United  
9 States acted in bad faith, in which case the award shall be  
10 paid by the agency found to have acted in bad faith and shall  
11 be in addition to the compensation, if any, awarded in the  
12 judgment.

13           “(d)(1) In addition to the costs which may be awarded  
14 pursuant to subsection (a) and except as otherwise specific-  
15 ly provided by statute, a court shall award fees and other  
16 expenses to any party other than the United States which  
17 prevails in any civil action (other than cases sounding in tort  
18 or cases arising under the internal revenue laws of the United  
19 States) brought by or against the United States in any court  
20 having jurisdiction of that action, unless the court finds that  
21 the position of the United States was substantially justified or  
22 that special circumstances make an award unjust. A party  
23 seeking an award of fees and other expenses shall, within  
24 thirty days of final judgment in the action, submit to the  
25 court an application which provides evidence of such party's

1 eligibility for the award and the amount sought, including an  
2 itemized statement from attorneys and experts stating the  
3 actual time expended in representing such party and the rate  
4 at which fees were computed.

5 “(2) For the purposes of this subsection—

6 “(A) ‘fees and other expenses’ includes the rea-  
7 sonable expenses of expert witnesses, the reasonable  
8 cost of any study, analysis, engineering report, test, or  
9 project which is found by the court to be necessary for  
10 the preparation of the party’s case, and reasonable at-  
11 torney fees. The amount of fees awarded under this  
12 subsection shall be based upon prevailing market rates  
13 for the kind and quality of the services furnished,  
14 except that (i) no expert shall be compensated at a rate  
15 in excess of the highest rate of compensation for ex-  
16 perts paid by the United States; and (ii) attorney fees  
17 shall not be awarded in excess of \$75 per hour unless  
18 the court determines that an increase in the cost of  
19 living or a special factor, such as the limited availabil-  
20 ity of qualified attorneys for the proceedings involved,  
21 justifies a higher fee;

22 “(B) ‘party’ means any individual who had at the  
23 time the civil action was filed, net assets less than  
24 \$1,000,000, and any partnership, corporation, associ-

1       ation, or organization that had, at the time the civil  
2       action was filed, net assets less than \$5,000,000; and

3               “(C) ‘United States’ includes any agency, and any  
4       official of the United States acting in his official capac-  
5       ity.

6       “(3) In awarding fees and other expenses under this  
7       subsection to a prevailing party in any action for judicial  
8       review of an agency adjudication conducted pursuant to sec-  
9       tion 554 of title 5, the court shall include in that award, the  
10      fees and other expenses for services performed during that  
11      agency adjudication unless the court finds that during such  
12      adjudication the position of the United States was substan-  
13      tially justified, or that special circumstances make an award  
14      unjust.

15      “(4) The court, in its discretion, may reduce the amount  
16      to be awarded pursuant to this subsection, or deny an award,  
17      to the extent that the prevailing party, during the course of  
18      the civil action or the agency adjudication, engaged in con-  
19      duct which unduly and reasonably protracted the final resolu-  
20      tion of the matter in controversy.

21      “(5) The Director of the Administrative Office of the  
22      United States Courts shall include in its annual report pre-  
23      pared pursuant to section 604 of this title, the amount of fees  
24      and other expenses awarded during the preceding fiscal year  
25      pursuant to this subsection. The report shall describe the

1 number, nature, and amount of the awards, the claims in-  
2 volved in the controversy and any other relevant information  
3 which may aid the Congress in evaluating the scope and  
4 impact of such awards.”.

5 (b) The item relating to section 2412 in the table of  
6 sections for chapter 161 of title 28, United States Code, is  
7 amended to read as follows:

“2412. Costs and fees.”.

8 (c) Effective three years after the date of enactment of  
9 this Act, subsection (d) of section 2412, as added by subsec-  
10 tion (a) of this section, is repealed.

11 SEC. 5. (a) Subdivision (f) of rule 37 of the Federal  
12 Rules of Civil Procedure is repealed.

13 (b) The table of rules of the Federal Rules of Civil Pro-  
14 cedure is amended by deleting the item relating to subdivi-  
15 sion (f) of rule 37.



AMERICAN MEDICAL ASSOCIATION

535 NORTH DEARBORN STREET • CHICAGO, ILLINOIS 60610 • PHONE (312) 751-6000 • TWX 910-221-0300

JAMES H. SAMMONS, M.D.  
Executive Vice President  
(751-6200)

June 7, 1979

The Honorable Dennis DeConcini  
Chairman  
Subcommittee on Improvements  
in Judicial Machinery  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Re: S 265, "The Equal Access to Justice Act"

Dear Senator DeConcini:

The American Medical Association takes this opportunity to comment on S 265, "The Equal Access to Justice Act." We request that this statement be made part of the hearing record on this bill.

S 265 provides that when a party prevails in litigation with the federal government, the agency will reimburse the party's costs and attorney's fees. The bill applies to certain agency adjudicatory proceedings as well as judicial actions. Such an award would not be made if it is determined by the agency or the Federal Courts that the agency's position was substantially justified or if the private party had engaged in dilatory tactics that unduly prolonged the proceeding. Since S 265 is intended to benefit individuals and small business, awards may not be made to individuals with net assets exceeding \$1,000,000 or to other entities with net assets in excess of \$5,000,000. The bill is seen by proponents as a partial deterrent to improper Federal agency activities.

The American Medical Association is very much aware of the problems that S 265 is intended to address. All too often the private individual or business does not have the resources needed to engage in protracted litigation with the government. The private party is often faced either with bankruptcy if the contest continues or capitulation to the government's demands to avoid financial disaster.

We also recognize that the government may use this inequality to its advantage, bringing actions of questionable merit, with the expectation that the respondent could not devote the resources necessary to mount a successful defense. The only viable option for a respondent may be to seek a settlement of the case on terms pressed by the government.

The Honorable Dennis DeConcini  
Chairman  
Subcommittee on Improvements  
in Judicial Machinery  
Committee on the Judiciary

June 7, 1979

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Such a situation makes justice an elusive shadow for many people. More importantly, it means that the bureaucracy is unaccountable to the public. Government is no longer the servant of the citizen, it has become his master.

In an effort to restore some balance to this situation, the AMA has developed a draft bill that would reimburse prevailing respondents in Federal agency adjudications. A copy is enclosed and we recommend it for your careful consideration.

While we are in accord with the purposes of S 265, we have reservations about the bill which preclude our support for this legislation at this time.

We hesitate to endorse the application of this concept to judicial actions. Costs may now be recoverable by parties under certain circumstances. We suggest that payment of costs and fees be limited at this time to agency adjudications. The cost of these awards should then be studied over time to determine the advisability of broader application in judicial actions.

We are also concerned that reimbursing petitioner's costs could encourage frivolous actions by private parties. The dockets of adjudicatory agencies are now crowded enough and legislation that could encourage this trend is not needed. We recommend that payment of costs and attorney's fees be limited to prevailing respondents.

As we noted earlier, S 265 would limit awards to individuals and other entities with limited assets. Yet the drain on other organizations is equally significant. We suggest that any prevailing respondent be entitled to an award of costs and attorney's fees. Only a handful of major corporations can now tolerate the expense of protracted litigation and even they should be safe from unfounded government action. We believe that the deterrent effect of this bill would be greater if there were no assets limitations.

We are also troubled by the provisions that would deny awards to prevailing parties if the agency's position were "substantially justified." We are concerned that the vagueness of this term could lead to frequent denial of these awards or to lengthy struggles to recover these funds. After all, what Federal agency can be expected to admit that its position was without substantial merit? The fact that a party has prevailed should be sufficient evidence of the lack of merit in the government's claim.

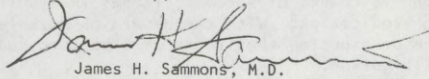
The Honorable Dennis DeConcini  
Chairman  
Subcommittee on Improvements  
Committee on the Judiciary

June 7, 1979

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In conclusion, the AMA is sympathetic and supportive of the intent of this legislation. We agree that steps must be taken to restore a balance between government and citizens, to increase the public accountability of the bureaucracy and to deter inappropriate agency adjudications. However, we do not believe, for the reasons already enunciated, that S 265 is the proper vehicle to achieve these goals. We believe that our draft proposal is a better means of attaining these desirable results and we urge its enactment by the Congress.

Sincerely,

A handwritten signature in dark ink, appearing to read "James H. Sammons", with a long horizontal flourish extending to the right.

James H. Sammons, M.D.

JHS:RBF/dap  
Enclosure

January, 1979

REIMBURSEMENT OF LITIGATION COSTS FOR PARTIES WHO PREVAIL  
IN ACTIONS BEFORE ADMINISTRATIVE AGENCIES

The cost of defending administrative actions before federal regulatory agencies often can be staggering. In fact, parties have been known to capitulate to agency demands and enter into consent decrees, even when they have had a reasonable chance of success, rather than suffer the enormous costs of seeking vindication. With the growth of more federal agency authority, it can be expected that there will be more complex, expensive and protracted litigation.

The draft bill would ameliorate the hardships by requiring administrative agencies to reimburse victorious defendants in actions initiated by the agency for reasonable attorney's fees and other costs directly related to the defense of the action. When a party prevails on only part of the charges made by the agency, the party would be reimbursed only for the cost directly related to defending the claims that were successfully defended. Agencies would be required to establish a reserve fund to insure payment of costs to prevailing parties.

Bill No. \_\_\_\_\_

IN THE (SENATE) (HOUSE) OF THE UNITED STATES

Date \_\_\_\_\_

\_\_\_\_\_ of \_\_\_\_\_ introduced the following bill;  
which was read twice and referred

To the \_\_\_\_\_ Committee

## A BILL

1 To amend the Administrative Procedure Act (Chapter 5 of Title 5, U.S. Code) to  
2 require the award of reasonable attorney fees and other relevant costs to persons  
3 successfully defending adjudicatory proceedings conducted by Administrative  
4 Agencies.

*Be it enacted by the Senate and House of Representatives of the United  
States of America in Congress assembled:*

5 SECTION 1. Subchapter 2 of Chapter 5 of Title 5 of the U.S. Code is amended  
6 by inserting directly after Section 558 a new Section 558a, as follows:

7 "Section 558a:(a) This Section applies to all actions initiated by an  
8 agency, or by a person before an agency, that are subject to  
9 the provisions of Section 554 of this Chapter, where a reasonable  
10 estimate of attorney's fees and other costs directly related in  
11 defending such an action is expected to exceed \$5,000, or such  
12 lower amount determined in regulations issued by the agency.

13 (b) (1) In cases where an agency has initiated, on its own initiative,  
14 an adjudicatory action wherein a person is named as party-

1 defendant (or such other similar identification, where  
2 applicable) and such party-defendant prevails on all charges,  
3 allegations and claims raised against him in such action,  
4 the agency shall reimburse such party-defendant for all  
5 reasonable attorney fees and other costs directly related  
6 to defending the action before the agency.

7 (2) In cases where an agency has initiated, on its own initiative,  
8 an adjudicatory action naming a person as a party-defendant  
9 (or such other designation where applicable) and such party-  
10 defendant prevails on some, but not all of the charges, claims  
11 and allegations raised in the action against him, the agency  
12 shall reimburse such party-defendant for all reasonable  
13 attorney's fees and other costs directly related to defending  
14 the charges, claims and allegations raised on which the  
15 party-defendant has prevailed.

16 (c) At the time an agency initiates an adjudicatory action subject  
17 to the provisions of Section 554 of this Subchapter, it shall,  
18 for purposes of this section, reserve from its currently appropri-  
19 ated operating funds, an amount equal to 50% of a reasonable  
20 estimate of the attorney's fees and other expenses directly related  
21 to the defense of the action by all party-defendants.

22 (d) Agencies subject to the requirements of this section may request  
23 such funds, as necessary to meet its obligations pursuant to this  
24 Subsection, through the general appropriations process."

1 SECTION 2. The analysis of Chapter 5 of Title 5, United States Code, is  
2 amended by inserting immediately after the item relating to Section 558  
3 of such Title the following new item:  
4 "558a. Attorney's fees and other costs: Prevailing parties."



## american rental association

2920 - 23rd Avenue, Moline, Illinois 61265 Telephone 309/764-2475

C. A. Siegfried, Jr.  
Executive Director

May 11, 1979

The Honorable Dennis DeConcini  
Chairman, Subcommittee on Improvements  
in Judicial Machinery  
Committee on the Judiciary  
United States Senate  
Washington, D. C. 20510

Dear Mr. Chairman:

On behalf of the American Rental Association (ARA), I would like to take this opportunity to comment on S. 265, the "Equal Access to Justice Act".

ARA is a national trade association comprised of approximately 3,000 individual member firms engaged in the equipment rental business. The member firms are generally small businesses and rent diversified types of equipment and light and medium construction equipment.

As a result of this diversity, ARA members are, with increasing frequency, forced into contact with the myriad rules, regulations, guidelines and orders issued by the multitude of Federal regulatory agencies. As small businessmen and women, ARA members rarely have the time, resources or expertise to challenge unreasonable or conflicting regulations promulgated by the government.

ARA supports the concept embodied in this bill that compensation for attorneys fees and costs be awarded to small businesses or individuals who prevail in either administrative or judicial litigation against the Federal government when the government's position is not substantially justified.

This legislation would enable citizens and small businesses to challenge arbitrary agency actions and permit them to vindicate their rights without being forced to acquiesce in the face of the virtually unlimited resources and legal expertise of the government. Also, when Federal agencies realize that unreasonable, poorly conceived regulations will be challenged, they will be less likely to propose such regulations.

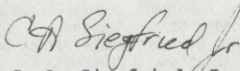
The Honorable Dennis DeConcini  
Page Two

May 11, 1979

ARA supports S. 265, the Equal Access to Justice Act, because it will inject greater responsibility and responsiveness into the Federal bureaucracy, reduce unwarranted or overzealous regulatory activities and help to curb excessive paperwork.

Thank you for this opportunity to comment on this important legislation; we appreciate your consideration of our views.

Sincerely,

  
C. A. Siegfried, Jr.  
Executive Director

cc: Members of Subcommittee on Improvements in Judicial Machinery  
Senator Adlai E. Stevenson, III  
Senator Charles H. Percy  
William T. Stephens, General Counsel, ARA  
Pamela Eldred, Subcommittee Counsel



JUN 11 1979

**FRAA** Furniture Rental Association of America  
1101 Connecticut Avenue • Washington, D.C. 20036 • 202/857-1144

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ARMAND SHAPIRO (1981)  
Modern Furniture Rentals, Inc.  
Houston, Texas

WALTER STARK (1980)  
ADMI Furniture Rental Co., Inc.  
Denver, Colorado

June 7, 1979

The Honorable Dennis DeConcini  
United States Senate  
4104 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Senator DeConcini:

On behalf of the Furniture Rental Association of America, I would like to indicate the Association's continuing support for S. 265, the Equal Access to Justice Act. Last year the Association testified before the Senate Judiciary Subcommittee on Improvement in Judicial Machinery in support of the legislation. As is stated in that testimony, we believe your legislation would "encourage Federal bureaucrats to make stronger efforts to resolve problems through informal consultation with the small business firm, rather than through formal complaints or court suits."

If there is anything that the Association can do to assist your office in securing favorable Committee and subsequent Senate action, please do not hesitate to contact me.

Sincerely,

*Gustave Fritschie*  
Gustave Fritschie  
Director  
Government Relations

GF:cp

Statement of the  
NATIONAL HOME FURNISHINGS ASSOCIATION  
on the  
Equal Access to Justice Act  
S. 265  
Improvements in Judicial Machinery Subcommittee  
Senate Judiciary Committee  
by  
Richard M. Barnett, Chairman  
NHFA Government & Public Affairs Committee  
May 30, 1979

I am pleased to submit these comments on behalf of the members of the National Home Furnishings Association who support legislation designed to preserve the vitality of small business firms. Specifically, I am delighted to express NHFA's continuing support for the Equal Access To Justice Act, a bill which will help smaller retailers to defend themselves against unwarranted actions by Federal enforcement agencies.

The National Home Furnishings Association is a trade association representing the owners of nearly 13,000 home furnishings stores throughout the United States. Our members are primarily independent, family-owned enterprises with typical sales of less than \$500,000 per year. Well over 90% of our member firms meet the Small Business Administration's definition of a small business in home furnishings retailing since their total sales are less than \$2 million a year.

NHFA has maintained an office in Washington since World War II. A primary function of this office is to provide association members with practical information to help guide them in complying with Federal requirements. Even with this assistance, it is the retailer's own responsibility to post the notices, retain the records, follow the rules and comply with all the laws that affect their business. There are certainly occasions when mistakes are made. There are also instances in which the individual's method of complying with the law may be misinterpreted or called into question.

It is the latter situation which concerns us the most. We know from experience that small firms in our industry are regularly challenged by Government agencies such as OSHA, FTC, EEOC and the Wage-Hour Division of the Department of Labor. Although these agencies are staffed with well-intentioned people, they are not always right when they accuse small firms of violating laws or regulations. Sometimes they misconstrue the meaning or Congressional intent of a law, especially when interpreted by their own agency regulations. Sometimes they fail to understand the mechanical steps which the retailer uses to abide by the law or regulation. A complaint or citation is usually the result of this misunderstanding.

When challenged, the small retailer typically consults with a local attorney who frequently is unacquainted with the Federal law or regulation that the retailer is accused of violating. The lawyer advises the retailer that it will cost \$1,000 or \$2,000 or more in legal fees to research the problem and contest the charges that have been brought against the store.

Rather than fight back and incur legal fees and related expenses which can quickly amount to thousands of dollars, the storeowner accepts the assertions of the Federal investigator, pays the fine, corrects the alleged safety hazard or changes his method of doing business -- just to avoid the costs to "prove" that his firm is innocent.

During the proceedings of some Federal agencies, such as the Federal Trade Commission, a firm may even sign a consent order in which it agrees to discontinue certain practices and allow itself to be placed under severe operating restrictions. The signing of a consent order sets other forces in motion. Now that the agency is

armed with an agreement signed by one member of the industry, it can transmit a copy of that agreement to other firms in that industry. The other firms are then placed "on notice" that certain commonly accepted practices are now illegal.

In effect, the agency has established a precedent for an entire industry out of an individual incident -- an incident that was never challenged or tested because the small business firm involved was intimidated by the apparently limitless legal and financial resources of the Federal Government. This "multiplier effect" is an improper use of the government's power over small business firms.

Last year NHFA presented testimony before this Subcommittee to support S. 2354, the original "Equal Access" bill introduced by Senator Domenici. In that testimony we cited examples of actual incidents which have occurred in our industry to show what can happen when an individual small business owner feels unable to exercise his right to defend himself. We shall not repeat those examples again, other than to simply mention that conditions have not changed appreciably with the passage of time. There is still a need for legislation to protect and preserve the rights of small business firms.

The legislation before the Subcommittee this year, S. 265, is designed to overcome these problems and permit smaller firms to take appropriate steps to defend themselves against inappropriate actions by Federal enforcement agents. It will allow small business firms with assets under \$5 million to be reimbursed for attorney fees and related expenses if the firm successfully defends itself during agency adjudication proceedings or in civil court proceedings.

We note certain changes in this bill compared to last year's bill, and we applaud those changes. Specifically, we view as a tremendous

improvement the requirement in S. 265 that awards to small businesses will be paid out of the budget of the agency involved in the adjudicatory proceeding against the firm. This one change alone will provide a significant deterrent which will discourage agency investigators from proceeding with unnecessary complaints and citations.

Deterrence is an extremely important factor which should not be overlooked. Several commentators have stressed sections of this legislation which concern sensitive issues such as the ramifications on the "American Rule" principle of jurisprudence. Others anticipate with delight the prospect of recovering expenses for legal actions. Neither concern is central to our needs.

It should be clearly understood that NHFA's goal is not to simply recover attorney fees and related court costs. Instead, our primary goal is to put a disincentive on the opening of a case or an administrative action that unnecessarily imposes on a small firm the burden of proving its innocence. Our members are in the business of providing a service to consumers. Legal action, in whatever form, is an unproductive use of the time and talents of store management. Home furnishings retailers are quite often reluctant to pursue legal action even when totally justified, as in the case of debt collection proceedings against customers who have clearly failed to honor their obligations. The inconvenience factor is magnified several times when the retailer has to use legal recourse to justify his innocence in a proceeding involving the Federal government.

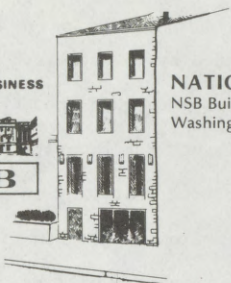
We expect that this legislation will force those in charge of Federal agencies to be far more sensitive to the actions of their field agents. Everyone in the chain of command will be far more accountable for the actions they initiate if it is clearly understood that the agency will be liable for the costs of making a

mistake.

Deterrance will also be strengthened by an increased willingness of small business owners to defend themselves when they know that they are right. Even though legal action is not the favorite pastime of home furnishings retailers, it is also true that many in our industry are more sensitive to the demands of government at this time than in years past. NHFA fully expects that our members will be willing to use the incentive provided by this legislation to defend themselves against arbitrary enforcement actions. Their willingness, coupled with this legislation, will keep the Federal enforcement agents in check.

In summary, the National Home Furnishings Association enthusiastically endorses the purpose of S. 265, the Equal Access to Justice Act, and encourages Congress to approve this legislation as soon as possible.

National Home Furnishings Assn.  
1025 Vermont Avenue, N.W.  
Suite 1002  
Washington, D.C. 20905  
202/783-2622


**NATIONAL SMALL BUSINESS ASSOCIATION**

 NSB Building • 1604 K Street, N.W.  
 Washington, D.C. 20006 • Telephone (202) 296-7400

May 30, 1979

Honorable Dennis DeConcini, Chairman  
 Subcommittee on Improvements in Judicial Machinery  
 Senate Judiciary Committee  
 Dirksen Senate Office Bldg.  
 Washington, D.C. 20510

Dear Mr. Chairman:

The National Small Business Association and the Small Business Legislative Council have long supported the intent of S. 265, the Equal Access to Justice Act. In the 95th Congress, the Small Business Legislative Council was most active in hearings on S. 2354 before your subcommittee, and in the 96th Congress we continue to support the bill and urge its passage.

On April 19, Mr. Ray Bailey of National Small Business Association's Board of Trustees testified in support of S. 265 in field hearings before your subcommittee held in Tuscon, Arizona. It is on behalf of Mr. Bailey that I submit the enclosed package of Small Business Legislative Council position papers and request that they be made part of the April 19 hearings record.

The enclosed material is excerpted from the "Policy Positions" booklet of the Small Business Legislative Council, NSB's affiliate organization of more than 70 national trade and professional associations. These papers represent the Council's positions on the Reform and Oversight of the Regulatory Process. The legislation which you have cosponsored in this Congress is in our view an integral part of this reform. But, in order for the root causes of over-regulation to be adequately dealt with, we believe that a total legislative package remedying the problem at its source, the agency level, must be considered and enacted by the Congress. We thus submit our views on this for your and your Colleagues' consideration.

Sincerely,

Herbert Liebenson  
 Vice President - Governmental Affairs

HL:sy

Enclosures

cc Mr. Ray Bailey

## COST JUSTIFICATION FOR REGULATIONS

Excessive government regulation is a significant inflationary factor. In fiscal 1979, the aggregate cost of government regulation is expected to reach \$102.7 billion, a 30 percent increase over fiscal 1978 estimated cost of \$79.1 billion.

The current cost of complying with government regulation now is estimated at \$3,600 per year for every small business in the land. Most small firms are experiencing inordinate amounts of financial and managerial problems in their attempts to comply with the proliferation of regulations generated by federal agencies.

The time and energy spent on federal paperwork, and the large capital expenditures required to meet environmental standards, job safety standards or other mandatory standards can be a matter of life or death for a small business. The inability of a small business to finance the cost of mandatory compliance is reflected in the higher direct costs a small business incurs.

The current and preceding administrations have attempted to deal with this problem by means of Executive Orders and resolutions. They have not worked and have been adjudged by the courts to "not carry the full force and effect of law."

Many pieces of legislation have been introduced to remedy the situation, but in many cases these bills are too narrowly drafted and apply only to the independent regulatory agencies and do not cover the Executive branch.

S. 93, introduced by Senator Gaylord Nelson, chairman of the Senate Small Business Committee, and other Senators, cover all federal departments, agencies and instrumentalities, and would provide the type of regulatory relief needed by the small business community.

S. 93 would require federal agencies to undertake an analysis of the economic consequences of regulations they propose. This would include an analysis of the impact of the regulations as reflected in increases in consumer prices -- a significant cause of inflation.

RESOLVED

The Small Business Legislative Council urges passage of broad-based legislation to reform the regulatory system, by way of imposing cost justification requirements upon the regulators prior to implementation of regulations, and recommends that the same requirements be placed upon the legislative process.

# # #

SUNSET LAWS

Once created, regulatory agencies tend to be self-perpetuating -- promulgating more regulations, seeking rulings or test cases against smaller firms before seeking out the bigs, and generally trying always to improve their own prestige and "batting averages" before Congress in order to secure larger appropriations for the following years.

Sunset laws would force periodic reassessment of the need for Government programs and agencies and require concrete justification for their continuance beyond a certain date.

Sunset would be a useful means by which it could be determined if regulations overlapped, conflicted or were unnecessary. Priorities and circumstances change: with a sunset review procedure, regulations no longer needed or proving to be unworkable could be deleted. This would lead to a reduction in Federal spending and with fewer regulations and/or agencies perhaps there would arise a better co-operation between the various agencies and a better implementation of Federal programs.

Sunset would make Congress accountable for the regulations issued by an agency. This should lead to more concise drafting of legislation, rather than Congress setting out a broad outline of policy which is interpreted and implemented by the agencies. In essence, sunset would mandate legislative oversight of on-going Government activities. This would also make it necessary to have a compilation of existing programs -- such a listing is practically impossible to obtain as matters stand now.

The proliferation of agency rules and regulations has increased at an alarming rate in recent years. The effect of these regulations is to overburden the small business owner. Is it not time to review such programs if the economic effect is forcing American small businesses out of business?

RESOLVED

The Small Business Legislative Council urges the use of sunset provisions and Congressional review of the effectiveness of existing programs in all cases. Regulations have dealt a heavy financial blow to the small business community. Sunset provisions can aid small business' recovery.

# # #

PAYMENT OF ATTORNEYS' FEES

Federal regulation of the private sector has burdened small business in particular with paperwork, increasing costs, and general frustration with seemingly frivolous regulations and guidelines. More importantly, though, the small business community has found itself the object of increasing abuse by regulatory agencies which use their statutory authority to seek rulings against small firms which, unlike the large corporations, haven't adequate resources to sustain a protracted legal battle with the government. This statutory abuse by certain agencies not only establishes precedents for rulings against larger firms, but builds the "batting averages" of the agency to justify its very existence and additional appropriations from Congress. Thus, the agency, its staff, and the regulatory process are further entrenched in the government.

A decision, right or wrong, by an official of a regulatory agency has caused more than just a few companies to go out of business. And even if the ruling has been proven wrong, a bankrupt company has no recourse of suing the government or righting the case through the appellate procedures -- it simply cannot afford the cost.

RESOLVED

The Small Business Legislative Council believes that legislation providing for the payment of attorneys' fees to individuals and small businesses prevailing in civil or administrative cases against the federal government is a first step toward restraining arbitrary regulatory proceedings. Since many cases result in a bureaucratic or administrative denial of justice to those unable to afford the extraordinary legal costs involved, legislation providing for attorney fee reimbursement would restore to those abused their right to seek legal redress for damages done.

# # #

## CURBING REGULATORY ABUSE BY CONGRESSIONAL VETO

As part of its oversight function, Congress has the duty to determine whether the agencies it has created are issuing rules and regulations contrary to law, inconsistent with legislative intent, and going beyond the statute it is supposed to implement.

When an agency does commit abuse, the damage to small business subject to such rule or regulation may be irrevocable. Therefore a review period of 60 days or longer is essential.

Here are some of the reasons why Congress should exercise veto power over proposed regulations:

- \*In spite of the fact that the Congress of the United States has ordered the FTC to afford opportunity for oral presentations to all parties desiring to testify in Rulemaking proceedings (P.L. 93-636), the Commission continually ignores the law.
- \*In another area, the FTC allows staff reports, assumably stating facts, to be entered into the Rulemaking record, yet refuses to allow those staff members to be cross-examined concerning those statements. This practice is being carried on despite a clear legislative imperative opposing the practice (Cong. Record, December 19, 1974, pp. 41405-41408).
- \*The Magnuson-Moss FTC Improvement Act authorized the FTC to designate those acts or practices which would be henceforth deemed unfair or deceptive on an industry-by-industry basis.

There are now many Rulemaking proceedings being conducted by the FTC in various stages of completion. Uniformly, these Rulemaking proceedings are directed at small business and its customers. The impact of these Rules when enacted will create unfair and unnecessary economic hardships to countless small business enterprises which lack the resources to represent themselves effectively against the institutional attack that tends to undermine their very existence. Congress has warned the Commission concerning this very eventuality, and had built into the text of the law a requirement that the FTC promulgate "a statement as to the economic effect of the rule, taking into account as to the economic effect on small business and consumers." This statement of the competitive impact

of the proposed Rule on small scale enterprise should be made when the promulgation of the Rule is initially proposed. Such competitive impact statements should also be subject to administrative fact finding and require a full opportunity for judicial review as an essential pre-condition to the adoption of such a Rule.

The need for overseeing the bureaucracy and its regulatory activities and for action to curb abuses of such activities is widely recognized. President Carter has named a Regulatory Council for the express purpose of reforming regulatory procedures, and eliminating areas of duplication, overlap and inconsistency.

However, more needs to be done. The Regulatory Council is composed of representatives of the Executive branch regulatory agencies and departments, but has no authority, power or relevancy to the regulatory activities of the independent regulatory agencies which are not a part of the Executive branch of the government, and are not subject to oversight, supervision or direction from the President or any of the departments under his control. Consequently, these independent regulatory agencies, as arms of the Congress, have only one overseer: The Congress.

#### RESOLVED

Small Business Legislative Council supports, IN PRINCIPLE, the establishment of a uniform procedure for Congressional review of the activities and regulations of "independent regulatory" agencies (those agencies which are not in the Executive branch but are arms of Congress, such as the ICC, FTC, FCC, SEC, CAB, and FRB) which may be contrary to law or inconsistent with Congressional intent, and permitting either the House of Representatives or the Senate to prevent an objectionable regulation from going into effect by passage of a simple resolution.

# # #

## AGENCY FOR CONSUMER ADVOCACY

Since 1967, legislation to establish a consumer agency has been introduced in every session of Congress. By whatever name, we may expect to see yet another version introduced in the 96th Congress. From past experience, it is likely the new legislation would again contain elements granting a consumer agency powers to intervene in proceedings before other agencies, thus leading to further litigation. The indirect control thus assigned a consumer agency through litigation, issuing of subpoenas and interrogatories, and, of course, additional paperwork, would give unprecedented power to an agency which is supposed to have no independent regulatory power.

Small businesses would not have the resources to combat this force -- they are already the targets of other regulatory agencies which find it easier to go after the "smalls" rather than the "biggs." Exempting small businesses would not necessarily alleviate the problem as they would then find themselves "caught in the middle." There is also the fear of an unfounded charge against a business being made public while those making the charge could remain anonymous. A small business could easily be wiped out on the basis of an unsubstantiated charge which could very well have been made by a competitor -- as with all things, it would be the initial charge which would be remembered by the consuming public.

In essence, a bureaucracy would be established which would decide what is best for consumers, then dictate to industry what can be manufactured, to what specifications, and at what cost. There no longer would be any freedom of choice for consumers nor freedom of the marketplace to develop new products and services.

While the public does need protection against unscrupulous business firms, honest firms, in turn, deserve protection from over-zealous consumer activists. The Small Business Legislative Council questions whether the best way to remedy the situation is through the promotion of an atmosphere of suspicion and hostility toward business which would all but destroy free enterprise. It could, in the end, make consumers wary of virtually all the merchandise they buy. Consumers demands can be met by reputable manufacturers who charge a fair price for a product which is safe to use, free of defects and performs as advertised. The free enterprise system on the whole has served the consumer well by providing new and needed products at affordable prices.

Finally, it is a complete fallacy to believe that a single agency in Washington could solve the problems of more than 200 million individual consumers or to believe that such an agency would actually give consumers a true voice in government decision-making processes.

RESOLVED

The Small Business Legislative Council opposes the establishment of any agency purporting to represent consumers and having the power to intervene in proceedings before other Federal agencies and in the courts. SBLC does support a more adequate functioning of consumer interest sections in existing agencies. SBLC decries attempts at placating small businesses by any "so-called" exemptions. By Executive Order, the President's Consumer Advisor has been granted oversight authority over consumer programs in all agencies of government, thus negating the need for a separate agency.

# # #

## EXPEDITING HEARINGS ON AGENCY RULINGS

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Administrative orders, citations and fines affecting small business have increased in number and widened in scope in recent years. Contesting such orders can deplete the resources of a small company. Rapid Administrative review is needed where the sum in controversy is small and the decision requires review of fact-finding rather than the invalidation of a statute, rule or regulation.

Senator Mathias (R-MD) has succinctly outlined the situation confronting small business:

"When confronted with a Federal order, citation or fine considered unjustified or inequitable, a business generally has two avenues of redress. It can appeal to the administrative agency or it can take the matter to a Federal court. Regrettably, in many of these instances, neither of these options offer an expedient resolution.

"If the small business owner decides to appeal to the administrative agency, he faces a difficult and burdensome task. First, if he cannot afford to send someone to Washington or to a regional office to present the case verbally...he must rely on a written appeal. Too often, under (this procedure) important questions go unanswered or significant details are left unexplained, working to the disadvantage of the business owner. Further...this method...pits one agency employee's decision against another's...

"If the small business owner decides to appeal to the Federal court, the cost of such appeal (is) likely (to) be greater than the fine involved. In addition, given the usual length of time between filing and decision, the prolonged frustration (and the expense and costs of this route) far outweighs the benefits. Small business owners often choose not to go to court, thereby waiving their rights to review."

What is needed is easy access to district courts for a quick magisterial review of agency rulings with the decision being final and not reviewable by any court or Agency.

RESOLVED

The Small Business Legislative Council supports legislation authorizing a small business to petition a district court for a magistrate to review a fine, citation or order of an Agency within 30 days of the ruling, where the direct dollar value of such fine, citation or order, or any part thereof, is \$2,500 or less and such review does not require invalidation of statute. If the magistrate determines that the citation, order or fine is inappropriate to the alleged offense, inconsistent with previous interpretation of pertinent regulations or inequitable, he may order the Agency to rescind or modify the citation, order or fine. Where a small business has petitioned a district court for a magistrate to conduct pending proceedings, the fine, citation or order shall not be enforceable until a decision has been rendered, except when failure to enforce the fine, citation or order would result in imminent danger to the health or safety of any person.

# # #

TWO-TIER REGULATION

As the number of Federal regulatory agencies grows, so too does the accompanying regulatory burden upon the private sector. Traditionally, government regulation has been applied equally to all companies across the board, without regard to the company size or impact on the economy. Statutory protection of the well-being of American citizens, while in many areas necessary, need not be the deterrent to economic progress it has become.

Small business is especially hard hit by excessive regulation, particularly when required to comply with regulations tailored to giant corporations. Unlike the larger companies, small business firms often haven't the time, personnel or expertise to meet the requirements of Federal regulations. The small business owner wears many hats in the day-to-day operation of his business -- the time and resources spent meeting often-frivolous government policy objectives erodes his effectiveness as a manager, his competitive stance, and his place in the local economy.

For these reasons, a flexible, tiered regulatory system should be adopted. When General Motors and Joe's Machine Shop are required to meet the same government standards, they are not being treated equally or fairly. With respect to both substance and procedure, small business should in every case bear a different compliance burden.

Since so many regulations have come into effect in an effort to control the practices of the largest companies, small business should not suffer from entanglement in the regulatory net; the social benefits of applying regulations to small firms are always diluted. Small business is different in terms of its ability to comply and also in its economic impact on the community. These facts should be recognized in all instances by the Congress and the regulatory agencies of the government by providing flexibility in all regulations, thereby leading to a reduction in paperwork and compliance burdens borne by small business.

RESOLVED

The Small Business Legislative Council urges the establishment of a flexible, multi-tiered system of regulation in order to equalize the compliance burden of all companies. Congress should by statute determine where flexible regulation and rules would be most applicable; and in addition, other legislative remedies, such as tax incentives to spur compliance, should be seriously considered.

# # #



## CIVIL AERONAUTICS BOARD

WASHINGTON, D.C. 20428

IN REPLY REFER TO: B-1-35

JUN 4 1979

Honorable Edward M. Kennedy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to you on behalf of the Civil Aeronautics Board. The Judiciary Committee is currently considering S. 265, the Equal Access to Justice Act. The bill would require the award of litigation expenses, including attorney fees, to parties who prevail against the United States in administrative or judicial adjudications, if the party is an individual with less than \$1,000,000 in assets or an organization with less than \$5,000,000 in assets, unless the agency or the court finds that the government was "substantially justified" in its action. Since many of our administrative proceedings, such as enforcement actions, involve business organizations with less than \$5,000,000 in assets, the bill could have a significant effect on the CAB. Although we have no objection to awarding attorneys' fees in certain situations, we do not believe the standard contained in S. 265 is the proper one.

We are concerned that the "substantially justified" standard would put the government in the position of having to show that its action was not only reasonable, but also wise and proper. While we agree that the government should be required to demonstrate the reasonableness of its position if the prevailing party seeks litigation expenses, we think it would be unfair to require a showing of "substantial justification." With the 20-20 vision of hindsight, losing positions often seem unjustified, and an inquiry into the justification for an action may well expand into an examination of prosecutorial discretion and general agency policies. This in turn, could have a chilling effect on vigorous enforcement or on development of new and innovative policies.

The bill seems to create a presumption that the government position is not substantially justified if it loses: "An agency, shall award, to a prevailing party..., fees and other expenses... unless the agency finds that the position of the agency as a party to the proceedings was substantially justified..." (proposed §504(a); emphasis added). This provision reverses the presumption of regularity and reasonableness ordinarily accorded official actions, and justification could require considerable time and expense to prove affirmatively. Even though payment of

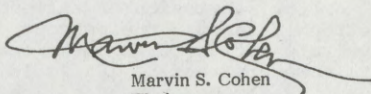
Honorable Edward M. Kennedy (2)

awards would come from the general fund, and not from agency budgets, the agency's time and expense of affirmatively proving justification could weaken the agency's overall ability to fulfill its duties. We submit that the sort of inquiry apparently required by the bill would not serve its purpose and would be wasteful of taxpayers' money.

We agree that individuals and small businesses of modest means should not be discouraged by the costs of litigation from contesting unreasonable government action. However, we do not believe that they should be compensated for contesting reasonable actions that are rejected upon adjudication. To require more than a showing of reasonableness, as the "substantially justified" standard seems to do, may necessitate the development of issues far beyond the scope of the instant case—issues that are more properly the subject of Congressional or Executive inquiry. Government officials generally try to act in the best interests of the public, and we believe the "little guy" should be reimbursed for his litigation costs only if a position is clearly unreasonable, not just the product of a policy eventually held to be incorrect. The "substantially justified" language is untested and unclear, at least within the context of assessing the reasonableness of agency actions. A standard such as "arbitrary or frivolous," we believe, represents a clearer and more familiar test of reasonableness.

OMB has been informed of these views and has no objections.

Sincerely,

A handwritten signature in cursive script, appearing to read "Marvin S. Cohen". The signature is written in dark ink and is positioned above the printed name and title.

Marvin S. Cohen  
Chairman



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

May 23, 1979

OFFICE OF THE  
ADMINISTRATOR

Honorable Dennis DeConcini  
Chairman, Subcommittee on  
Improvements in Judicial Machinery  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to express our opposition to S. 265, the "Equal Access to Justice Act," and to urge you to consider the Administration's proposed bill, the "Fairness in Government Act of 1979," instead.

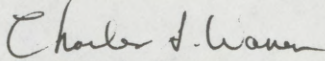
As the submission of the Administration bill indicates, we strongly support the concept of providing attorney's fees to private litigants who meet certain qualifications. We fear, however, that S. 265 would go too far along these lines. As the Department of Justice pointed out in testimony before your Subcommittee, S. 265 places the burden on the government, rather than the litigant who seeks fees, defines that burden as "substantial justification," and permits the award of fees to individuals with net assets of up to \$1 million and corporations, partnerships, and associations with net assets of up to \$5 million. We agree with the Department of Justice that the burden is inappropriate and that lower dollar limits would focus the relief on the persons most in need of it--less affluent individuals and small businesses.

As a major regulatory agency, however, our gravest concern, one also stressed by the Department of Justice, is that S. 265 would have a chilling effect on the enforcement of civil statutes and regulations. To establish a presumption that the government's position was not justified if it loses a case and that, therefore, it was not lawful or taken in good faith would impose an unnecessary and incalculable restraint on needed enforcement actions.

Because of our concerns with S. 265, we strongly urge your support of the Administration's alternative bill, which would achieve the same salutary purposes at lower cost and without harmful inhibiting side effects on our enforcement duties.

Thank you for the opportunity to comment on this important legislation.

Sincerely yours,

A handwritten signature in cursive script that reads "Charles S. Warren".

Charles S. Warren  
Director  
Office of Legislation



Federal Maritime Commission  
Washington, D. C. 20573

Office of the Chairman

JUN 8 1979

June 5, 1979

The Honorable Dennis DeConcini  
Chairman  
Subcommittee on Improvements in  
Judicial Machinery  
United States Senate  
Washington, D. C. 20510

Dear Mr. Chairman:

The Federal Maritime Commission opposes S. 265, a bill that would provide for the awarding of attorney fees to private litigants who prevail against the government in administrative or civil proceedings where the government fails to show that its action was "substantially justified." While we support the legislation's attempt to eliminate financial barriers that deter private citizens and small businesses of limited means from challenging or defending against unreasonable agency actions, we prefer the approach utilized by the Administration's draft "Fairness in Government Act of 1979."

Both bills eliminate government exemption from liability for attorney fees in most cases, but they differ in several important respects. The Administration's bill sets forth a narrowly drawn standard of proof that attorney fees will be awarded only upon a showing by the prevailing party that a government position was "arbitrary, frivolous, unreasonable or groundless." This standard is based upon the Supreme Court decision involving attorney fees in Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978). In contrast, the standard of "substantial justification" used in S. 265, taken from Rule 37, F.R.C.P. (involving enforcement of discovery), appears to be overly broad, undefined, and may result in varying interpretations by the courts at substantial cost to the government.

The Honorable Dennis DeConcini

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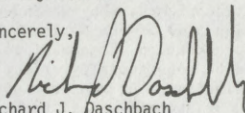
June 5, 1979

We agree with the Administration that the burden of proof should be placed on the party seeking the award. Placing the burden on the government, as is done in S. 265, would automatically lead to the presumption that an agency position is not substantially justified when the agency loses a case. This conflicts with the well-established presumption that the actions of public officials are lawful and performed in good faith.

Finally, we believe that the Administration's draft bill defines those private parties and small businesses who qualify to make application for an award in a more appropriate manner than does S. 265 by providing for a lower, more reasonable ceiling level of financial worth.

Although we support the two bills' common goal of removing financial deterrents for litigants challenging arbitrary government action, we believe that the Administration's proposed legislation sets forth better standards and procedures for achieving this objective.

Sincerely,



Richard J. Daschbach  
Chairman

**NATIONAL LABOR RELATIONS BOARD****OFFICE OF THE GENERAL COUNSEL**

Washington, D.C. 20570

June 4, 1979

Honorable Dennis DeConcini  
Chairman, Subcommittee on Improvements  
in Judicial Machinery  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Senator DeConcini:

This letter is written to present the views of the National Labor Relations Board concerning S. 265, now under consideration by the Subcommittee on Improvements in Judicial Machinery. The letter also expresses the views of the General Counsel of the National Labor Relations Board, who has independent statutory responsibilities under Section 3(d) of the National Labor Relations Act for the investigation and prosecution of complaints before the Board - a function which would be substantially affected by the provisions of the proposed legislation. Our concerns about the legislation - providing for the award of attorneys fees to certain classes of parties prevailing in litigation initiated by a government agency unless the Agency can establish that its position was substantially justified - center on three aspects of its impact on this Agency's operations. They are (1) the inhibiting effect on the initiation of proceedings to enforce the provisions of the National Labor Relations Act, (2) the danger of creating additional issues for litigation and lessening the attraction of settlements of suits as an alternative to litigation, and (3) the substantial cost of the proposed legislation.

1. Throughout its history this Agency, absent a settlement agreement, has followed a policy of seeking to obtain an appropriate Board remedy for each charge of unfair labor practice which an investigation by the General Counsel establishes to be meritorious. Similarly, a court judgment will be sought enforcing each Board order not fully complied

with, and contempt proceedings will be initiated where necessary to obtain compliance with court judgments enforcing Board orders. This policy of proceeding fully in all situations having substantive merit is essential to effectuate the policies of the NLRA and to achieve an evenhanded enforcement of the statute.

Effective implementation of this policy requires that the General Counsel be free to evaluate the merits of charges under investigation and to take to the Board for resolution critical credibility conflicts and other disputed factual questions. It also requires that the General Counsel be free to place before the Board for its consideration a wide variety of factual situations involving new legal principles and changing aspects of established principles. Only under those circumstances will the General Counsel, acting in the public interest, be able to fulfill his statutory role of presenting to the Board for resolution all those matters appropriate for its consideration.

The policy of evenhanded enforcement also requires that the Board, as administrator of a uniform national labor law under the NLRA, be free to maintain its view of that law for all persons, even those within the territory of a circuit court of appeals which has disagreed with the Board in a prior case on the same issue until the question is definitively resolved through Supreme Court review.

We believe that the provisions of S. 265 would substantially inhibit the Board and the General Counsel in their enforcement of the NLRA in the particulars noted above. Concern over whether the action taken subsequently could be "substantially justified" would become a factor in every decision on whether to prosecute or judicially enforce a case which appeared to be meritorious. Since the proposed standard is ambiguous and essentially subjective, the Agency could not predict with any certainty how it would be applied and thus would be prompted to proceed only in the clearest cases and forego novel issues, thereby retarding the development of this law. The Agency would have the burden of justification upon the mere application of the prevailing party. Such an application could be expected in every instance where the General Counsel or Board did not prevail on all aspects of the proceeding.

2. Under the proposed legislation, whenever a request was made for fees and other expenses, the burden would be on the Agency to establish substantial justification for instituting the action. Resolution of that issue could be an extended trial in itself. Since much Board

litigation involves resolution of disputed factual contentions, establishing the justification might require an evaluation not only of the evidence in the record but also of evidentiary material in the investigatory file, and a probe of the deliberative processes of the General Counsel and the Board. Such litigation could be very extensive and only serve to enlarge the fees claimed. To the extent the claim for fees were presented to a court of appeals, it might well have to be referred to a special master for hearing. This additional litigation would drain trained agency staff from other assignments and foreseeably slow the processing of other cases on the merits.

Additional litigation is also likely to result from a drop in the rate of settlements of meritorious cases which could be expected from enactment of this legislation. We have long recognized that an inducement in many settlements is the saving of the fees and expenses of litigating the issues. If the mere possibility of recovering those expenses in the event of prevailing before the Agency were available, a significant drop in our very high settlement rate could be expected. In fiscal year 1978 there were 39,652 charges of unfair labor practices filed with the Agency, of which 33.3 per cent, or almost 10,000, were determined after investigation to be meritorious. The pre-trial settlement rate for cases closed that year was 82.2 per cent, with only 1240 proceedings going to hearing. Were the settlement rate to drop only 5 per cent as a result of the availability of fees and expenses under this bill - a not unreasonable estimate - the Agency's hearing load would increase by 500 cases - an increase of over 40 per cent. That increase would be projected to engender an additional 125 cases before the courts of appeals on enforcement or review of Board orders.

3. The potential cost to this Agency of the proposed legislation could be quite substantial, with only a portion of the cost attributable to fees payable to prevailing parties. Initially, the Board for budget purposes estimates that a one per cent reduction in the settlement rate costs the Agency at least an additional \$500,000 in case processing costs. The 5 per cent reduction estimated here would cost the Agency at least \$2,500,000 annually.

As for the possible award of fees and expenses, in the unfair labor practice litigation before the Administrative Law Judges and the Board in fiscal year 1978, the General Counsel's position was sustained in 1221 decisions, or 55.7 per cent, sustained in part in 610 decisions, or 27.3 per cent, and rejected in 360 decisions, or 17 per cent. In the 336

decisions issued by courts of appeals, 218, or 67 per cent, enforced Board orders in full, 58, or 16 per cent, enforced orders in part, and 60, or 17 per cent, denied enforcement or remanded. In addition, there were, during 1978, 294 petitions for injunctions filed by the Board in federal district courts, only 8 of which were denied, and 59 other court actions involving the Board as a party, in only 6 of which the Board's position was not sustained.

Thus, in fiscal year 1978, there were at least 970 administrative proceedings and 132 court proceedings in which applications for fees and expenses by a non-Board party would have been entertainable under this legislation. Projecting this same experience on the 500 case increase in formal hearings due to the reduced settlement rate, results in 222 additional administrative proceedings and 41 additional court proceedings in which such an application would be entertainable, for a total of 1192 administrative proceedings and 173 court proceedings.

From a 1975 study of the number of establishments and workers within the statutory and discretionary standard jurisdiction of the NLRA, it can be estimated that 73%, or 438,000, of the 595,000 establishments within the jurisdiction of the Board, had gross receipts of less than \$1,000,000. It is reasonable to assume that at least those employers would be within the proposed statute's definition of "party", based as it is upon a net asset standard of less than \$1,000,000, or in the case of corporations and partnerships, less than \$5,000,000. Indeed, in view of the net asset standard, it can reasonably be assumed that, at a minimum, 80 per cent of the establishments within the Board's jurisdiction would be entitled to apply for fees and expenses if they were prevailing parties in litigation with the Board. Assuming further that Board litigation is evenly distributed among the various sizes of establishments within its jurisdictions, it follows that in 80 per cent of the proceedings where the Board is not the prevailing party an application for fees and expenses would have to be considered. On the basis of the above figures, this would be in 954 administrative proceedings and 138 court proceedings.

For staffing and budget purposes the Board uses a figure of 24 professional staff days for each administrative hearing and about 30 professional staff days for the briefing and argument of each contested court decision. These figures, about 200 hours for an administrative hearing and 240 hours for a court proceeding, are a reasonable

basis for estimating attorney fee claims. Using a \$60 per hour fee rate, fees would be about \$12,000 for administrative proceedings and \$14,400 for court proceedings. Were the Board to be assessed fees and expenses in even one-half of the proceedings where claims could be submitted, the total cost for attorney fees alone could thus exceed \$6,670,000 annually.

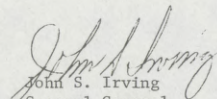
The third element of substantial cost is the proceeding to determine whether fees and expenses are payable. In such a proceeding the net asset value of the applicant for an award, the justification of the Agency for the position it has taken in the proceeding, whether special circumstances exist which would make an award unjust, and whether the Agency was acting in bad faith, would be among the triable issues. Hearing and resolution of those issues, and the many related matters of construction which will foreseeably arise, would require substantial court resources in those cases where the issues are resolved by the court upon review of the underlying decision. Probably few cases could be disposed of on the pleadings and referrals to special masters would be required. Applications handled at the Agency level would be equally cumbersome and costly. Even assuming an average of only 25 working hours to brief and argue an application, additional costs to the Agency in staff costs and in attorney fees for parties' counsel could exceed \$2,400,000.

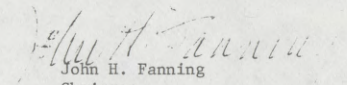
Although the reasonably anticipated costs of this legislation arising from this Agency's operations thus exceed \$11,500,000 at the present level of Agency activity, it is the legislation's inhibitory impact on the Agency's enforcement of the provisions of the NLRA which are of greatest concern. We believe that the injection of the fees and expenses liability issue into our processing of cases solely on their carefully evaluated merits, will be detrimental to the Agency's performance of the function for which Congress established it.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report to the Committee.

We appreciate the opportunity to present the Board's views on this legislation.

Sincerely,

  
John S. Irving  
General Counsel

  
John H. Fanning  
Chairman



## SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

JUL 16 1979

The Honorable Edward M. Kennedy  
 The Committee on the Judiciary  
 United States Senate  
 Washington, D.C. 20515

Re: S. 265, the "Equal Access to Justice Act"

Dear Chairman Kennedy:

In Chairman Williams' absence this responds to your request for the Commission's comments on S. 265, the "Equal Access to Justice Act" (the "Bill"), as revised by the Senate Subcommittee on Improvements in Judicial Machinery. The Commission favors the goal of the Bill to remove financial impediments to the achievement of justice. Nonetheless, for the reasons set forth below, we cannot support adoption of the Bill in its present form.

The Bill would permit federal agencies and the courts to award attorneys' fees and other expenses under specified circumstances to individuals and certain small businesses and organizations who prevail as parties in administrative proceedings and civil actions brought by or against the federal government. The Bill would apparently create a presumption in favor of an award of fees and expenses to prevailing parties other than the federal government. In order to defeat the presumption, a federal agency would be required to prove that its position as a party to the administrative proceeding or civil action was "substantially justified or that special circumstances make an award unjust." Awards of fees and expenses would be paid out of the appropriation of the particular agency over which the party prevails, except in certain limited circumstances.

As the Committee is aware, in cases involving the federal government, S. 265 would reverse the long-standing "American Rule" under which attorneys' fees are not ordinarily recoverable by the prevailing party in federal litigation. <sup>1/</sup> Specifically,

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<sup>1/</sup> Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). As the Court pointed out in that case, Congress has provided for the award of attorneys' fees by statute in a limited number of situations: e.g., by private litigants

(footnote continued)

The Honorable Edward M. Kennedy  
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unless the position of the agency as party to the proceeding was "substantially justified or circumstances make an award unjust," the Bill would allow for awards of fees and expenses in:

- (a) on-the-record agency adjudications subject to Section 554 of Title 5, in which a party prevails in a proceeding by or against the agency;
- (b) civil actions brought by or against an agency in which the party prevails; and
- (c) actions for judicial review of an agency adjudication conducted pursuant to Section 554 of Title 5 in which the party prevails.

Due to the operation of the American Rule, the Commission has been insulated from the assessment of fees and expenses in cases in which parties prevail in administrative proceedings or in civil actions brought by or against the Commission. <sup>2/</sup> We believe the Commission's insulation from the assessment of attorneys' fees and expenses has had salutary effects, since it

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(footnote continued)

against other private parties in certain circumstances under the federal securities laws, including the Securities Act of 1933, Section 11(e) (15 U.S.C. 77k(e)); and the Securities Exchange Act of 1934, Section 18(a) (15 U.S.C. 78r(a)). Other provisions give litigants the right to recover attorneys' fees from the government: e.g., the Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e5(K); the Clean Air Act Amendments of 1966, 42 U.S.C. 1857h-2(d); and the Noise Control Act of 1972, 42 U.S.C. 4911(d).

- <sup>2/</sup> Moreover, Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. 78(aa)) provides that "[n]o costs shall be assessed for or against the Commission in any proceeding under this

(footnote continued)

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has encouraged the Commission and its staff to interpret the federal securities laws broadly in the public interest to carry out their remedial purposes, 3/ without the prospect that adverse court decisions in developing or uncertain areas of the law would result in the imposition of costs on the Commission's relatively small budget.

If Congress decides nonetheless that some mitigation of the American Rule would be appropriate, then we are troubled with the standard for relief embodied in the Bill. Under the Bill, as mentioned above, there would apparently be a presumption in favor of an award of fees and expenses unless the agency as party to the proceeding can demonstrate that its position was "substantially justified or that special circumstances make an award unjust." This presumption could lead to the awarding of fees and expenses in many litigated cases although an agency or its staff acted in good faith in interpreting statutes and regulations to protect the public interest.

Changing business and economic conditions require flexibility in the Commission's application of statutory provisions and regulations. It is the very purpose of the judicial system to settle factual disputes and controversies as to the proper application of statutory provisions and agency regulations. But, often, it is only after a number of court or agency decisions that the contours of statutory or regulatory provisions are clearly delimited. For this reason, an initially credible legal

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2/ (footnote continued)

title brought by or against it in the Supreme Court or such other courts." Similarly: Securities Act of 1933, Section 22(a) (15 U.S.C. 77u(a)); Public Utility Holding Company Act of 1935, Section 25 (15 U.S.C. 74y); Trust Indenture Act of 1939, Section 322(b) (15 U.S.C. 77vvv(b)); Investment Company Act of 1940, Section 44 (15 U.S.C. 80a-43); and Investment Advisers Act of 1940, Section 214 (15 U.S.C. 80b-14).

3/ See, e.g. Supt. of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6 (1971); Tcherepnin v. Knight, 389 U.S. 332, 339 (1967).

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position, developed and adhered to in good faith in an individual case, may appear not to have been substantially justified when viewed with the benefit of hindsight. And, in such cases, the Commission could be required to pay fees and expenses of the opposing party out of its own appropriations. Thus, the threat of being exposed to direct financial liability for fees and expenses of the opposing party could impede the Commission's effective administration of the federal securities laws in response to changing market conditions and evolving legal standards.

Moreover, the Bill may have substantial adverse effects beyond imposing financial burdens which would impede or prevent the Commission and other agencies from carrying out their functions.

As your Committee is aware, the Commission is charged with administering the federal securities laws. The disclosure provisions of those laws are designed to provide shareholders of publicly-held companies and the investing public with truthful and adequate financial and other material information which may be used as a basis for investing in the securities of those companies, or as the basis for corporate shareholders to exercise their voting rights in selecting corporate management. The Commission also has the authority to enforce statutory provisions and adopt rules prohibiting fraudulent and deceptive practices in connection with securities transactions. In addition, several of the federal securities laws contain provisions authorizing the Commission, not only to adopt rules to define acts or practices which are fraudulent, deceptive or manipulative, but also to prescribe means reasonably designed to prevent such acts or practices. <sup>4/</sup>

Thus, the Commission is given a wide variety of choices in designing rules to prevent violations of law. There are many areas in which business activities may involve the potential for fraud and other abuses of the public. Often, however, it would be contrary to the public interest to prohibit such business activities completely; rather it is preferable to permit legitimate businessmen the greatest possible amount of freedom, but subject to conditions carefully designed to prevent actual abuse.

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<sup>4/</sup> See, e.g. Securities Exchange Act of 1934, Section 13(e)(1) and Investment Advisers Act of 1940, Section 206(4).

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position, developed and adhered to in good faith in an individual case, may appear not to have been substantially justified when viewed with the benefit of hindsight. And, in such cases, the Commission could be required to pay fees and expenses of the opposing party out of its own appropriations. Thus, the threat of being exposed to direct financial liability for fees and expenses of the opposing party could impede the Commission's effective administration of the federal securities laws in response to changing market conditions and evolving legal standards.

The securities markets, which are regulated by the Commission, are evolving and changing rather rapidly. No doubt considerable change is occurring elsewhere in the economy. In response to these developments, and in an effort to reduce the burdens of regulation, the Commission is moving in the direction of replacing detailed prescriptive rules which confine a changing industry by rigid formulas, with more general rules which permit innovation and rely upon requirements that industry members act in good faith and with reasonable care in their treatment of investors.

This approach involves some risk in enforcement, since it is easier to prove that a defendant failed to conform to some specific requirement of a rule than to prove that he acted in bad faith or without due care. This risk might become unacceptable if any failure of proof would result in heavy monetary penalties which could not be provided for in the Commission's appropriations. In any event, the law should not discourage agencies from relieving unnecessary regulatory burdens and adapting regulatory requirements to changing conditions.

Finally, an especially troublesome feature of the Bill is its prohibition of the appropriation of any sums specifically for the purpose of paying fees and expenses awarded under the Bill. In our view, this is poor fiscal and public policy, because it could tax the Commission's already limited financial resources. In this connection, although the apparent purpose of the Bill is to penalize federal agencies for bringing unwarranted legal actions and administrative proceedings which are not substantially justified, the ultimate effect could be to penalize the public by diverting agency resources away from vital programs for protecting investors and the public interest and even have effects directly contrary to its goals.

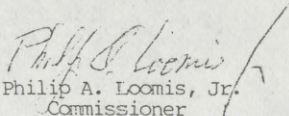
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Therefore, we strongly urge that if your Committee favors adoption of the Bill, it delete the provisions requiring agencies to pay awards from their operating funds and the prohibitions against appropriations for the purpose of paying fees and expenses awarded under the Bill.

In sum, we oppose the adoption of the Bill in its present form. The views expressed herein are those of the Commission and do not necessarily represent the views of the President. These materials are being simultaneously submitted to the Office of Management and Budget. We will inform you of any advice received from that Office concerning the relationship of these materials to the programs of the Administration.

Thank you for giving us the opportunity to comment on the Bill. Please let me know if we can be of any further assistance.

Sincerely,

  
Philip A. Loomis, Jr.  
Commissioner

cc: Mr. Bernard Martin,  
Office of Management and Budget



## SMALL BUSINESS ADMINISTRATION

\*\*\*\*\* Washington, D.C. \*\*\*\*\*

STATEMENT OF  
MILTON D. STEWART  
CHIEF COUNSEL FOR ADVOCACY  
UNITED STATES SMALL BUSINESS ADMINISTRATION  
BEFORE THE  
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

May 23, 1979

MR. CHAIRMAN AND MEMBERS OF THIS SUBCOMMITTEE:

It is a pleasure to appear here today to present the views of the Small Business Administration regarding S. 265, "The Equal Access to Justice Act." Let me state at the outset that SBA supports the principle underlying S. 265 but prefers to see enactment of the Administration's alternative proposal.

Although S.265 is designed to be a positive step towards a reduction in the regulatory burdens which the Federal Government has imposed on the small business community, SBA recommends enactment of the Administration's alternative which was recently proposed by the Department of Justice.

Small Business has neither the resources nor staff, available to big business, to protect itself from unjustified and unwarranted government proceedings. As a result, small business often finds itself the victim of an agency trying to establish a "winning

batting average." The small business person is easy prey because he or she is forced to make a practical business decision that has very little to do with the merits of the case. For a small business with limited resources it is generally less expensive to pay a fine or comply with an order than to fight for vindication. Thus, an agency can secure judgments against several small businesses, without regard to the merits of their cases, in the same amount of time it takes to bring one case against a big business, who is sure to fight the action all the way down the line.

While it costs small business thousands of dollars each year to defend themselves against unjustified proceedings, these costs are not the true barometer of the need for this legislation. The true barometer is the number of actions that go uncontested because of the potential costs. However, this proposal goes too far in that its standard for the award of attorneys fees should key on whether the government's action in the proceeding was unreasonable or frivolous -- the standard contained in the Administration's proposal.

The small businessperson is seldom in a position to delegate critical responsibilities and can seldom leave the business "unattended" for great periods of time throughout the year. For the small business person it is not only how much will legal representation cost, but also "how much time will I have to spend fighting for vindication."

However, we believe there should not be a presumption in favor of an award which can only be rebutted by a positive showing of substantial justification by the agency.

This bill does require awards to be paid out of the budget of the agency involved in the adjudication. This will serve as a deterrent and will provide a quantitative measure of the problem. However, we do not believe that this legislation is the ultimate solution to the problem.

We recommend additional measures that will strike at the root of the problem. We must limit the opportunities that spawn unwarranted government investigations and proceedings. We can do this by eliminating unnecessary regulations, tightening controls on enforcement procedures and improving the training given to enforcement personnel. In some cases, we can tier regulations and vary compliance terms to allow for the differences in resources of the parties affected and the degree of their involvement necessary to fulfill the purposes of the regulation. This must be done carefully.

The Administration has submitted legislation which requires an impact analysis for major regulations. This analysis would state the impact on small business and competition along with other factors. Such an analysis would define the problem as it relates to small business, the effects of the regulation on small business

and the feasible alternatives that lessen the adverse impact on small business. The agency would then adopt the alternative that is most appropriate for the circumstances. By carefully tailoring such regulations to limit their impact to the businesses necessary to achieve the purposes of the regulation, we believe there will be less opportunities for enforcement abuses. The problem has been that small business' special problems have been consistently overlooked during the regulatory process, particularly during the early development stage. Any regulation which affects large and small firms "equally" weights more heavily on small business. Enforcement abuse is only one aspect of the problem.

Enactment of the measures proposed by the Administration will cut back on the need for enforcement activities and the accompanying abuses. The passage of the Administration's proposals will provide small business a chance to protect itself on equal footing.

Mr. Chairman this concludes my prepared statement. I will be happy to answer any questions you may have.

Material submitted by Ed Bundrick

The material presented in this folder is a brief representation of facts and adverse procedure of the government bureaucracy.

A matter of the government taking away our land, our business, thirty years of hard work and my Mothers home, all in 1969 and assigning the Bureau of Indian affairs in 1975 to purchase it. This issue is still unsettled.

I deem it necessary to present letters and documents to substantiate my testimony. However, it is not an intent of defamation to anyone whose name may appear in this presentation.

The issues holding back any settlements, derive from Public Law 93-530 88 stat. 1711 (note # 2).

1. Acquire through purchase as of January 24, 1969, all privately owned real property. BIA claims this means pay what it was worth in 1969.
2. For reasonable value of such improvements. Their interpretation is whatever their appraisers deem it.
3. In no event shall any person receive total compensation under this act in excess of \$300,000.00. BIA claims this means \$300,000.00 per ranch no matter how many persons are involved in ownership of the ranch.
4. There are authorized to be appropriated for the purpose of this act, not to exceed three million dollars. It appears now, this is not enough money to cover reasonable value of improvements and deeded land involved.

In January of 1969, the Secretary of the Interior was Stewart Udall, who gave the San Carlos Mineral Strip to the San Carlos Tribe. Land previously had been ceded back to the United States. Within these boundaries there <sup>was</sup> ~~was~~ twenty-six ranches affected.

February 15, 1973 we were notified of eviction by the San Carlos tribe and ordered to have all our cattle off the land by June 30, 1973.

My Mother and I sold all our cattle to the D LAND & CATTLE COMPANY on May 7, 1973 with the agreement that the total responsibility of removing the cattle and any trespass problems with the San Carlos people would be the buyers sole responsibility.

August 3, 1973 we received a trespass notice from the BIA land operations office. They had counted the cattle by helicopter and gave their location as on Section 32-33-34 TS4-R17E of which all locations were on our state leased land or our deeded land.(Ref. note 1 )

From 1973 until December of 1974 the ranchers pooled funds to expedite a bill through Congress to pay the ranchers for their range improvements. December 22, 1974 Public Law 93-530 88 Stat. 1711 was passed by Congress directing the Department of Interior to settle with the ranchers, the Interior Department in turn assigned the settlement to the BIA. (Ref. note 2)

The BIA appointed Mr. Robert Donlevy to the Phoenix office to handle the settlement.

On March 19, 1976 Mr. Robert Donlevy accompanied by Mr. Swanson, held a meeting in the Valley National Bank Building in Globe, Arizona to discuss the settlement with the ranchers. At this time he told the ranchers it would take approximately three months for preliminary title searches and approximately six months to assign appraisers. So, hopefully it would be settled within a year.

At this time he was questioned by the audience, "Would the ranchers have to accept the appraisal offer for the deeded land?" Mr. Donlevy's reply was, "Yes you will."

Because of dividing the area into range units, a portion of our ranch was included into Range unit 11 which was adjoining to a ranch on the west side, therefore our improvements on this portion were inspected October 5, 1976 and sales contracts were submitted to us on December 14, 1977. At this time I notified Mr. Donlevy that they had credited 1½ miles of our road to our neighbors on Range unit 11, and this needed to be corrected and because of the wording of the contract, we would have to receive all the entire ranch submitted all together. (ref. note 3 and 4 )

The remainder of the ranch, range unit 13 was inspected by the appraisers on October 6-7 and 8th and November 8th, 1976 and the sales contract received April 5, 1978.

Upon examination of the appraisals, I listed the discrepancies and omissions in the appraisal and notified Mr. Donlevy of the issues and told him the land appraisal was too low.

Mr. Donlevy told me we would set up a meeting, go through the appraisals and for me to show why the land was worth more and ~~we~~ they would re-evaluate it.

Because of previous discrepancies of our discussions, I had our attorney set up a meeting with Mr. Donlevy on May 10, 1978 to be held in Mr. Williams office at 9 a.m. .

On the morning of May 10th, my Mother, my wife and myself met Mr. Williams and proceeded to wait for Mr. Donlevy; at 10:35 a.m. Mr. Williams called Mr. Donlevy at his office, at which time he did apologize and said he had the wrong day on his calendar, so he arrived at 11 a.m. .

We started with discussing the poor overall appraisals of the improvements, the deeded land, presented him with photographs of the running water on the deeded land (which consists of almost 5 miles of streams), photos of the giant cactus, mesquite trees, jojoba plants and ocotilla plants; gave him copies of the state permits of desert plants I had sold from the ranch.

Mr. Donlevy said he needed the photographs and permit forms to evaluate with and would get them back to me, which I have never seen since. Mr. Donlevy said the water was of no value to the price of the land, we had no mineral rights to the land. I again brought up the 1½ miles of the road he had on the neighbors land appraisals that was on our land and on the neighbors land, the road was valued at \$1900.00 per mile, but when the road crossed to our land it was only valued at \$1800.00 per mile. Mr. Donlevy stated he would have the appraisers go back over the appraisal.

I told Mr. Donlevy the appraisal was not fair and he would not sell his land for that price. Mr. Donlevy said he knew it wasn't but there wasn't anything he could do about it. I stated that "I didn't care if the government didn't buy it, I would sell it to someone else." "No you won't!" Was his answer. "You don't have a permit for your road and the Indians won't give you one and they won't let anyone out to the land." His final statement was he had talked to Morris Udall, Sam Steiger and the other Arizona congressmen and the \$300,000.00 per limitation was per ranch and you can't get anymore than that.

I called Mr. Donlevy on the morning of May 11, 1978, and told him I was going to get an answer from Mr. Udall as to why he changed his answer to Mr. Donlevy about the \$300,000.00 limitation after stating to 8 ranchers that the \$300,000.00 limitation meant a man and wife could get the \$600,000.00. Mr. Donlevy stated he would ask the solicitors to review their decision of the \$300,000.00 limitation, however, if they did agree it was per person, it wouldn't mean much, because there wouldn't be enough money anyway.

After several telephone conversations and letters to Rep. Udall's office, I received a letter from Morris Udall written on July 24, 1978, stating he understood the review of the appraisals were under way. (ref. note # 5)

After several months of no satisfaction, I then contacted Rep. Eldon Rudd giving him the statements made by Mr. Donlevy at the meeting in Mr. Williams office in Phoenix. I received a copy of a letter back, denying the statements made by Mr. Donlevy, but his letter was signed by David C. Harrison, dated January 17, 1979. (Note #6)

I had also received a letter from the BIA dated January 5, 1979, stating I was incorrect on the statements made by Mr. Donlevy and the appraisers would have something for the BIA review within two weeks. This letter of denial was signed by Mr. Robertson of the BIA in Phoenix. (ref. note #7) Neither Mr. Harrison or Mr. Robertson were present at the meeting held with Mr. Donlevy when he made the statements.

January 5, 1979, I received the appraisal adjustment of an additional \$5,506.00 for items of improvements which had previously been omitted and a statement the appraisers feel their figures of \$75.00 per acre for the deeded land was correct. We received no consideration for mineral rights nor the 1½ miles of road credited to our neighbors. (ref. note #8)

The State of Arizona settled with the BIA, giving our state leased land to the San Carlos Indians. The State Land Dept. refused our request for payments of our authorized improvements upon the leased land; as a result, I have appealed this decision into the Arizona civil court.

I sincerely feel, had we had the Equal Access to Justice Act in 1969, this entire matter for the 26 ranchers involved would have been completely and satisfactorily settled by 1972.

Sincerely,

*E. W. Bundrick*

E.W. Bundrick

Enc.: one appraisal book under separate cover included.

NOTE 1



United States Department of the Interior  
 BUREAU OF INDIAN AFFAIRS  
 SAN CARLOS INDIAN AGENCY  
 San Carlos, Arizona 85550

IN REPLY REFER TO:

August 3, 1973

Land Operations

Yzobel R. Bundrick & Edward W.  
 or Ruby I. Bundrick  
 P. O. Box 153  
 Winkelman, Arizona 85292

Dear Mrs. Bundrick:

Under date of February 15 and June 29, 1973 you were notified that livestock owned by you would be grazing in trespass on restricted Indian lands if not removed before July 1, 1973. You were given at least 122 days to make preparations for removal of your livestock before your Grazing Permit expired. The June 30, 1973 deadline has expired and you have not complied with our request. On June 29, 1973, twenty-seven (27) head were counted, on July 10, 1973 fifty-seven (57) head were counted, on July 11, 1973 fourteen (14) head were counted, all of these were from a helicopter and on Range Unit No. 13.

On July 30, 1973 another inspection of Range Unit 13 was made by vehicle and sixty-two (62) head of Adult cattle were found to be grazing on the following described lands. Section 32, 33, and 34, T4S, R.17E. The cattle were branded either JS, L.sh. & Rib or R, L.R. You were granted a reasonable period of time to remove these livestock and have failed to do so. The State Brand Board records these brands in your name.

SIAE  
 LEASE  
 # 15

These livestock are on the above described land without proper authorization. This act constitutes grazing trespass as defined under Title 25, Code of Federal Regulations, Part 151.24. This regulation provides that the owner of livestock grazing in trespass on restricted Indian lands is liable to a penalty of \$1.00 per head for each animal thereof for each day of trespass, together with a reasonable value of the forage consumed and damages to property injured or destroyed.

You have five days from date of this notice or until August 6, 1973 whichever occurs first, to show cause why these penalties and damages should not be assessed, and to remove the livestock from the trust Indian land. If proper settlement is not made within this time, the matter will be referred to higher authority with a request for legal action to prevent further trespass on Indian trust land and to collect the penalties and damages.

Sincerely yours,

Acting Superintendent

CERTIFIED MAIL NO: 413994 RETURN RECEIPT REQUESTED

## NOTE 2

## SAN CARLOS MINERAL STRIP—PURCHASE

PUBLIC LAW 93-530; 88 STAT. 1711

(H. R. 7730)

An Act to authorize the Secretary of the Interior to purchase property located within the San Carlos Mineral Strip.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:*

The Secretary of the Interior (hereinafter referred to as the "Secretary") is hereby authorized and directed to acquire through purchase within the so-called San Carlos Mineral Strip as of January 24, 1969, all privately owned real property, taking title thereto in the name of the United States in trust for the San Carlos Apache Indian Tribe.

Sec. 2. The Secretary is authorized and directed to purchase from the owners all range improvements of a permanent nature placed, under the authority of a permit from or agreement with the United States, on the lands restored to the San Carlos Apache Indian Tribe for the reasonable value of such improvements, as determined by the Secretary: *Provided, however, That, if any such range improvements were constructed under cooperative agreement with the Federal Government, the reasonable value shall be decreased proportionately by the percentage of original Federal participation.* Such permanent improvements shall include, but not be limited to, wells, windmills, water tanks, ponds, dams, roads, fences, corrals and buildings. The Secretary shall take title to such range improvements in the name of the United States in trust for the San Carlos Apache Indian Tribe.

Sec. 3. There are authorized to be appropriated for the purposes of this Act not to exceed \$3,000,000 to be available without fiscal year limitation: *Provided, That in no event shall any person receive total compensation under this Act in excess of \$300,000: Provided further, That the Secretary shall make a fair determination of compensation for property acquired pursuant to this Act: And provided further, That the Secretary shall make such appraisals and require the owners to present such documents as title, tax assessment, bills of sale, other paper, and other evidence which he may deem necessary for such determination.*

Approved Dec. 22, 1974.

## NOTE 3

2

2. As consideration for the conveyance herein, the United States will pay to Vendor the sum of TEN THOUSAND, SEVEN HUNDRED FIFTY-FIVE DOLLARS (\$10,755.00), which sum is based upon an appraisal (Exhibit A) made on behalf of the Secretary and upon such adjustments, if any, required by the provisions of the said Act of Congress. However, Vendor agrees that there may be withheld from compensation payable a sufficient amount to pay all taxes due but unpaid, and also an amount sufficient to pay Vendor's pro rata share of current taxes, such share being pro rated as of the date of this conveyance. The United States shall reimburse the Vendor for any taxes paid which are allowable to a period subsequent to the date of this conveyance. Vendor also agrees that there may be withheld from consideration payable hereunder an amount sufficient to obtain release of any an all liens or encumbrances held by third parties.

3. The said sum shall be payable within thirty (30) days following:

(a) physical and actual surrender of possession of such permanent improvements located on the lands described on Exhibit A, or

(b) the date this agreement is executed, whichever is later, or at such earlier date as may be deemed appropriate by the Secretary; Provided, however, that nothing contained herein shall be construed or interpreted as recognizing any possessory interest of the Vendor to the land or improvements thereon.

4. Vendor warrants that there are no other rightful claims to ownership of the improvements herein conveyed and agrees that if it should hereafter be determined that such improvements are subject to the interests of third parties, Vendor will refund to the United States that portion of the consideration paid pursuant to this agreement attributable to such interest and further agrees to hold the United States harmless from the claims of third parties based upon a claim of ownership of said improvements.

5. Vendor hereby releases the United States and the San Carlos Apache Indian Tribe from any and all claims for damages arising out of the use or possession of the lands and improvements described in Exhibit A and disclaims ownership to the same.

6. The Vendor on behalf of himself, his heirs, executors, administrators, and assigns hereby releases, quits, and discharges the United States, its officers, employees, agents, and assigns from any and all liability for damages arising from the acquisition of, entry upon, and use of the above-described property by the United States, its officers,

employees, agents, or assigns. Vendor agrees that acceptance of the stated amount to be paid under this contract shall be final settlement, conclusive on Vendor, and shall constitute a complete release by Vendor of any claim under the Act of December 22, 1974 (88 Stat. 1711), against the United States, its officers, employees, agents, and assigns.

7. No member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this agreement if made with a corporation or company for its general benefit.

8. The Vendor warrants that no person or agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial agencies maintained by the Vendor for the purpose of securing business. For breach or violation of this warranty, the United States shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

IN WITNESS WHEREOF, the parties hereto have caused the execution of this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA

By \_\_\_\_\_  
 Title: \_\_\_\_\_ Area Director  
 Phoenix Area Office

Vendor: Edward W. Bundrick \_\_\_\_\_

Vendor: Ruby I. Bundrick \_\_\_\_\_

Vendor: Yzobel R. Bundrick \_\_\_\_\_

ACKNOWLEDGMENT

STATE OF ARIZONA     )  
                              )     ss:  
COUNTY OF \_\_\_\_\_)

THIS CONTRACT, was acknowledged before me this \_\_\_\_\_  
day of \_\_\_\_\_, 19\_\_\_\_, by \_\_\_\_\_,  
for the purposes set forth therein.

\_\_\_\_\_  
Notary Public

My commission expires:  
\_\_\_\_\_

## NOTE 4

- 1-4-78 Mr. Donlevy on leave, will be back tomorrow.
- 1-5-78 8:30 a.m. MR. Donlevy not in
- 1-5-78 9:15 a.m. Mr. Donlevy said all papers are put together but he was waiting for deeded land contract.
- 1-16-78 3:00 p.m. Mr. Donlevy is in a meeting.
- 1-30-78 Mr. Donlevy said papers aren't quite ready.
- 2-7-78 Mr. Donlevy said they would get the papers out by the middle or end of next week.
- 2-22-78 Mr. Donlevy not in but office girl would have him call back, but he never returned the call.
- 2-23-78 Mr. Donlevy said a couple of corrections had been made but he had to call Joe for verbal clearance.
- 3-1-78 Mr. Donlevy said that the office girl had the flu and that there was 20-25 pages to be typed and only one girl to do it, so they may get it out by the last of the week or first part of next week.
- 3-3-78 10:45 a.m. Mr. Donlevy said he would have the papers out next Wed. or Thursday.
- 3-9-78 Office girl said Mr. Donlevy was out and would not be back in until Monday.
- 3-10-78 Office girl said she couldn't find any papers and didn't know where they were.
- 3-14-78 Office girl said Mr. Donlevy was gone to Sacaton with Mr. JACKSON and that we would probably get the papers by Friday.
- 3-17-78 10:30 a.m. Mr. Donlevy was not in but she would have him call back and when he did return the call, he said the papers weren't ready.
- 3-29-78 Mr. Donlevy said they would mail the papers today or tomorrow that the papers were on his desk ready to mail.
- 4-3-78 Mr. Donlevy was out and when he called back he said the papers were on his desk and they would mail them today.
- 4-5-78 I received the papers and called Mr. Donlevy back about the deeded land.

## NINETY-FIFTH CONGRESS

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COMMITTEE ON INTERIOR AND INSULAR AFFAIRS  
U. S. HOUSE OF REPRESENTATIVES  
WASHINGTON, D. C. 20515

CHARLES CONKLIN  
STAFF DIRECTOR

ROBERT A. REVELES  
ASSOCIATE STAFF DIRECTOR

LEE MC ELVAIN  
GENERAL COUNSEL

STANLEY SCOVILLE  
SPECIAL COUNSEL

LOUIS STRIEBEL  
MINORITY COUNSEL

July 24, 1978

NOTE 5

Mr. Edward E. Bundrick  
Post Office Box 38  
Coolidge, Arizona 85228

Dear Mr. Bundrick:

I have been in touch with the Bureau of Indian Affairs' office in Phoenix in regards to the appraisal made of your ranch property involved in the San Carlos Mineral Strip.

Several points made by the Bureau of Indian Affairs appear significant. I would certainly appreciate your views on these should you wish to comment.

The BIA indicated that these appraisals were not made by BIA employees but were made under a contract let to Real Estate Science Corporation -- one of the larger and more reputable real estate appraisal firms in the Phoenix area. BIA also indicated that, as a result of your expressed dissatisfaction with the value placed on your property, they requested that the contractor review the appraisal to see if any significant value factors had been overlooked in the original appraisal report. I understand that this review is now in progress, but that it has not been completed at this time. It is possible this review may alter the value placed upon your property by the original appraisal. I was also informed that, while you have clearly indicated your own estimate of the value of your property, there was not any verification or substantiation of this value by independent real estate appraisers. BIA informed me that they would give careful consideration to an appraisal submitted to them by a qualified appraiser of your choice.

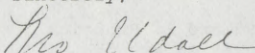
Mr. Bundrick, Coolidge, Arizona

July 24, 1978

Page 2

I find myself in a very difficult position. While I am sympathetic with your position, it is difficult to find fault with the procedures that BIA has followed up to now. If the issue is, as it now appears to be, an honest difference of opinion over the value of the property, and your present negotiations are unsuccessful, the final decision may have to be resolved by the courts.

Sincerely,



MORRIS K. UDALL  
Chairman



REPLY REFER TO:

## United States Department of the Interior

BUREAU OF INDIAN AFFAIRS  
WASHINGTON, D. C. 20245

NOTE 6

Trust Services  
Acc. & Disp.  
BCCO 3736

JAN 17 1979

Honorable Eldon Rudd  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Rudd:

Thank you for your correspondence of December 26 on behalf of Mr. E.W. Bundrick of Coolidge, Arizona regarding his concern about the valuation of his ranch on the San Carlos Mineral Strip.

Information that has been furnished this office by our Phoenix Area Office personnel familiar with Mr. Bundrick's complaints is that he has apparently misinterpreted some of the statements made to him and other ranchers on or adjacent to the Mineral Strip.

The private appraisal firm, Real Estate Science Corporation, has a contract with the Bureau of Indian Affairs to determine the fair market value of the private lands and improvements on the Mineral Strip. The appraisal firm has not been told to keep their appraisals below a certain figure by any of the Bureau personnel. The Act of Congress approved December 22, 1974 (Public Law 93-539, Stat. 1711) authorized appropriations not to exceed \$3,000,000 to be available without fiscal year limitations, provided that in no event shall any person receive total compensation in excess of \$300,000. As you can see, the limitation was made by Congress.

The appraisal contract with Real Estate Science Corporation does not provide for reevaluating an appraisal, but the corporation has agreed to do some reevaluation as time permits. They have not yet completed their appraisal work as provided for in the contract which, of course, is their primary function. We have been assured that Mr. Bundrick's appraisal will be reevaluated when possible. The time schedule that was given Mr. Bundrick was interrupted by the long negotiations and federal court action involving the Arizona State's claim to certain properties.


The San Carlos Tribe has agreed to let the ranchers cross the Mineral Strip, provided they get a free permit from the Tribe. The purpose of requiring the permit is to keep unauthorized persons from trespassing upon tribal land. To date, not one rancher has made application for a permit. We are sure that you understand the reasons for keeping unauthorized persons off of private property.

At no time did any Bureau of Indian Affairs official say that the ranchers had to accept the offered price for their lands and improvements. They were told that if they disagreed with the offer and had proper documentation of a higher value, then the final value would be negotiated.

Finally, the above named Act does not provide any authority for the Tribe to exchange lands of equal value with the owners of deeded land. Should the Act have provided for exchanges, the Tribe does not have any surplus lands with which to trade.

Hopefully, this information will clarify the situation for Mr. Bundrick. If we can be of further assistance in this matter, please let us know.

Sincerely,

 David C. Harrison

Acting Director, Office of  
Trust Responsibilities

Enclosure



United States Department of the Interior  
BUREAU OF INDIAN AFFAIRS

PHOENIX AREA OFFICE  
P.O. Box 7007  
Phoenix, Arizona 85011

IN REPLY REFER TO:  
Real Prop. Mgmt.  
308.5 - San Carlos  
(602) 261-4195

NOTE 7

January 5, 1979

Mr. Edward W. Bundrick  
P.O. Box 38  
Coolidge, Arizona 85228

Dear Mr. Bundrick:

This is in reply to your letter of December 6, 1978, concerning the San Carlos Mineral Strip.

You have raised several issues which we will attempt to answer in the order in which they are asked.

You are correct in your statement that the information which you gave Mr. Donlevy for further consideration by the contract appraiser, is still in their hands and we have not received their response. They have advised us they should have something for our review within two weeks.

We have not received a copy of your letter from Mr. Udall. If you would furnish us a copy, we would be in a much better position to answer any of these questions. We have discussed the mineral strip problems with Mr. Udall's office on several occasions and have attempted to keep his office advised of our progress in completing these purchases.

You are totally incorrect in your statement that we instructed the appraisers to limit their appraisal to three million dollars nor are we aware of any attempts or threats to close any roads on the mineral strip.

To the contrary, the San Carlos Tribe, has authorized the Superintendent to issue permits to all ranchers, both those who reside off the strip but use the roads to get to their ranches and those who have property within the strip. Ranchers

have been stopped by the Tribal Game Wardens and advised of the need to obtain an access permit. To date the Agency has not received a single request for a permit nor has any been issued.

At the March 19, 1976 meeting it was explained by Mr. Donlevy that the ranchers would be given the opportunity to review the appraisals and question the value. Should they have documented proof of a different value, we would have the appraisals reviewed and consider the new documentation. In fact you have contradicted yourself in this instance because we are reviewing your appraisal per your own request. Reference is made to your last sentence.

As has been explained to you on many occasions, the main reason for the delay was the state law suit, which has now been resolved. Of the 26 range units covered by the Act of December 22, 1974, only five (5) ranchers have yet to receive an offer. They should have our offer in their hands within 30 days.

To again answer your question concerning exchanging your fee lands located within the mineral strip for lands elsewhere, please be advised there is no statutory authority for such a transaction.

We hope this answers your questions.

Sincerely yours,

*Harold Robertson*

Acting Asst. Area Director

*Phoned  
1-8-79 -11:15  
England  
who signed  
this  
is going to call Bob*

*Area - 261-4101*

*Harold Robertson*

Deeds 37/525

Rec'd 4/8

NOTE 8

Phoenix 045425.

THE UNITED STATES OF AMERICA,

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, a Certificate of the Register of the Land Office at Phoenix, Arizona, has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of LEE C. PYLE has been established and duly consummated, in conformity to law, for the

North half of the Southwest quarter and the west half of the southeast quarter of Section thirty-five in Township four south of Range seventeen east of the Gila and Salt River Meridian, Arizona, containing one hundred sixty acres,

according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor-General:

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described: TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, WARREN G. HARDING, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, in the District of Columbia, the Fourth day of April in the year of our Lord one thousand nine hundred and Twenty-two and of the Independence of the United States the one hundred and Forty-Sixth.

(SEAL)

By the President: WARREN G. HARDING

By VIOLA B. PUGH, Secretary

M. P. LeRoy, Recorder of the General Land Office.

RECORDED: Patent Number 857301.

Filed and recorded at request of Hampton & Arnold, Phoenix, Arizona, May 24th, 1922 at 2:00 P.M.

Alberta Hood - Deputy

MARY A. MCGEE, Recorder

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## OLWINE, CONNELLY, CHASE, O'DONNELL &amp; WEYHER

299 PARK AVENUE, NEW YORK, N. Y. 10017

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JOHN E. CONNELLY, JR.  
EDWARD F. JOHNSON  
COUNSEL

WASHINGTON OFFICE:

FRANK W. GAINES, JR.\*  
JOHN J. O'DONNELL

ROBERT L. HOEGLE\*

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WASHINGTON, D. C. 20006  
(202) 659-4871\*NOT ADMITTED IN  
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JOSEPH C. KAPLAN  
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MARY C. MONE  
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MARGO RAPPOPORT  
JEFFERY H. SHEETZ  
E. SHERRELL ANDREWS  
GARY HOPPE  
JOHN A. McFARLAND  
THOMAS M. WOODBURY  
KATHLEEN A. DRAINE  
RICHARD S. KALIN

May 25, 1979

Dear Ms. Morris:

Thank you for sending me a copy of S. 265 for comment. This bill has the commendable purpose of protecting persons against unreasonable Government actions, but I am concerned about whether it may go too far in actual operation.

I hope that the bill, as now written, will not be extended to Federal tax cases. While I believe that the little taxpayer should be protected against arbitrary and unreasonable actions of the Internal Revenue Service, I believe that the taxpayer with much at risk should pay his own way. The Government is generally outgunned in tax litigation, and this tilt will increase as the compensation differential between lawyers in private practice and those working for the Government continues to grow.

The definition of "party" is so broad as to include the very wealthy, their personal holding companies and their professional corporations. These people don't need protection from the system. Instead, thanks to the impact of the tax lottery (insufficient IRS audit coverage) and declining compliance with our tax laws, it is the system that now needs protection.

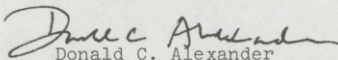
In my judgment, it is not out of line to provide for the award of limited attorneys' fees to a truly small taxpayer as to whom the Government has taken arbitrary, frivolous, unreasonable or groundless action. Not only should the circumstances of the award be limited, but I

believe there should be a limitation upon the amount of the fee that may be awarded. I suggest \$10,000 as such an appropriate limit.

If the Subcommittee decides to have a hearing with respect to S. 265 and its possible extension to Federal tax cases, I will be glad to participate.

With best wishes.

Sincerely,

  
Donald C. Alexander

Ms. Robin A. Morris,  
Subcommittee on Judicial Improvements,  
6306 Dirksen Senate Office Building,  
Washington, D. C. 20510.

njr

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