

May 13, 2000

Awarding Attorney Fees for Bivens Actions

Michael G. Shaw

Table of Contents

Introduction	3
I. Fee-shifting Statutes	3
A. Section 1988.....	4
B. Equal Access to Justice Act	6
1. EAJA Subsection (b)	6
2. EAJA Subsection (d)	8
C. Eligibility and Calculations.....	9
II. Problems Obtaining Attorney’s Fees under Bivens Actions	9
A. Section 1988.....	10
B. EAJA Subsection (b).....	11
1. In an Analogous Manner to Any Other Party.....	11
2. Common Law Exceptions	13
C. EAJA Subsection (d).....	14
1. Substantially Justified.....	14
2. Who can be sued?	15
D. Federal Tort Claims Act.....	16
III. Lucas v. White.....	17
A. Background	17
B. Entitlement to Fees	18
1. Sounding in Tort.....	19
2. Substantially Justified.....	19
3. Special Circumstances.....	20
IV. Conclusion	20

Introduction

Prevailing parties in Section 1983 actions are able to have attorney fees awarded by courts pursuant to Section 1988. However, prevailing parties in Bivens actions, which are considered the federal equivalent of Section 1983 actions, have not often been able to obtain attorney fee awards. This paper looks to see if there are settled reasons why fees are not often awarded in Bivens actions, and looks at the arguments that have been used successfully by plaintiffs to win fee awards. The first part discusses the background of federal statutes that award attorney's fees. The next part discusses the two federal statutes that can be used to obtain attorney fees for Bivens cases: Section 1988, and the Equal Access to Justice Act Subsections (b) and (d). The next part discusses the arguments and issues that arise when using the statutes to request fees. The next part gives the facts and arguments that were used in a successful 1999 case. The paper concludes by noting that the law is very unsettled and that prevailing parties in Bivens cases have multiple available arguments that can very possibly be effective.

I. Fee-shifting Statutes

The traditional rule on attorney's fees is that each party to a lawsuit is required to bear its own attorney's fees (the "American Rule").¹ In addition to suits against private actors, this rule is also construed to apply to suits against the federal government unless Congress has expressly indicated its intent to depart from the general rule.² There have been, however, many federal statutes that have departed from the general rule and allowed so-called "fee-shifting." These federal fee-shifting statutes provide that, if the non-government party prevails, the government is

¹ See *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975) (reaffirming the traditional "American Rule").

² See Gregory C. Sisk, *A Primer on Awards of Attorney's Fees against the Federal Government*, 25 *Ariz. St. L.J.* 733, 739, *citing* *Palmer v. General Serv. Admin.*, 787 F.2d 300, 301 (8th Cir. 1986).

required to pay the attorney's fees of the non-government party. Many of the statutes also provide that expert witness fees will be awarded.³

As an example of a federal fee-shifting statute, Title VII of the Civil Rights Act of 1964 expressly authorizes attorney's fees against the federal government.⁴ Subsequent to 1964, Congress has enacted numerous additional fee-shifting statutes, including the Fair Housing Act,⁵ Clean Water Act,⁶ Clean Air Act,⁷ Solid Waste Disposal Act,⁸ Freedom of Information Act,⁹ Americans with Disabilities Act,¹⁰ and the Age Discrimination in Employment Act.¹¹

A. Section 1988

In 1975, the Supreme Court upheld the American Rule and rejected the argument that fees should be provided on a more liberal basis in civil rights cases.¹² In response to that decision, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976 ("Section

³ Section 1988 and the Civil Rights Act of 1964 refer only to attorney's fees; they do not award expert fees. However, there are many federal statutes that do award expert fees, including the EAJA. A 1991 United States Supreme Court case, *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), stated that at that time there were at least 34 statutes in 10 different titles of the United States Code that explicitly shifted *both* attorney's fees and expert witness fees. *See id.* at 88-89. These included the Toxic Substances Control Act; Consumer Product Safety Act; Resource Conservation and Recovery Act; Natural Gas Pipeline Safety Act; Endangered Species Act; Public Utility Regulatory Policies Act; Administrative Procedure Act; Federal Trade Commission Act; Petroleum Marketing Practices Act; National Historic Preservation Act; Federal Power Act; Tax Equity and Fiscal Responsibility Act; Surface Mining Control and Reclamation Act; Deep Seabed Hard Mineral Resources Act; Federal Oil and Gas Royalty Management Act; Longshoremen's and Harbor Workers' Compensation Act; Federal Water Pollution Control Act; Oil Pollution Act; Marine Protection, Research, and Sanctuaries Act; Deepwater Port Act; Act to Prevent Pollution from Ships; Safe Drinking Water Act; National Childhood Vaccine Injury Act; Noise Control Act; Energy Reorganization Act; Energy Policy and Conservation Act; Clean Air Act; Powerplant and Industrial Fuel Use Act; Ocean Thermal Energy Conversion Act; Comprehensive Environmental Response, Compensation, and Liability Act; Emergency Planning and Community Right-to-Know Act; Hazardous Liquid Pipeline Safety Act (citations omitted).

⁴ *See* 42 U.S.C. § 2000e-5(k) (1994) ("In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.").

⁵ *See* 42 U.S.C. § 3613(c)(2) (1995).

⁶ *See* 33 U.S.C. §§ 1365(d), 1369(b)(3) (1986 & Supp. I 2000).

⁷ *See* 42 U.S.C. §§ 7604(d), 7607(f) (1995).

⁸ 42 U.S.C. § 6972(e) (1995).

⁹ *See* 5 U.S.C. § 552(a)(4)(E) (1996 & Supp. I 2000).

¹⁰ *See* 42 U.S.C. §§ 12101 et seq. (1995).

¹¹ *See* 29 U.S.C. §§ 621 et seq. (1999).

1988”)¹³ to extend fee-shifting to specific Federal civil rights statutes.¹⁴ Section 1988 mandates that the federal government pay attorney’s fees to a party that has prevailed when bringing an action under one of the specific statutes listed in Section 1988. These statutes are generally considered to be “civil rights statutes” and currently are “sections 1981¹⁵, 1981a¹⁶, 1982¹⁷, 1983¹⁸, 1985¹⁹, and 1986²⁰ of this title, title IX of Public Law 92-318,²¹ the Religious Freedom Restoration Act of 1993²², title VI of the Civil Rights Act of 1964,²³ or section 13981²⁴ of this title.” One of the specific civil rights statutes in Section 1988 is “Section 1983.”²⁵ Section 1988 has been used extensively to obtain attorney’s fees for Section 1983 actions.

¹² See *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 240 (1975). See generally Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 *N.C. L. Rev.* 337, 364 (1989) (discussing attorney’s fees in Bivens-type cases).

¹³ See 42 U.S.C. § 1988 (1994 & Supp. I 2000).

¹⁴ See generally *Geier v. Richardson*, 871 F.2d 1310, 1313 (6th Cir. 1989) (stating that the legislative history of Section 1988 indicates the purpose of the Act was to provide attorney’s fees to “private attorneys general”), citing *Charles v. Daley*, 846 F.2d 1057, 1063 & n. 8.

¹⁵ 42 U.S.C. § 1981 (1994) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”).

¹⁶ 42 U.S.C. § 1981a (1994) (defining the right of recovery and damages in cases of intentional discrimination in employment). The statute includes a determination that punitive damages may be awarded when the employer engages in the discriminatory practice with malice or reckless indifference to the federally protected rights of the individual. However, the statute states that punitive damages do not apply to a government, government agency, or political subdivision. See *id.*

¹⁷ 42 U.S.C. § 1982 (1994) (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”).

¹⁸ 42 U.S.C. § 1983 (1994 & Supp. I 2000).

¹⁹ 42 U.S.C. § 1985 (1994) (providing for conspiracy to interfere with civil rights).

²⁰ 42 U.S.C. § 1986 (1994) (providing additional information on liability for persons involved in a conspiracy under 42 U.S.C. § 1985).

²¹ 20 U.S.C. § 1681 et seq. (1999) (prohibiting certain forms of sexual discrimination by educational programs or any activity receiving Federal financial assistance).

²² 42 U.S.C. § 2000bb et seq. (1994) (“The purposes of this chapter are (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”).

²³ 42 U.S.C. § 2000d et seq. (1994) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

²⁴ 42 U.S.C. § 13981 (1995) (establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.).

²⁵ See 42 U.S.C. § 1983 (1994 & Supp. I 2000).

B. Equal Access to Justice Act

In 1980, the Equal Access to Justice Act²⁶ (“EAJA” or “Section 2412”) was enacted, and on the surface seemed to greatly expand fee-shifting by requiring the federal government to pay attorney’s fees to the prevailing party in civil cases 1) to the same extent that any other party would be liable under the common law or any statute that provides for fees, or 2) whenever the government’s position could not be substantially justified. The EAJA seemed to make the federal government liable under Section 1988 the same as any other party.²⁷

The EAJA is different from other statutes that have fee-shifting provisions because it is not attached to any particular cause of action. Its purpose is to “diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States”²⁸ and to “counterbalance the financial disincentives to vindicating rights against the Government through litigation.”²⁹ It has two distinct fee-shifting provisions.

1. EAJA Subsection (b)³⁰

²⁶ See 28 U.S.C. § 2412 (1994 & Supp. I 2000).

²⁷ See *Unification Church v. INS*, 762 F.2d 1077, 1079-81 (D.C. Cir. 1985); *Lauritzen v. Lehman*, 736 F.2d 550, 552-59 (9th Cir. 1984); see also *Geier v. Richardson*, 871 F.2d 1310, 1312 & n.1 (6th Cir. 1989) (holding that EAJA Subsection (b) and Section 1988 “operate together to permit the district court in its discretion to award reasonable attorney’s fees against the United States” to any prevailing party in a civil rights action).

²⁸ Act of October 21, 1980, Pub. L. No. 96-481, Title II, § 202(c)(1), 94 Stat. 2325, 2325 (1980) (not codified).

²⁹ *Sullivan v. Finkelstein*, 496 U.S. 617, 630 (1990).

³⁰ The two other main parts of EAJA are Subsection (a), which provides for payments of costs to the prevailing party, and Subsection (c), which provides for the methods of payment of the awards. See 28 U.S.C. § 2412(a), § 2412(c). Additionally, a frequently litigated provision is Subsection (d)(1)(B), which specifies that an application for the fees must be made within thirty days of final judgment in the action. See 28 U.S.C. § 2412(d)(1)(B) (1994 & Supp. I 2000).

EAJA Subsection (b) provides a general waiver of sovereign immunity and thus makes the federal government liable, in the discretion of the court, for fees “to the same extent that any other party would be liable under the common law or under the terms of any statute which explicitly provides for such an award.”³¹ As an example, prior to Subsection (b), Section 1988 was not considered to apply to the federal government because there was no express waiver of sovereign immunity.³² After EAJA, the federal government became liable under Section 1988 the same as any other party.³³ However, Section 1988 applies only to a specific set of statutes. The federal government can therefore only be liable for fees under Section 1988 if it violates one of those statutes.³⁴

Other than applying Section 1988 to the federal government, Subsection (b) does not provide any new right to an attorney’s fee; one of the three common law exceptions to the American Rule must still be found.³⁵ First, a court may award attorney’s fees as a sanction for a willful violation of its orders.³⁶ Second, a court may award attorney’s fees against a losing party that has manipulated the judicial process in bad faith.³⁷ Third, if there is a common fund for the

³¹ 28 U.S.C. § 2412(b). The full text of Subsection (b) is:

Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

³² See *NAACP v. Civiletti*, 609 F.2d 514, 516-21 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 922 (1980); *Shannon v. United States Dep’t of Hous. & Urban Dev.*, 577 F.2d 854, 855-56 (3d Cir.), *cert. denied*, 439 U.S. 1002 (1978).

³³ See *Unification Church v. INS*, 762 F.2d 1077, 1079-81 (D.C. Cir. 1985); *Lauritzen v. Lehman*, 736 F.2d 550, 552-59 (9th Cir. 1984); see also *Geier v. Richardson*, 871 F.2d 1310, 1312 & n.1 (6th Cir. 1989) (holding that EAJA Subsection (b) and Section 1988 “operate together to permit the district court in its discretion to award reasonable attorney’s fees against the United States” to a prevailing party in a civil rights action).

³⁴ See *Unification Church*, 762 F.2d at 1079-81; *Lauritzen*, 736 F.2d at 552-59.

³⁵ See *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 257-59 (1975). See also *Lauritzen*, 736 F.2d at 554 (“The primary purpose of Congress in enacting section 2412(b) was to apply the common law exceptions to the American rule to the federal government.”).

³⁶ See *Alyeska Pipeline Co.*, 421 U.S. at 258.

³⁷ See *id.* at 258-59; see also *Lauritzen*, 736 F.2d at 559 n. 13 (“[U]nder the ‘bad faith’ exception, the common law allows attorney’s fees when one party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”). *Lauritzen* also states that section 2412(b) allows awards for the “bad faith” exception, but, since the award is

benefit of a class of individuals, a court may allow the attorneys to obtain their legal fees from the fund.³⁸ If any of these common law exceptions are found, EAJA will apply them to the federal government. The courts have limited federal government liability to federal fee-shifting statutes; the federal government is not liable for fee-shifting that is granted by state statutes.³⁹

2. EAJA Subsection (d)

EAJA Subsection (d) authorizes an award of attorney's fees in "any civil action"⁴⁰ (other than cases sounding in tort) . . ."⁴¹ when the federal government's position is found to be "unreasonable" or when special circumstances make an award unjust.⁴² A private defendant or plaintiff can collect the fee, as long as the party prevails against the federal government.⁴³ The government cannot collect a fee. Subsection (d) has been held to include proceedings for judicial review of agency actions. Additionally, pursuant to a different section of the EAJA, when there is an adversarial adjudication before an administrative agency, a fee award can be obtained in the same manner as in Subsection (d).⁴⁴

punitive, "the penalty can be imposed only in exceptional cases and for dominating reasons of justice." *Id.* at 559 n.13.

³⁸ See *Alyeska Pipeline Co.*, 421 U.S. at 257.

³⁹ See *Olson v. Norman*, 830 F.2d 811, 822 (8th Cir. 1987); *Joe v. United States*, 772 F.2d 1535, 1537 (11th Cir. 1985).

⁴⁰ See *Boudin v. Thomas*, 732 F.2d 1107 (2d Cir. 1984) (stating that "civil action" did not include habeas proceedings and hence 2412(d) was not meant to apply to habeas proceedings). Administrative proceedings fall within the definition of "civil action." See *Sullivan v. Hudson*, 490 U.S. 877, 892 (1989) ("[A]dministrative proceedings may be so intimately connected with judicial proceedings as to be considered part of the "civil action" for purposes of a fee award.")

⁴¹ 28 U.S.C. § 2412(d)(1)(A) (1994 & Supp. I 2000). The full text of Subsection (d)(1)(A) is:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

⁴² See 28 U.S.C. § 2412(d)(1)(A) (1994 & Supp. I 2000); see also Gregory C. Sisk, *A Primer on Awards of Attorney's Fees against the Federal Government*, 25 *Ariz. St. L.J.* 733, 783.

⁴³ See 28 U.S.C. § 2412(d)(1)(A) (1994 & Supp. I 2000); see also Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 *Duke L.J.* 435, 449.

⁴⁴ See 5 U.S.C. § 504(a)(1) (1996 & Supp. I 2000); see also *Unification Church v. Immigration*

& Naturalization Service, 762 F.2d 1077, 1079 (D.C. Cir. 1985) ("The Equal Access to

C. Eligibility and Calculations

The common test for eligibility for a fee-shifting award is that the plaintiff has “prevailed.”⁴⁵ The amount of the award is then usually determined by applying what is a “reasonable” fee.⁴⁶ This reasonable fee can vary but is generally based upon the “lodestar” method, which multiplies a “reasonable” hourly fee by the number of hours “reasonably” spent on the case.⁴⁷ For a time, the use of a “lodestar multiplier” was frequently used to increase the award to compensate for the risk of an unsuccessful suit. Additionally, the lodestar could be adjusted to reflect the quality of representation.⁴⁸ Neither of these adjustments is often used anymore. However, there is still an option to downward adjust a fee when the plaintiff has only achieved limited success.⁴⁹ There is also the understanding that the fee should not necessarily be limited to the total damages awarded because there can still be a value to society—particularly in civil rights cases—that exceeds the amount awarded to the plaintiff.⁵⁰

II. Problems Obtaining Attorney’s Fees under Bivens Actions

The United States Supreme Court has never ruled on whether prevailing parties in Bivens actions can be awarded attorney’s fees, even though the law is very unsettled in the Circuit

Justice Act (Act) waives the federal government’s immunity from attorney’s fees, under certain conditions set forth therein, in both adversarial administrative proceedings and judicial proceedings.”).

⁴⁵ See Gregory C. Sisk, *A Primer on Awards of Attorney’s Fees against the Federal Government*, 25 *Ariz. St. L.J.* 733, 742-44 (discussing the various interpretations of “prevailing”).

⁴⁶ See *id.* at 745-56 (discussing the measurement of a fee-shifting award).

⁴⁷ See *id.* (discussing the use of the lodestar method in determining fee-shifting awards).

⁴⁸ See *id.* at 756-759 (discussing the adjustments to the lodestar method).

⁴⁹ See *Hensley v. Eckerhart* 461 U.S. 424 (1983) (stating that “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee” but that “the fee should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.”).

⁵⁰ See *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (rejecting the theory that the amount of attorney’s fees must be directly proportionate to the amount of monetary damages). But see *Farrar v. Hobby*, 113 S.Ct. 566 (1992) (disallowing attorney’s fees when only nominal damages had been awarded). *City of Riverside* also awarded the

Courts. Plaintiffs normally invoke one or more of three main tactics: Section 1988, EAJA Subsection (b), and EAJA Subsection (d). Section 1988 and EAJA Subsection (b) are closely entwined and are usually argued together. Courts are split on whether Subsection (d) and Subsection (b) are mutually exclusive or whether fee awards may be given under both of them.⁵¹ Following are the usual arguments and issues.

A. Section 1988

A Bivens action is essentially the federal equivalent of a Section 1983 action. It allows private actions to be brought against the federal government in the same manner as Section 1983 allows private actions to be brought against persons acting under color of state law. However, Bivens is not based on a statute and does not exist in the list of statutes in Section 1988. Most courts that have analyzed the issue have determined that attorney's fees cannot be obtained in Bivens actions based on Section 1988.⁵² Courts normally reason that the only time federal officials can be awarded fees under Section 1988 is when they act in conspiracy with state officials under color of state law to deprive someone of their rights.⁵³ This would normally arise under Section 1985(3).⁵⁴

fees at the prevailing market rates even though the attorneys were very inexperienced at the time of taking the case. See City of Riverside, 477 U.S. 561 at 569-70.

⁵¹See Boudin v. Thomas, 732 F.2d 1107, 1110 (2d Cir. 1984) (stating that it awarded fees under Subsection (d) but did not consider the motion to award under Section 1988 because it considered that duplicative). But see Curry v. Block, 608 F.Supp. 1407 (S.D. Ga. 1985) (awarding fees under both 2412(b) (using section 1988) and 2412(d).

⁵²See e.g., Hall v. United States, 773 F.2d 703, 707 (1985) (“Section 1988 does not provide for awards of attorney fees in Bivens actions.”). But see Curry v. Block, 608 F.Supp. 1407, 1410 (S.D. Ga. 1985). (stating that “[t]he case at bar is analogous to one brought under § 1983, differing only in that the deprivation of rights resulted not from state action but from the action of federal officials” and that “[l]iability under § 1983 could have resulted had a state officer worked a violation of federal right analogous to that perpetrated by the Federal Government in the case at bar.”)

⁵³See Cabrera v. Martin, 973 F.2d 735, 741 (9th Cir. 1992). (“[A] well-established line of cases has held that federal officials, who act in concert or conspiracy with state officials to deprive persons of their federal rights, may be held liable for prospective relief under § 1983 when sued in their official capacity.”)

⁵⁴See Hall v. United States, 773 F.2d 703, 707 (1985) (“Section 1988 applies to the United States when federal officials are involved in section 1985(3) conspiracies; court does not reach the issue of federal liability under section 1988 for pure Bivens actions.”), citing Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 735 F.2d 895, 899-900 (5th Cir. 1984).

B. EAJA Subsection (b)

Because the use of Section 1988 for Bivens actions has not been very successful, attorneys have also used EAJA Subsection (b). This tactic has also not been very successful. EAJA Subsection (b) provides for fees when the defendant is either “the United States or any agency or any official of the United States acting in his or her official capacity.”⁵⁵ Subsection (b) applies “to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.”⁵⁶

1. In an Analogous Manner to Any Other Party

The usual dispute concerning Subsection (b) is the meaning of “to the same extent that any other party would be liable.” Plaintiffs argue that if a state party would be liable for fees under Section 1988,⁵⁷ then if the United States or an official of the United States acted under color of federal law in an “analogous” manner as the state party acted under state law, the United States or a federal official should be liable to the same extent. Further, Section 1988 allows fees for suits brought under Section 1983, which concerns violations of the Constitution and federal laws by persons acting under color of state law. Therefore, since the federal defendants’ conduct would have been actionable under section 1983 if they had acted under color of state law, then “Section 2412(b) should be interpreted to make the United States liable for fees when it loses a lawsuit based on conduct that would support an award against a party acting under color of state law.”⁵⁸

⁵⁵28 U.S.C. § 2412(b) (1994 & Supp. I 2000).

⁵⁶28 U.S.C. § 2412(b) (1994 & Supp. I 2000).

⁵⁷See *Lauritzen v. Lehman*, 736 F.2d 550, 553 (9th Cir. 1984) (“The most nearly applicable statute [falling under Section 2412(b)] is section 1988.”)

⁵⁸*Premachandra v. Mitts*, 753 F.2d 635, 636-37 (8th Cir. 1985)(en banc). Other cases have adopted the reasoning of the plaintiffs. See e.g., *Boudin v. Thomas*, 732 F.2d 1107, 1114 (2d Cir. 1984)(dictum); *Trujillo v. Heckler*, 587 F.Supp. 928, 931-32 (D. Colo. 1984); *Clemente v. United States*, 568 F. Supp. 1150, 1171 (C.D. Cal. 1983).

On the other side, the federal government argues that since it did not violate any of the statutes specifically referred to in 1988 (usually Section 1983), it cannot be liable for fees. The vast majority of courts side with the federal government and declare that the only way for the federal government to be liable under Section 1988 is if it actually violates one of the statutes giving rise to fees.⁵⁹ In particular, since the federal government cannot violate Section 1983, it cannot be held liable for fees under 1988. Courts normally reason that the only time federal officials can be awarded fees under Section 1988 is when they act in conspiracy with state officials under color of state law to deprive someone of their rights.

The arguments were analyzed in the series of cases of Premachandra v. Mitts.⁶⁰ The trial court held that fees should be awarded under Section 2412(b) “because § 1988 explicitly allows the award of fees to ‘prevailing parties’ in civil rights actions.”⁶¹ The divided panel of the 8th Circuit then affirmed that decision. The panel stated that its biggest problem was in interpreting the intent of Congress when it enacted Section 2412. The panel held that Section 2412(b) authorized fee awards in cases analogous to actions brought under Section 1983 and that “[S]ection 1988 applies in suits against the United States or its officials based on rights analogous to those protected by the laws specifically listed in section 1988.”⁶²

The Premachandra Circuit Court (en banc) then again looked at the legislative history of 2412(b) and came to a different result. The bill originally was worded that the United States shall be liable for attorney’s fees “in those circumstances where the courts may award such fees

⁵⁹See e.g., Premachandra v. Mitts, 753 F.2d 635 (8th Cir. 1985)(en banc); Lauritzen v. Lehman, 736 F.2d 550 (9th Cir. 1984).

⁶⁰ 548 F.Supp. 117 (E.D. Mo. 1982) (holding that Premachandra was entitled to fees under Section 1988 and Section 2412(b)), aff’d, 727 F.2d 717 (8th Cir. 1984) (affirming, by a divided panel of the Circuit Court, the award of fees), rev’d en banc, 753 F.2d 635 (8th Cir. 1985)(en banc) (reversing the award of fees under Section 1988 and Section 2412(b) and remanding for a determination of whether Premachandra is entitled for an award under the common law provisions of Section 2412(b)).

⁶¹753 F.2d 635, 636 (8th Cir. 1985)(en banc), citing 548 F.Supp. 117, 121 (E.D. Mo. 1982).

⁶²753 F.2d 635, 636 (8th Cir. 1985)(en banc), discussing 548 F.Supp. 117, 121 (E.D. Mo. 1982).

in suits involving *private* parties.” (emphasis added) A witness named Armand Derfner then testified that the term “private parties” would not include state or local governments and stated that if the wording were changed, “it would go even further toward putting the United States on a par with other government bodies.” The subcommittee then—without explanation—changed “private party” to “any other party.”⁶³ This testimony by Armand Derfner has been discussed in other cases⁶⁴ and seems to be a key to how courts rule on the issue of attorney’s fees being awarded in cases against the United States using Section 2412(b) and Section 1988. If the court believes that Congress changed the wording to conform to Derfner’s testimony (“putting the United States on a par with other government bodies”), then it will award fees. If it thinks there is no relation between Derfner’s testimony and the final wording, it will not award fees. Here, in Premachandra, the Circuit Court did not think there was a relationship and did not award fees.

2. Common Law Exceptions

Section 2412(b) authorizes fee awards under the common law exceptions to the American rule. The most frequently litigated common law exception is “bad faith.” “Bad faith” has been

⁶³ Award of Attorneys’ Fees Against the Federal Government: Hearings on S. 265 Before the Subcomm. On Courts, Civil Liberties, and the Administration of Justice of the House Comm. On the Judiciary, 96th Cong., 2d Sess. 100 (1980).

⁶⁴ See Lauritzen v. Lehman, 736 F.2d 550, 555-56 (9th Cir. 1984) (concluding that the court should not give Derfner’s testimony dispositive weight). But see Curry v. Block, 608 F.Supp. 1407 (S.D. Ga. 1985) (stating that the court disagrees with the courts in Lauritzen, Premachandra, and Unification Church, and believes that Derfner’s testimony and Congress’s change to the wording very shortly thereafter, were the necessary indications that 2412(b) applies to the federal government). See also Northwest Indian Cemetery Protective Ass’n v. Peterson, 589 F.Supp. 921, 925-26 (N.D. Cal. 1983); United States v. Miscellaneous Pornographic Magazines, Inc., 541 F.Supp. 122, 128-29 (N.D. Ill. 1982).

held to refer to the litigation and not to the underlying actions.⁶⁵ The common law allows attorney's fees when one party has acted “in bad faith, vexatiously, wantonly, or for oppressive reasons.”⁶⁶ However, an award of attorney's fees based on bad faith is punitive, and “the penalty can be imposed only in exceptional cases and for dominating reasons of justice.”⁶⁷ These common law circumstances do not occur very often and Bivens actions have not often been able to obtain attorney’s fees from the federal government based on the common law exceptions.

C. EAJA Subsection (d)

1. Substantially Justified

Under Subsection (d), there is a presumption that fees should be awarded to the prevailing party in judicial proceedings against the United States “unless the court finds that the position of the United States was substantially justified or that special circumstances made an award unjust.”⁶⁸ The government has the burden of overcoming that presumption. When analyzing whether the United States was “substantially justified,” courts have used different definitions for the “position of the United State.”⁶⁹ Some have defined “position” to include both the government’s underlying position and litigation position.⁷⁰ Other courts have said that

⁶⁵ See e.g., *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989) (holding that “the requisite bad faith may be found in a party’s conduct in response to a substantive claim, whether before or after an action is filed, but it may not be based on a party’s conduct forming the basis for that substantive claim.”); *Premachandra v. Mitts*, 753 F.2d 635, 641-42 (8th Cir. 1985)(en banc) (remanding the case to the district court for a determination of whether the government acted in bad faith and should be liable for fees under the common law principles of Subsection (b)).

⁶⁶ See *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975), quoting *F.D. Rich Co. v. United States ex rel. Indust. Lumber Co.*, 417 U.S. 116, 129 (1974).

⁶⁷ *Lauritzen*, 736 F.2d at 559 n. 13, citing *United States v. Standard Oil Co.*, 603 F.2d 100, 103 (9th Cir.1979)

⁶⁸ 28 U.S.C. § 2412(d)(1)(A) (1994 & Supp. I 2000).

⁶⁹ See *Lucas v. White*, 63 F.Supp.2d 1046, 1054 (N.D. Cal. 1999), citing *Meinhold v. U.S. Dep’t of Defense*, 123 F.3d 1275, 1277, amended by 131 F.3d 842 (9th Cir. 1997).

⁷⁰ See also *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988) (stating that the focus must be on whether the government was substantially justified in taking its original action and in defending the validity of the action in court); *Lauritzen v. Lehman*, 736 F.2d 550, 559 (9th Cir. 1984) (stating that the court must evaluate the “totality of the circumstances prelitigation and during trial” and that it must be determined whether the government’s position had a “reasonable basis both in law and in fact.”).

the only determining factor was the whether the government was reasonable in its litigation position.⁷¹

2. Who can be sued?

There is also a question about what type of defendant Subsection (d) applies to and whether Bivens actions even fit at all. The wording is “the United States” but that is defined to include “any agency and any official of the United States acting in his or her official capacity.”⁷² Bivens actions are against individuals⁷³ and hence Subsection (d) would seem to include Bivens actions. However, in an action to collect attorney’s fees for a Bivens case concerning the illegal use of search warrants by two federal officers, the court held that fees could not be awarded under EAJA Subsection (d) for suits against federal employees in their individual capacities.⁷⁴ The main reasoning was that individual parties are liable under Bivens because their actions exceeded the scope of their legal authority.⁷⁵ Therefore, the argument went, it could not be said that the officers acted as agents of the United States within their official capacity, when they violated the Plaintiff’s rights.⁷⁶ The court also rejected the additional argument that 1) although the action was nominally against the individual officers, it was in reality against the United

⁷¹ See *Boudin v. Thomas*, 732 F.2d 1107, 1115-17 (2d Cir. 1984)(dictum). (stating that “substantially justified” under 2412(d) referred only to the government’s litigation position--whether the government’s legal arguments were reasonable).

⁷² 28 U.S.C. § 2412(d)(2)(C) (1994 & Supp. I 2000).

⁷³ See *Lauritzen v. Lehman*, 736 F.2d 550, 558 n. 10 (9th Cir. 1984) (“Bivens actions are against governmental employees in their individual capacities”).

⁷⁴ See *Kreines v. United States*, 33 F.3d 1105 (9th Cir. 1994) (stating that “a Bivens action is not a ‘civil action . . . against the United States’ within the plain meaning of § 2412(d)” and that “the EAJA provides for fees only from the United States, which of course is never a party to a Bivens action” and a Bivens action is not a “civil action . . . against the United States” under § 2412(d)”) See *id.* at 1109.

⁷⁵ See *id.* at 1108 (stating that Bivens actions “are brought against rogue officers who step outside the scope of their official duties”).

⁷⁶ See *id.* at 1107.

States,⁷⁷ and 2) since the United States had volunteered to pay the judgment for the individuals, the United States had accepted the action as being against itself.⁷⁸

D. Federal Tort Claims Act

While this paper does not address the specifics of the Federal Tort Claims Act⁷⁹ (“FTCA”), a brief description of its use relative to Section 1988 and EAJA is helpful. The FTCA allows individuals to sue the United States for injury caused by a negligent or wrongful act of an employee of the United States while acting within the scope of employment, as long as, if the United States were a private person, it would be liable to the claimant in accordance with the law of the place where the act or omission occurred.⁸⁰ However, constitutional tort claims are not cognizable under the FTCA.⁸¹ Attorney’s fees may be awarded under the FTCA but are subject to significant limitations.⁸²

⁷⁷ See *id.* at 1107.

⁷⁸ See *id.* at 1108 (stating that the United States is not legally obligated to defend its employees in Bivens actions and therefore any payments are wholly discretionary).

⁷⁹ 28 U.S.C. §§ 1346, 2671 et seq. (1994).

⁸⁰ 28 U.S.C. §§ 1346(b)(1) (1994). Section 1346(b) provides:

[T]he district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

⁸¹ See *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 477-78, 486 (1994) (holding that constitutional torts do not fall under the FTCA and additionally that Bivens suits cannot be brought against a federal agency); see also *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989) (“[S]uits for violations of federal constitutional rights, even though tortious in nature, are not within the scope of the FTCA. . . . [T]he FTCA does not provide a cause of action for constitutional torts.”). The court in *Sanchez* said its position was supported by the Supreme Court’s decision in *Carlson v. Green* of the difference between a FTCA and a Bivens claim. See *Sanchez*, 870 F.2d at 295, citing *Carlson v. Green*, 446 U.S. 14 (1980) (stating that a Bivens remedy is available even when the

In Sanchez v. Rowe, the Plaintiff brought one claim against the United States under the FTCA and a second claim against an agent of the U.S. Border Patrol using Bivens.⁸³ The court held that a judgment under the FTCA bars a plaintiff from also recovering against the government employee whose actions gave rise to the claim and, therefore, that the Plaintiff had to elect between the two claims. The Plaintiff elected the FTCA and received damages from the FTCA claim. He then submitted a motion to recover fees under EAJA Subsections (b) and (d). The court stated that the judgment in an FTCA action constitutes a “complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.”⁸⁴ Therefore, since the Plaintiff had elected to recover from the United States under the FTCA, he did not “prevail” against the individual officer and could not meet the threshold requirement of the EAJA.⁸⁵

III. Lucas v. White

In 1999, the United States District Court for the Northern District of California decided the case of Lucas v. White.⁸⁶ This decision awarded attorney’s fees for a Bivens action. It is illustrative as a recent case with winning arguments.

A. Background

Three female prisoners had filed suit seeking damages and injunctive relief from officials of the United States Department of Justice, Bureau of Prisons. The claim alleged that prison officials had placed the women in an all-male security unit, had opened the women’s cell doors

allegations could also support a FTCA suit, but that an FTCA suit is not a sufficient alternative to a Bivens suit for unconstitutional actions resulting in physical injury).

⁸² 28 U.S.C. § 2678 (declaring that an attorney cannot recover fees in excess of 25 percent of any judgment or settlement after litigation is initiated and cannot recover in excess of 20 percent of any claim resolved through the administrative process prior to formal litigation.)

Additionally, the attorney fees limitations are supported by criminal sanctions. See id.

⁸³ See Sanchez, 870 F.2d at 291.

⁸⁴ 28 U.S.C. § 2676 (1994).

to allow male prisoners' access, had allowed physical and sexual harassment, had allowed correctional officers and male prisoners to assault and rape the women, and had failed to properly evaluate, train, discipline, and supervise the prison personnel so as to prevent such occurrences. The plaintiffs alleged that this conduct violated their rights under the First, Fourth, Fifth, and Eighth Amendments of the United States Constitution.

The parties agreed to mediate and, at the suggestion of the defendants, the plaintiffs amended their complaint by adding a claim against the United States under the Federal Tort Claims Act.⁸⁷ This amendment was made in order to “facilitate resolution of the claim for damages.”⁸⁸ The parties eventually reached a private settlement.

The Bureau of Prisons agreed to implement national reforms that would reduce the risk that female prisoners would be the victims of sexual assault and harassment. The Bureau also agreed to make specific changes at the local prison and agreed to pay damages to the plaintiffs of \$500,000. The attorneys received a contingency fee of twenty-five percent of the damages--\$125,000. After the settlement, the attorneys monitored compliance of the agreement.

The plaintiffs then filed a motion seeking interim attorney's fees of \$673,035 for time spent on the claims for injunctive relief against the Bureau of Prison officials in their official capacity. They did not seek fees for any time spent on the claim for damages. The District Court, after using the analysis discussed below, decided the case and awarded attorney's fees of \$543,891.

B. Entitlement to Fees

⁸⁵ See Sanchez, 870 F.2d at 295.

⁸⁶ 63 F.Supp.2d 1046 (N.D. Cal. 1999).

⁸⁷ 28 U.S.C. §§ 1346, 2671 et seq. (1994).

⁸⁸ Lucas, 63 F.Supp.2d at 1051.

The Court stated that under the EAJA, there is a presumption that prevailing plaintiffs are entitled to recover attorney's fees. The government has the burden to overcome the presumption by showing that the government's position was substantially justified, or there were special circumstances that would make an award unjust, or the application for the fees was not timely filed. Additionally, the Court addressed the issue of whether a case must not "sound in tort" in order for fees to be awarded under the EAJA.

1. Sounding in Tort

The EAJA states that fees shall be awarded to a party when they are "incurred by that party in any civil action (other than cases sounding in tort)" ⁸⁹ The government argued that this action sounds in tort and therefore the claim for fees is barred by sovereign immunity. The Court stated, however, that the phrase "cases sounding in tort" does not mean that a plaintiff is automatically ineligible for fees any time the allegations involve conduct that could be tortuous and the complaint includes a claim for damages. The Court indicated that as long as there are other aspects of the complaint that do not sound in tort, the EAJA might still apply. Specifically, the Court stated that when, as here, the complaint was "aimed primarily" at obtaining equitable relief, the phrase "sounding in tort" does not apply. The Court also explained that the EAJA's legislative history indicates that the "sounding in tort" exception does not encompass "constitutional torts." ⁹⁰

2. Substantially Justified

The government has the burden of overcoming the presumption that fees should be awarded to a prevailing party. One of those ways is for the government to prove that "the

⁸⁹ 28 U.S.C. § 2412(d)(1)(A) (1994 & Supp. I 2000).

⁹⁰ See Lucas, 63 F.Supp 2d at 1052-53, citing Kreines v. U.S., 33 F.3d 1105 (9th Cir. 1994).

position of the United States was substantially justified.”⁹¹ The Court stated that the “position” of the United States refers to both the agency’s underlying position and the agency’s litigation position and therefore the government must prove that BOTH are substantially justified in order to overcome the presumption.⁹² The Court felt that the underlying position was not substantially justified and hence ruled that the government had not met its burden of proving that the award of fees should be denied because the position of the government was “substantially justified.”⁹³ The Court added that even when, as here, a case has been resolved by settlement, there is no need for the plaintiffs to prove the factual allegations in order to recover fees under EAJA.

3. Special Circumstances

Even if the government’s position was not substantially justified, fees may still be denied if special circumstances would make an award unjust.⁹⁴ The government here argued that since the attorneys had already received a contingency fee for the damages, and because the case had never gone to trial, additional fee awards would be unjust. The Court ruled against these arguments.

IV. Conclusion

Until the United States Supreme Court makes a ruling, the issue of attorney’s fees for Bivens actions can be expected to remain unsettled. Even for specific jurisdictions, the issue can

⁹¹ See Lucas, 63 F.Supp 2d at 1054, citing Meinhold v. U.S. Dep’t of Defense, 123 F.3d 1275, 1277, amended by 131 F.3d 842 (9th Cir. 1997).

⁹² See also Kali v. Bowen, 854 F.2d 329, 332 (9th Cir. 1988) (stating that the focus must be on whether the government was substantially justified in taking its original action and in defending the validity of the action in court); Lauritzen v. Lehman, 736 F.2d 550, 559 (9th Cir. 1984) (stating that the court must evaluate the “totality of the circumstances prelitigation and during trial” and that it must be determined whether the government’s position had a “reasonable basis both in law and in fact.”).

⁹³ See also Pierce v. Underwood, 487 U.S. 552, 565 (1988)(stating that the most natural meaning of the word “substantially” in this context is “is *not* ‘justified to a high degree,’ but rather ‘justified in substance or in the main’--that is, justified to a degree that could satisfy a reasonable person. That is no different from the ‘reasonable basis both in law and fact’ formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue.”) (emphasis added).

be considered unsettled, since there are so many different arguments that can be used. There is most likely some combination of arguments that has not been made in that jurisdiction.

Plaintiff's attorneys should not be dissuaded from pursuing Bivens arguments merely because of the relatively small probability of receiving attorney's fees. There is always a chance in any jurisdiction to have a favorable ruling. There have been successful motions that have brought high awards.

Based on the cases discussed in this paper, there are some general considerations. For instance, coupling injunctive relief with damages will normally be helpful. And, of course, attorney's fees should be part of any settlement, but even if not, there is precedent to pursue the fees subsequent to the settlement.

Arguing that fees for Bivens' actions are the federal equivalent of fees under Section 1988 for Section 1983 actions will not, by itself, be very successful (even though there have been successes). The strict list of statutes in Section 1988 seems to be too difficult to overcome. Therefore, pursuing fees based solely on a Section 1988 action is not useful. Arguments need to be based on a combination of statutes, such as using EAJA Subsection (b) to prove that Section 1988 applies to violations "analogous" to Section 1983. This requires using the legislative history to prove that Congress' intent was to put the United States on a par with state governments for these kinds of violations.

There are other strategies that look not just the result of the Bivens violation but at the government's conduct in the litigation. This, of course, is not helpful when deciding to take a case in the first place, but can be helpful after the fact. If the government litigated in bad faith or took a litigation position that was not substantially justified, fees can be obtained under EAJA

⁹⁴ 28 U.S.C. § 2412(d)(1)(A) (1994 & Supp. I 2000).

Subsections (b) or (d). Subsection (d) can also be used when the United State's underlying position was not substantially justified, thus acting almost like punitive damages.

And finally, while conspiracy between state and federal officials will not often be found, it should be kept in mind. Federal funding that leads to Constitutional abuses would seem to be open for this strategy. If conspiracy can be proven, fees will be relatively easy to obtain under Section 1988.