DOJ memo

U.S. Department of Justice

Office of Legal Policy

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Office of the
Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

October 31, 1983

TO: Edwin Meese III
Counselor to the President

FROM: Edward C. Schmults
Deputy Attorney General

SUBJECT: Proposed Administration
Attorneys' Fee Reform Bill

As we discussed several weeks ago, the Department of Justice has met with representatives of the array of groups that have an interest in, or would be affected by, the Administration's proposed attorneys' fee reform bill. 1/ These meetings indicate that there is a need for reform of the laws governing the award of attorneys' fees in federal court, but that we will encounter strong opposition to any reasonable fee reform proposal. In addition, it was the opinion of most of the groups with whom we we met that any fee reform bill would be blocked in the current Congress.

Our meetings with these groups produced few surprises. As one would expect, our fee reform proposal was well received by the groups representing state and local governments, which have been ordered to pay high fee awards in recent years. The more conservative of these groups (such as NAAG) indicated strong support for our proposal; even the more liberal groups of state and local governments (such as the Conference of Mayors) told us that, at worst, they probably would not be able to take

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1/ Among the groups we met with are the National Association of Attorneys General, the National Institute of Municipal Law Officers, the United States Conference of Mayors, the National League of Cities, the National Federation of Independent Business, the Small Business Administration, the Alliance for Justice (an umbrella group representing a variety of environmental and civil rights interests), and Bill Coleman and Jack Greenberg of the NAACP Legal Defense Fund.

Attached is a memorandum (without attachments) from Jon Rose to me, dated October 27, 1983, which outlines in greater detail the matters discussed in this memorandum.

any formal position on the bill, although their individual members might oppose it. The small business interests were greatly concerned that the bill not affect the provisions of the Equal Access to Justice Act, and we have made many changes to meet their concerns. Similarly, we were told that the criminal defense bar would welcome the bill's doubling of Criminal Justice Act fee scales. However, not surprisingly, most representatives of environmental and civil rights "public interest" groups were opposed to the bill in any form and refused even to consider possible avenues of compromise. They expressed little or no interest in the criminal justice fee proposals.

From a political standpoint, therefore, it is probable that a serious fee reform bill would sharply divide Congress on ideological grounds. No significant action is likely during the rest of this session, except for the possible scheduling of hearings if the bill were introduced promptly. Next year, the bill would stand a reasonable chance of being favorably reported by the Senate Judiciary Committee, although the vote would be a close one and we would need the support of some liberal Republicans or moderate Democrats. In the House, the liberal composition of the House Judiciary Committee makes it exceedingly unlikely that our bill would clear even a subcommittee mark-up. Thus, like other controversial legislation, it is unlikely that the bill would be enacted into law.

We have also conducted some preliminary research into the amounts of attorneys' fees currently being paid by the United States under federal fee shifting statutes. Although it is very difficult, perhaps impossible, to come up with comprehensive figures, we have reviewed the GAO judgment fund disbursements, other Justice Department files, and reported cases. This preliminary review indicated that the annual cost to the federal government most likely does not exceed $10 million. Assuming that 75 percent of this total would be payable even with the $75 cap, it could be argued by our critics that the annual budgetary benefits of the bill are only $2-3 million. This figure does not include the substantially higher costs to state and local governments, but could be taken by many to indicate that there is no serious fiscal problem at the federal level.

This is not to say that the bill should not be proposed. Although our fee reform proposal has been characterized by our critics as an anti-environmental and anti-civil rights initiative, past leaks of drafts of the bill have already produced considerable media coverage of this issue. Thus, it is unlikely that our sponsorship of a fee reform bill will come as a surprise to anyone, and it is probable that the public could discount most of the adverse publicity that may accompany the introduction of a bill. Moreover, we will stand to receive a favorable reaction to a fee reform initiative from state and local officials and, perhaps, from the criminal defense bar.

Because it is unlikely that the bill will pass the current Congress, however, I think that any fee reform bill is better viewed as a public statement of administration policy than as a viable legislative initiative. As in the past, real progress in curtailing abuses in the award of attorneys' fees is likely to be gained through the Supreme Court, where we have enjoyed considerable success in recent years. 2/ An Administration fee reform bill will bring into the public eye many of the policies we have been espousing before the courts.

Because the decision whether or not to take this course at this point is primarily one of political timing for the White House, I would suggest a White House level meeting to resolve that one issue. Should you choose to have us submit legislation now, the Department is fully prepared to give it its strongest support.

cc: James A. Baker III
Chief of Staff and Assistant to the President

Nancy Risque
Special Assistant to the President

Joseph R. Wright
Deputy Director
Office of Management and Budget

Michael J. Horowitz
General Counsel
Office of Management and Budget

2/ In Ruckelshaus v. Sierra Club, we successfully argued to the Supreme Court that attorneys' fee awards were not available to plaintiffs who were not successful in a Clean Water Act case brought against the EPA. Likewise, in Hensley v. Echerhart, the Supreme Court held that attorneys' fees are not available to civil rights plaintiffs for work on issues upon which the plaintiffs did not prevail. In Blum v. Stenson, the Department is arguing (as amicus curiae) that the use of contingency multipliers is improper in civil rights cases and that non-profit legal aid societies should receive attorneys' fee awards calculated on the basis of their actual costs, and not on the basis of the market rates charged by private law firms. Finally, the Department is considering filing an amicus curiae brief in the D.C. Circuit in the case of Laffey v. Northwest Airlines, where the district court awarded very high attorneys' fees to plaintiffs' counsel, even though there existed a money judgment from which counsel could be paid under traditional common law theories.

U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

October 27, 1983

TO: Edward C. Schmults
Deputy Attorney General

FROM: Jonathan C. Rose
Assistant Attorney General
Office of Legal Policy

SUBJECT: Draft Attorneys' Fee Bill

This memorandum describes the terms of the current draft of the Attorneys' Fee Reform Bill, summarizes the informal contacts we have made with interested groups, points out the important changes we have made or could make in the bill in response to the concerns expressed to us, and describes some of the empirical evidence we have been able to gather regarding attorneys' fee awards against the government. I have attached at Tab 1 a memorandum I recommend that you send to Ed Meese, which sets forth some of the important policy considerations on this bill that must be weighed before the Administration seeks the introduction of the bill in Congress. Tab 2 is the Fact Sheet on the bill we have prepared, Tab 3 is the text of the proposed bill, and Tab 4 is the section analysis. Tab 5 includes information we have gathered regarding the amounts of attorneys' fees paid from the Judgment Fund in the past year.

It is essential that the final decision on this bill be made quickly, if the Administration expects to build support for the introduction of a bill. Unless a final decision to proceed with this legislative proposal is made promptly, there will be no real chance for legislative consideration before the spring of 1984. Even at this late date, it is difficult to foresee much legislative progress on the bill other than a hearing before the Senate Judiciary Subcommittee on the Constitution (Sen. Hatch) and perhaps a favorable subcommittee markup vote. If the Administration introduces a bill by the end of this month, or the beginning of November, we may be able to get a hearing date of Nov. 17. We are hopeful of getting several state attorneys general -- such as John Ashcroft of Missouri, Steve Clark of Arkansas, and Frank Bellotti of Massachusetts -- to testify on the bill to help build the proper record. However, unless we act promptly, it will be impossible to arrange for their appearances in time.

I. Summary of the Provisions of the Bill

The Fact Sheet attached at Tab 2 succinctly summarizes the provisions of the draft bill. As to criminal and habeas proceedings under the Criminal Justice Act, the bill would double the current hourly rates of $30 for in-court time and $20 for out-of-court time, and double the overall compensation limits per case. As to civil judicial and administrative proceedings, the bill would apply, notwithstanding any other provision of law, to all awards of attorneys' fees against the United States, or against states or local governments, pursuant to any federal fee-shifting statute.

The bill would limit the hourly rate awarded to $75 per hour, forbid the use of bonuses and multipliers, and set other minimum requirements for the award of such fees pursuant to any provision of law. The bill would limit awards of attorneys' fees to prevailing parties, following a standard developed in the Fifth Circuit that is somewhat more restrictive than the ambiguous language of the Supreme Court's decision in Hensley v. Eckerhart. It would provide for reduction of the attorneys' fee award in money judgment cases, and specify other discretionary factors to consider in determining the amount of attorneys' fees. The bill would apply to the Equal Access to Justice Act, but several exceptions would be made to preserve the current status of the EAJA (e.g., allowing adjustments to the $75 fee cap under the EAJA; no reduction of fee award in money judgment cases).

II. Informal Contacts With Interested Groups

As I advised you earlier, my staff, as have you and I, met with representatives of several groups, of varying viewpoints, to advise them informally of the contents of the draft bill, and to solicit their views on the policies underlying the bill itself and any suggestions they might have on specific aspects of the draft bill. These meetings have been coordinated with Rick Irby at OMB. We have permitted these groups to review the draft bill, and have given them the Fact Sheet on the bill as well. This process of consultation, now nearly completed, has produced several good suggestions for improvements, and has allowed us to refine some of the provisions of the bill.

A. National Association of Attorneys General (Ray Marvin and Lynn Ross)

Generally, NAAG is very supportive of the draft bill, more so perhaps than any other group. NAAG, and several of its members in particular, have publicly expressed great concern over what is perceived as a growing problem of excessive awards of attorneys' fees to parties litigating against the states and local governments.

In order to be able to make an effective case for the proposed bill in Congress, an effective presentation of the

problems now facing the states by NAAG and other such groups will be invaluable. If the bill is introduced, we will work with NAAG to prepare for the hearings on the bill. Ken Eikenberry, the Attorney General of Washington State, and his deputy Tom Carr have taken a considerable interest in attorney's fee reform. As explained above, others particularly interested in this subject are Missouri A.G. John Achcroft, Arkansas A.G. Steve Clark, and Massachusetts A.G. Francis Bellotti.

B. National Institute of Municipal Law Officers (Peter Meier and Joan Cayagil)

NIMLO is interested in the question of attorneys' fee reform, and supports the general purpose of the draft bill. However, NIMLO apparently does not take an active part in the legislative process in general, and does not plan any active steps to support legislative reform on attorneys' fees.

NIMLO's greatest concern is to achieve a substantive change in § 1983 itself, for two reasons: 1) the potential liability of localities for damage awards under § 1983 is much greater than their liability for attorneys' fees; and 2) the Supreme Court's Monell decision, which held that a state's violation of most federal statutory rights is cognizable as a civil rights violation under § 1983, arguably allows plaintiffs to couch a great number of complaints against localities as a civil rights action. NIMLO views the attorneys' fee issue as derivative to the problems with the substantive interpretation of § 1983.

C. United States Conference of Mayors (Steve Chappelle)

Chappelle's insights on the position of the Conference on attorneys' fee reform were very helpful. In his view, most of the members of the Conference (which represents the larger cities) would react negatively to a limitation on attorneys' fees in civil rights and environmental cases. Although the cities would frequently be the subject of those suits and accordingly liable for the attorneys' fees, the mayors themselves were more likely to be sympathetic to the interests of the plaintiffs. As a practical matter, though, he indicated that the topic of attorneys' fees is so controversial that it has not been able to come to the floor of the Conference in the past, and probably would not be able to do so in the future; thus, the Conference likely would be unable to take a formal position whatever the Department does. He cautioned, however, that the Conference might be able to reach a consensus if the reaction to the Department's bill is strongly negative. 1/

1/ We had hoped to schedule a meeting with Cynthia Pohl of the National League of Cities, which represents more the medium and

He suggested that the Department's bill would arouse much less passion if it could be written so as to exclude "core" civil rights matters from its provisions. He suggests including racial discrimination and other "strict scrutiny" cases within the definition of "core" civil rights, but excluding such matters as prisoners' rights or violations of statutory rights. Although this concept has some superficial appeal, it will likely be all but impossible to draw so precise a line. Moreover, it is far from clear that such a dividing line would be a good idea as a matter of policy, because it implies that the overcompensation of attorneys is acceptable as long as it is done in the name of a good cause -- "core" civil rights -- whether or not the putative clients receive any benefit.

He emphasized that the Conference would be much more likely to support the Department's bill in the context of anti-trust suits against cities, because of the great potential liability of cities under recent Supreme Court decisions.

D. National Federation of Independent Business (Sally Douglas)

NFIB is principally concerned that the bill not have any substantive impact upon the Equal Access to Justice Act, which was one of NFIB's highest legislative priorities to help the small businessman fight unjustified government regulation. On this matter, NFIB is taking its lead from the Small Business Administration's Chief Counsel for Advocacy, Frank Swain. We received SBA's views in the A-19 process, and also met twice with Chas. Cadwell of that office.

We have made some technical changes in the draft bill to assure that it does not adversely affect the EAJA. However, some of the NFIB and SBA concerns go to such fundamental matters as the determination of when a party has prevailed. NFIB and SBA strongly favor the Hensley formulation of the standard, 2/ and would oppose a tightening of that standard to require a showing

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smaller cities, but she was unable to keep several scheduled meetings. From prior contacts, however, we believe that the position of the NLC will not be much more favorable than that of the Conference of Mayors.

2/ In Hensley v. Eckerhart, 103 S. Ct. 1933, 1939 (1983), the Supreme Court described as a "typical formulation" the rule that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." (emphasis added). The Department's concern is that the last part of this test is indeed a "generous formulation" (id.) and will lend itself to excesses in the lower courts.

that the relief obtained was in fact significant. In their view, the EAJA was intended to allow small businessmen to obtain attorneys' fees to challenge unjustified agency actions, no matter how "significant" the ultimate result; in order to get attorneys' fees at all, the government's position must not have been substantially justified.

E. Alliance for Justice (Nan Aron and Others)

As we learned at the meeting, the very idea of reform in the area of attorneys' fees will meet the fervent opposition of the non-profit firms and legal services groups that now are supported by attorneys' fee awards under the present system. Although it is of course not surprising that those who benefit most from the current system should strongly oppose any change, the meeting did highlight the important considerations that we must take into account in deciding whether to proceed with the introduction of an attorney's fee bill. We are proceeding on fundamentally different premises in our bill than the Alliance for Justice representatives perceive under the present system.

1. The bill is intended to eliminate the abuses or excessive awards that have come to light by providing common minimum standards for the award of attorneys' fees. Their view is that the cases of excess are few, and that if anything the fee awards have been too low.

2. The bill sets a $75 per hour cap as a reasonable reflection of the actual cost of retaining attorneys. In their view, any fee cap is objectionable, because it will encourage the courts to award fees below the cap; moreover, they are intent on establishing the principle that plaintiffs' attorneys who bring civil rights or environmental suits should be paid the same rates as Covington & Burling or White & Case.

3. The bill allows fee awards only when the party prevails on the merits, and precludes the use of bonuses and multipliers. Their view is that the standard for prevailing on the merits is too strict and, even more important, that the use of bonuses and multipliers is essential to "tide them over" until they can collect the fee award at the end of the litigation and to help defray their expenses in cases in which they don't prevail. In their view, civil rights attorneys couldn't make a living if they only got paid for work on cases they won.

4. The premise of the bill is that awards of attorneys' fees are intended simply to enable aggrieved individuals to obtain competent legal counsel to vindicate their rights. Their view is that attorneys' fee awards are intended to support a civil rights plaintiffs' practice, and that the prospect of a huge award of attorneys' fees against the government intended to be a punitive measure to deter supposed violations of the law.

5. In view of this, the Alliance for Justice representatives made quite clear that they would regard any attorneys' fee bill -- and particularly this one -- as inherently hostile to the concept of civil rights and environmental enforcement.

Even though their view of the purpose and practice of the present fee-shifting statutes is not the correct one, 3/ the position of the Alliance for Justice is not one to be taken lightly.

F. NAACP Legal Defense Fund (William Coleman, Jack Greenberg, Elaine Jones)

The highly informative meeting with Bill Coleman and Jack Greenberg indicated that, in the abstract, an attorneys' fee reform bill might be drafted to meet some of the concerns of the civil rights/environmental public interest groups, but that the bill as drafted does not do so. They emphasized the weakness of the Department's factual case for the need for attorneys' fee reform, and the inability of the Department to determine what the government pays its own outside counsel. Their view is that, as drafted, the bill effectively would affect only the public interest attorneys, the one group that is not really receiving excessive attorneys fees at present, while leaving untouched the private sector attorneys' fees that are tax-deductible.

Mr. Greenberg indicated that the LDF presently receives approximately $1 million annually in court-awarded attorneys' fees, and that the average hourly rate is approximately $80-90. This figure includes the low awards of $40 and the higher awards of $110; the highest fee award to the LDF was $150 in a case in Dallas. Thus, the $75 fee cap would affect their position to a significant degree, particularly when the $75 hourly rate could be litigated down based on the factors stated in the bill. Moreover, the lack of a cost-of-living factor in the fee cap

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3/ The Alliance for Justice did point out one apparently valid objection to the language of the draft bill, with respect to the reduction of attorneys' fees by 25% of the money judgment. Under several IRS Revenue Rulings, nonprofit public interest law firms are not permitted to receive any fees from their clients, but are permitted to receive court-awarded attorneys' fees because these are awarded in the "public interest." See Rev. Ruls. 75-74, 75-75, and 75-76; and Rev. Proc. 75-13. The bill as drafted would reduce the award of attorneys' fees on the theory that the attorneys could obtain compensation from their clients, but this would not be possible for the non-profits. The bill has been revised to provide for a reduction of the judgment (not more than 25%) by the amount of the attorneys' fees awarded. Another alternative would be to exempt such non-profits from the 25% reduction, which is discussed below.

would make the $75 amount increasingly unreasonable over time, just as the CJA rates have been written into statute since 1970 and not amended.

Mr. Coleman also objected strongly to the 25% reduction in the case of a monetary judgment. First, the LDF's charter prohibits it from accepting part of any judgment awarded to a client as compensation, and, second, the types of monetary awards obtained by the LDF are frequently back-pay awards and other real monetary losses that do not include a "fudge factor" such as pain and suffering or treble damages from which to pay the attorneys' fees. Finally, he reiterated the purpose of Congress in authorizing the award of attorneys' fees to prevailing civil rights plaintiffs, that it is the government's responsibility to enforce civil rights and that "private attorneys general" who enforce this public responsibility should be paid from public funds for their services.

This meeting has made the need for a careful factual case in support of the attorneys' fee reform bill all the more apparent. Mr. Greenberg offered to canvass the other public interest groups to determine the amount of fees they have been awarded, and encouraged the Department to determine both the amount of fee awards and the amounts that the government is paying its own outside counsel in many cases, such as the proposed sale of Conrail. He also noted that in most cases in which the LDF brings suit against Southern cities, the defendants are represented by private counsel rather than city attorneys, and that states and localities regularly hire outside counsel for the going rates well in excess of $75.

III. Remaining Controversial Issues

We have made numerous technical changes in language of the draft bill in response to those informal contacts and to comments received in the A-19 clearance process. The points of significant dispute and the changes made are summarized as follows:

1. $75 Fee Cap. Several objections have been made that the $75 fee cap is too low in general and that it should allow for inflation as the Equal Access to Justice Act does. Of course, the $75 fee cap is a substantial increase over earlier versions of the bill. However, it does not precisely track the language of the EAJA, which the is intended to follow. It is probably inevitable that a cost of living adjustment, and perhaps a "special factor" provision as in the EAJA, will be added to the bill in the legislative process. We could either make the change before the bill is introduced, or offer that as an amendment during the legislative process. My recommendation is to leave these changes to the legislative process.

2. The definition of "prevailing on the merits" and "decision on the merits". As noted above, the small business interests are concerned about the definition of "prevail on the merits," out of fear that it would restrict the applicability of the EAJA in some cases where small businesses now get attorneys' fees. However, it would seem quite difficult either politically or legally to create a different standard of "prevail" for EAJA cases as opposed to other cases. The history of the EAJA indicated that it should have the same standard as for all other fee-shifting statutes; moreover, many groups other than small business use the EAJA and an easier standard for prevailing would only encourage further use of that Act.

In fact, we may not be that far apart from the small business groups. Our major concern in not simply adopting the Hensley standard is the inherent ambiguity of the statement that the party must merely achieve "some of the benefit" sought in the proceeding in order to be eligible for fees. This is subject to misinterpretation by the courts as a rather low standard. The bill, by contrast, would require that the party achieve "significant relief" with respect to the issues on which it prevailed. We recommend retaining this language in the bill as introduced.

3. 25% Reduction of Money Judgment. The Alliance for Justice and Bill Coleman have objected to the 25% reduction of the money judgment in cases where damages are awarded. The two principal objections are 1) that no reduction should be made where the award represents back pay or other direct pecuniary loss; and 2) that non-profit public interest groups are prevented by the Tax Code and their charters from receiving compensation from their clients even if they win.

Regarding the back pay issue, the bill has been changed to include a "hardship" exception for the court or administrative agency to apply. The other matter is not as easy to resolve. It would be possible to draft an exception to the 25% reduction in the case of a non-profit group that cannot receive fees from clients, but the effect would be to put these groups and their clients in an even better situation than others. This is a provision that can easily be negotiated once the legislative process begins. We recommend that this change not be made at this time, while reserving the right to consider the matter again once the bill is introduced.

4. Applicability of This Act to the EAJA. In light of the purposes of the bill to standardize fee-shifting practices, it is drafted to apply to attorneys' fee awards under the EAJA as well as all other fee-shifting statutes. However, the opposition of the EAJA supporters (small business) has dictated that several exceptions be made to accommodate current EAJA practice. Moreover, as explained above, there is continuing friction over the definition of

"prevail on the merits." We have considered the alternative of simply exempting the EAJA from the requirements of this Act -- which would have the advantages of avoiding the potential wrath of the small business community, particularly while the EAJA is now up for reauthorization. However, this is again a matter that can be negotiated during the legislative process, and we believe that it would be advantageous to go forward with a bill that is even-handed in the sense that it applies to all fee-shifting statutes against the government.

IV. Estimates of Cost of Fee-Shifting Statutes to the Federal Government

At your request, we have undertaken further research into the cost of federal fee-shifting statutes to the federal government (Tab 5). The gathering of this information is very difficult, because no records are kept of this information for the entire government.

Table I reflects information gleaned from cases reported in the Federal Attorneys' Fee Award Reporter or accessed through computer searches of court decisions. This table indicates the general range of attorneys' fee awards and hourly rates. These awards vary widely, with many above $75 per hour and others below. However, it represents only a small sample of all attorneys' fee awards because the bulk are negotiated and settled by the parties rather than determined by the courts.

Table II reflects information gathered from a manual review of the record of disbursements paid from the Judgment Fund maintained by GAO, the most complete source of information. 4/ This survey included attorneys' fees paid from this fund from July 1982 through September 1983, and indicates a total expense for attorneys' fees (including settlements) of $3,742,000 during that period.

These figures do not cover the entire federal government, because many agencies pay court judgments from their agency appropriations in some circumstances, plus the award of attorneys' fees in administrative proceedings. Knowledgeable officials within the Department and at OMB believe that the true total expenditure by the federal government is significantly

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4/ This study encompassed over fifty file drawers of materials which, according to Sharon Green, GAO's records custodian, represent more than 3,000 cases. In 154 cases, the federal government paid attorneys' fees under a fee-shifting statute, and in two cases, attorneys' fees were an undifferentiated portion of a lump sum settlement. Federal Tort Claims Act cases and other cases that did not involve fee-shifting statutes were excluded from this study.

greater than the disbursements from the judgment fund. However, as that is the most readily available source of information on the total cost to the government, we must expect many people to challenge the necessity of an attorneys' fee initiative in an area of such relatively small federal budget impact. Of course, in any event, these data do not reflect the amounts paid by state and local governments under § 1988 and other fee-shifting statutes.

This study did not provide adequate data for determining the prevailing hourly rates, because only 26 of the 156 cases studied indicated the hourly rates at which attorneys' fees were paid. 5/ The range of those 26 cases varied greatly, from a low of $14.50 per hour to a high of $270 (including a multiplier. Thirteen cases had an hourly rate at or below $75 per hour, while the other thirteen had higher rates.

These figures do not include judgments under the Equal Access to Justice Act, which would remain largely unaffected by the proposed bill. The courts awarded $1,717,084 in EAJA awards during the period from July 1982 through June 1983. 6/

According to a recent GAO report, the Department of Justice has paid out $350,000 in fiscal year 1981 and $505,000 in 1982 for outside counsel. 7/ This report listed only the total amount of the fee payments.

Attachments

5/ In a large number of these cases, the total amount of attorneys' fees was stipulated or settled by the parties without mention of hourly rates.

6/ Report by the Director of the Administrative Office of the U.S. Courts on Requests for Fees and Expenses under the EAJA (Sept. 23, 1983). A single award of attorneys' fees against HUD amounted to $1,129,000, almost two-thirds of the entire total.

7/ GAO, Report on Justice Expenditures for Private Counsel and Judicial Fee Awards in Antitrust and Securities Cases (GAO/GGD Oct. 7, 1983).

DOJ memos

Office of the Attorney General
Washington, D. C. 20530

September 12, 1983

MEMORANDUM

TO : Jim Cicconi

FROM : Tex Lezar

Attached is a memorandum I received concerning our immigration reform legislation and the safeguards it contains to prevent discrimination. I thought you might find it interesting.

U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

September 12, 1983

MEMORANDUM TO: Tex Lezar
Special Counsel to the
Attorney General

FROM: Phillip D. Brady
Associate Deputy Attorney General

Pursuant to your request, please find below the principal responses to the assertion made by some Hispanic organizations that the pending immigration reform legislation (Simpson/ Mazzoli) will result in an increase in employment discrimination against those who "look or sound foreign."

1. The immigration reform legislation (S. 529 and H.R. 1510) directly addresses the concern that discrimination will result from employer sanctions:

   a. The Senate-passed bill and the version of the House bill supported by the Administration provide that the employment eligibility verification procedure applies to all new hires. The employer is not permitted to screen the "foreign-appearing" or non-citizens, nor can he require that some individuals submit to a heavier documentation burden. This uniform verification procedure is specifically designed to eliminate any incentive for an employer to discriminate.

   b. The employer is only obliged to make a "good faith" effort to examine the alternative forms of documentation. The responsibility for judging the authenticity of documentation rests with the government in post-hiring audits.

   c. Both bills require specific monitoring and reporting requirements relative to discrimination.

      1) the Senate bill requires a comprehensive review by the Comptroller General annually for 5 years. Congressional hearings and recommendations for remedial action, if

necessary, are required no later than 60 days after the GAO report is received. The President is also required to submit reports on this same subject eighteen, thirty-six and fifty-four months after enactment.

2) The House bill provides for similar monitoring and reporting by both the President and the Civil Rights Commission, the former every six months, the latter every 18 months. Further, the Attorney General together with the Chairman of the EEOC and the Secretary of Labor are to establish a task force to monitor implementation and investigate complaints of employment discrimination.

2. Employers who engage in discriminatory employment practices will be subject to prosecution.

a. The Civil Rights Division of D.O.J. has concluded that an employer would not be able to defend a Title VII employment discrimination action on the grounds that the challenged practice was necessary to avoid violating the employer sanctions provisions of the Immigration and Nationality Act.

b. Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) makes it illegal to refuse to hire because of an individual's national origin or race. This is supplemented by the Executive Orders (#11246, 11478, 12086) which give the Department of Labor jurisdiction to investigate allegations of discrimination by businesses which contract with the Federal government.

c. Individuals are also entitled to seek relief under 42 U.S.C. 1981, which creates a private right of action for discrimination in employment, regardless of the size of the employer. (42 U.S.C. 2000e et seq. only permits jurisdiction over employers of 15 or more.)

d. Finally, many states and localities have statutes prohibiting employment discrimination.

3. The legislation could actually serve to lessen discrimination and exploitation already existing with regard to employment.

a. Discrimination currently exists where employers knowingly hire "more malleable" illegal aliens in

preference to American citizens and permanent resident aliens. Other employers in an effort to prevent illegal aliens from being hired either summarily reject "foreign appearing" applicants or require all non-citizens to submit to unreasonable documentation checks. These forms of employment discrimination will be rectified by the legislation which requires a single uniform procedure for establishing the employment eligibility of all new hires.

b. Many illegal aliens face exploitation at the hands of employers who know they will not complain or demand their rights under existing wage and labor standard laws because of fear of deportation.

c. Permitting continued high levels of illegal immigration is itself inhumane and discriminatory. It discriminates against American minorities and the young, some of whom are displaced from their jobs by illegal aliens. It also results in discrimination against those who follow legal procedures by applying to our consulates abroad and await their turn at home, often for years, to immigrate here legally.

4. Finally, the legalization provisions in S. 529 and H.R. 1510 have been included in large measure to bring illegal aliens with long-term residence out of the shadows, so they can and will avail themselves of the protections of our law and fully participate in our society.

In summary, the immigration reform legislation currently before the Congress is carefully crafted to permit us to regain control of our borders in a non-discriminatory manner while at the same time creating a mechanism for legalizing those illegal aliens who have demonstrated a commitment to this country as long-term continuous residence as self-sufficient, contributing members of their communities. It is notable that a majority of the Hispanic community appears to support those goals. Attached is a summary of an August 1983 national poll on the attitudes of Hispanic and black Americans on U.S. immigration issues. Pollsters Peter Hart and Lance Tarrance found that by a margin of 60% to 33% Hispanics support adoption of employer sanctions against employers who hire illegal aliens and 74% of those polled support legalization.

Don't hesitate to ask if I can provide additional information on this important subject.

EXECUTIVE SUMMARY

HISPANIC AND BLACK ATTITUDES TOWARD IMMIGRATION POLICY

A NATIONWIDE SURVEY CONDUCTED FOR
FEDERATION FOR AMERICAN IMMIGRATION REFORM

June-July 1983

V. Lance Tarrance & Associates
Houston, Texas

Peter D. Hart Research Associates
Washington, D.C.

Introduction

This executive summary presents the key findings of a survey conducted jointly by V. Lance Tarrance & Associates and Peter D. Hart Research Associates, Inc., on behalf of the Federation for American Immigration Reform. The study was designed to examine attitudes toward U.S. immigration policy among representative national samples of Hispanic and black respondents.

The interviews for this survey were conducted by telephone between June 24 and July 12, 1983, using the phone bank facilities and professional field staff of V. Lance Tarrance & Associates. The data are based on completed interviews with scientifically selected random samples of 800 Hispanic respondents and 800 black respondents. The sample of Hispanics includes 266 respondents who were interviewed wholly or partly in Spanish. Among the Hispanic respondents, 76% report that they are currently U.S. citizens and 24% report that they are not U.S. citizens. An Appendix fully describes the sampling procedures and other methodological aspects of the study.

The contents of this executive summary include: (1) a narrative presentation of the major highlights from the survey findings, (2) a copy of the questionnaire, including tabulations of the results for all black respondents, all Hispanic respondents, Hispanic citizens, and Hispanic non-citizens, and (3) the Appendix referred to above.

SURVEY HIGHLIGHTS

- Majorities of both Hispanics and blacks rate the issue of immigration as having above average importance as a matter for the government's attention.

- Both with regard to legal and illegal immigration, substantial portions of the Hispanic and black communities perceive a need for change in American immigration policies--with pluralities or majorities of respondents emphasizing the need to put greater controls on immigration.

- Substantial majorities of both Hispanics and blacks favor proposals to curb illegal immigration by having penalties and fines for employers who hire illegal immigrants, and by making major increases in the amount of money the federal government spends on patrolling the borders to stop illegal immigrants from entering the country.

- Hispanics tend to be strongly sympathetic to the idea of an amnesty program for illegal immigrants who have been in the country for a certain period of time; a majority of blacks also support this idea, but with less intensity. When asked to volunteer how long an illegal immigrant should have been in the country to qualify for amnesty, 28% of Hispanics mention a period of four years or less, 32% suggest five years, 29% volunteer a period of more than five years, and 5% stress their opposition to any sort of amnesty. Among blacks, 21% mention a residency requirement of four years or less, 27% specify five years, 34% mention a period of more than five years, and 10% say no illegal immigrant should be granted amnesty.

- Pluralities of Hispanics and majorities of blacks believe that the U.S. should admit fewer immigrants into the country legally than has been the case in recent years.

- Substantial majorities of Hispanics and blacks believe that illegal immigration hurts the job situation for American workers by taking away jobs that Americans might fill. Sixty-nine percent of all blacks say this is a major problem, as do 51% of Hispanics who are U.S. citizens.

- There is no clear consensus among Hispanics or blacks with regard to the argument that restricting illegal immigration would be harmful to the economy because illegal immigrants work at low-paying jobs that would not otherwise get done.

- Throughout the survey results, there are substantial differences in attitudes toward immigration policy between Hispanics who are U.S. citizens and those who are non-citizens--with Hispanic citizens significantly more likely to favor restrictions on immigration.

- Low-income blacks are particularly likely to feel an economic threat from illegal immigration.

SUMMARY OF MAJOR FINDINGS

Concern with the Immigration Issue

1. Among both Hispanics and blacks, there is a broad degree of concern with the issue of immigration. This is particularly true among Hispanics, 72% of whom rank immigration as having above average importance among the range of issues with which government deals--including 31% who say immigration is one of the most important issues facing government and 41% who rank it as very important. Among blacks, 57% assign above average priority to the issue of immigration.

2. There is a widespread perception that illegal immigrants hurt the job situation for American workers by taking away jobs that Americans might take. Fully 82% of all blacks say that illegal immigrants hurt the job situation for Americans. Sixty-nine percent of all blacks believe that this situation is a major problem. Blacks with incomes under $10,000 are particularly likely to feel that job losses caused by illegal immigration are a major problem (76%). Among Hispanics, a 58% majority believe that illegal immigrants take jobs away from Americans who might want them, and 46% of all Hispanics consider this to be a problem of major proportions. Fifty-one percent of Hispanics who are U.S. citizens consider the impact of illegal immigration on American employment to be a problem of major proportions, compared to 28% among non-citizen Hispanics.

3. The large majority of blacks (71%) believe that illegal immigrants cause general pay rates and wages in America to be lower than they otherwise would be, and six-out-of-ten blacks term the impact of illegal immigration on wage rates a major problem. Attitudes among Hispanics on this question are somewhat more divided--52% say that illegal immigrants undermine American wage rates, while 40% do not believe this is the case. Among Hispanics who are U.S. citizens, 55% say illegal immigrants undercut wage rates in the country, including 43% who deem this to be a major problem. Among non-citizen Hispanics, 42% say that illegal immigrants undercut wages and the issue is considered to be a major problem by 26%.

4. Attitudes among both Hispanics and blacks are divided with regard to the assertion that restricting illegal immigration would be harmful to the economy because low-wage jobs now done by illegal immigrants would not get done or employers would be forced to pay higher wages. Among Hispanics, 51% agree and 40% disagree. Among blacks, 48% agree and 44% disagree.

The Basic Direction of Immigration Policy

Both with regard to legal and illegal immigration, substantial portions of the Hispanic and black communities perceive a need for change in American immigration policies--with pluralities or majorities of respondents emphasizing the need to put greater controls on immigration.

1. On the subject of legal immigration, 46% of Hispanics say that the U.S. should admit fewer immigrants legally than has been the case over the past decade (the question cited 450,000 as the annual average over the past decade), 27% feel the recent levels of immigration are about right, and only 15% say the U.S. should increase the number of legal immigrants admitted to the country. Among Hispanics who are U.S. citizens, 50% believe fewer legal immigrants should be admitted than has been the case in the recent past, 12% prefer higher quotas, and 26% are satisfied with current levels. Among non-citizen Hispanics, 30% would prefer less legal immigration, 25% say more legal immigration should be allowed, and 28% endorse the status quo. When asked specifically about legal immigration from Mexico in a question that cited the 1980 level of 56,000, Hispanics are somewhat less agreed on the need for reductions (14% allow more, 37% allow fewer, 40% about right). There is a broad consensus among blacks in support of reducing legal immigration generally: fully 65% say the U.S. should admit fewer legal immigrants than it has under recent practices, including 45% who say the number of legal immigrants should be a lot less.

2. On the subject of illegal immigration, a substantial plurality of Hispanics and a large majority of blacks say our current laws need to be changed to be tougher and more restrictive of illegal immigration and illegal aliens. Among blacks, fully 70% favor changing current laws to be tougher on illegal immigration, 16% say the current laws are about right, and just 8% feel the laws should be changed to be made less restrictive. Among Hispanics, 47% favor tougher laws, 22% support the status quo, and 15% favor moving toward less restrictions; 16% are unsure. Again, the difference in attitudes between Hispanics who are U.S. citizens and those who are non-citizens is substantial: 55% of Hispanic citizens favor tougher laws to deal with illegal immigration, compared to 23% among Hispanic non-citizens. Among both blacks and Hispanics, attitudes toward the basic direction of U.S. policy on illegal immigration hold relatively stable after respondents are given arguments both for (protecting American jobs and wages, put the needs of Americans first) and against ("nation of immigrants" tradition, difficulty of enforcement, potential for discrimination) tough restrictions on illegal immigration. After hearing the pro and con statements, Hispanics favor tough restrictions on illegal immigration by a margin of 57% to 32%; blacks favor tough restrictions by a 71%-to-19% margin. (See attached questionnaire for wording of statements.)

Reaction to Specific Policy Proposals

Substantial majorities of both Hispanics and blacks favor proposals to curb illegal immigration by having penalties and fines for employers who hire illegal immigrants and making major increases in the amount of money the federal government spends on patrolling the borders to stop illegal immigrants from entering the country. At the same time, Hispanics tend to be strongly sympathetic to the idea of an amnesty program for illegal immigrants who have been in the country for a certain period of time; a majority of blacks also support this idea, but with less intensity. When respondents volunteer what they believe would be an appropriate amount of time an illegal immigrant should have been in the U.S. in order to qualify for amnesty, the median response among Hispanics is 4.7, while the median response among blacks is somewhat higher than five years.

1. By a margin of 60% to 33%, Hispanics support adopting legal sanctions against employers who hire illegal immigrants. Among Hispanic citizens, 66% favor these employer sanctions--including 53% who strongly support them. Hispanic non-citizens oppose employer sanctions by a margin of 55% to 38%. Blacks favor penalizing employers who hire illegal immigrants by a margin of 66% to 27%, with 56% strongly supporting employer sanctions.

2. Stepped-up spending on tougher border enforcement is supported by all Hispanics by a margin of 61% to 30%, with 47% saying they feel strongly about their support for greater efforts to patrol the borders. Among blacks, fully 69% favor major increases in funding for border patrols (including 55% who strongly favor this).

3. When asked how they feel about the idea of establishing "some sort of amnesty or legalization program that would allow illegal immigrants or undocumented workers who have been in the U.S. for a certain period of time to remain here legally," 74% of all Hispanics say they favor this idea, with 57% who say they favor it strongly; 19% oppose the plan. Blacks favor the concept of amnesty by a margin of 57% to 34%--including 38% who are strongly supportive; 29% are strongly opposed. When asked in a subsequent question to volunteer how long an illegal immigrant should have been in the country to qualify for amnesty, 28% of Hispanics mention a period of four years or less, 32% suggest five years, 29% volunteer a period of more than five years, and 5% stress their opposition to any sort of amnesty. Among blacks, 21% mention a residency requirement of four years or less, 27% specify five years, 34% mention a period of more than five years, and 10% say no illegal immigrant should be granted amnesty.

4. Finally, respondents were asked for their reaction to the provision of certain tax-funded services to illegal immigrants, with the following results:

- Hispanics broadly support the idea of having the government provide free public education to the children of illegal immigrants (71% favor, 25% oppose); blacks are also favorable to this idea, but by a somewhat smaller margin (55% favor, 40% oppose).

- Majorities of both Hispanics (57% oppose, 36% favor) and blacks (60% oppose, 36% favor) reject the idea of allowing illegal immigrants to receive welfare such as AFDC and Food Stamps. Among Hispanic citizens, 63% oppose permitting illegal immigrants to participate in these welfare programs, including 53% who are in strong opposition.

- With regard to Medicaid, Hispanics favor allowing illegal immigrants to receive benefits by a margin of 52% to 41%, while opinions among blacks are slightly more divided (50% favor, 44% oppose).

DOJ memo

U.S. Department of Justice

Cicconi

Washington, D.C. 20530
July 21, 1983

MEMORANDUM TO: Edwin Meese
Counselor to the President

James A. Baker
Chief of Staff and Assistant to the President

Michael K. Deaver
Deputy Chief of Staff and Assistant to the President

FROM: William French Smith WFS
Attorney General

SUBJECT: Announcement of the President's Commission on Organized Crime

As you know, the President is scheduled to announce the membership of his Commission on Organized Crime in a Rose Garden event next Thursday, July 28. I recommend the following steps to ensure maximum attention for the announcement:

1) On Tuesday July 26, the President should telephone Judge Irving Kaufman to offer him the Chairmanship officially. Proposed talking points are attached.

2) On Wednesday July 27 -- one day before the Rose Garden ceremony -- the White House should formally announce that Judge Kaufman will be the Chairman of the President's Commission on Organized Crime and release the Executive Order creating the Commission. The announcement could also indicate that the President will the next day be meeting with and announcing the other members of the Commission.

3) On Thursday, July 28, the President should meet with the Commission members in the Oval Office and then take them out to the Rose Garden to introduce them. Preferably, the President would meet first with Judge Kaufman for a few minutes and then be joined by the rest of the Commission members (plus the Executive Director, if chosen by then). In the Rose Garden, the President could make a few remarks about the importance of the Commission and its distinguished membership. I understand that Tony Dolan, who has worked with us on this Commission since the inception

of the idea, is preparing the President's remarks. Judge Kaufman could then respond with a few remarks lauding the President for setting up the Commission. The ceremony should take no more than twenty minutes. You might also want to invite as attendees some distinguished outsiders historically identified with the fight against organized crime -- such as former Attorney General Brownell, Mrs. Ethel Kennedy, and the family of Don Bolles (the reporter whose murder while investigating organized crime shocked the Nation).

Following these events at the White House, we envision having the Commission members attend a luncheon at the Justice Department followed by a press conference, which we will coordinate in advance with Dave Gergen and Larry Speakes.

cc: David R. Gergen
Craig L. Fuller
John Herrington

Proposed Talking Points for the President's Call to Judge Kaufman

1. As you know, I have proposed the creation of a Commission on Organized Crime to highlight and combat the social threat posed by organized crime.

2. A wide consensus of experts in the area -- both inside and outside the Administration -- believes that you are the perfect choice to serve as Chairman of the Commission.

3. I agree with them. I know of your great interest and experience in the area -- particularly since the Appalachian trial when you spoke of the tremendous menace organized crime poses for our Nation.

4. I therefore want to ask you formally to serve as the Chairman of this Presidential Commission and to help us to destroy organized crime.

5. You've already had one of the most distinguished careers in the American judiciary. As a result, I'm especially grateful that you'd be willing to make yet another sacrifice and provide this tremendous new service to the country.

6. I guess the only other thing to add is for you to go to it with all of your well-known vigor and to work with the Attorney General and the rest of us to remove this blight upon America.

7. I look forward to seeing you and thanking you in person this Thursday when we announce the Commission members here at the White House.

DOJ memo

U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

June 15, 1983

TO: James Cicconi
Special Assistant to the President

Michael J. Horowitz
Counsel to the Director
Office of Management and Budget

Fred F. Fielding
Counsel to the President

FROM: Jonathan C. Rose JCR
Assistant Attorney General

SUBJECT: "Fee Cap" issue for the CCLP

Attached is the Attorney General's memorandum on the "Fee Cap" issue for the CCLP meeting tentatively scheduled for June 20.

Office of the Attorney General
Washington, D. C. 20530

MEMORANDUM TO: The Cabinet Council on Legal Policy

FROM: William French Smith
Attorney General

SUBJECT: Attorneys' Fee Cap Legislation

The Cabinet Council on Legal Policy must decide whether the Administration should propose legislation to limit awards of attorneys' fees against federal, state, or local governments under federal law and, if so, what kind of "fee cap" should be proposed.

I. BACKGROUND

Currently, there are over 120 federal statutes that permit courts to award attorneys' fees to private parties who prevail against the federal government in litigation. In addition, federal civil rights laws allow federal courts to assess attorneys' fees against state and local governments in favor of prevailing plaintiffs. Despite the number and breadth of these fee-shifting statutes, only the Equal Access to Justice Act provides any guidance to the courts as to how "reasonable attorneys' fees" are to be calculated. In provisions of the Equal Access to Justice Act, passed in 1980, Congress imposed a maximum hourly rate of $75 an hour.

Under all other "fee-shifting" statutes, courts have been free to set compensation rates according to their own perception of the local market rates, the quality of the attorney's work, and the risk factors incurred by the attorney in undertaking representation. Though the formulas have varied considerably, courts have often allowed hourly compensation levels between $100 and $200 and have adjusted even these high hourly rates upward by "multipliers" or bonus factors to reflect exceptional performance or contingency/risk factors. In some cases, this has resulted in exceedingly high hourly attorneys' fee awards: by applying multipliers some courts have awarded fees in the range of $300-$400 per hour. Excessive attorneys' fee awards are a matter of considerable concern not only to the federal government, but also to state and local governments who have been forced to pay large attorneys' fee awards to plaintiffs under federal civil rights statutes.

II. LEGISLATIVE PROPOSALS

The Office of Management and Budget has drafted legislation to "cap" allowable attorneys' fees at reasonable hourly rates. Drafts of this legislation have been discussed informally within the Administration and with Congress over the past year, but no Administration bill has been sent to Congress. OMB's current draft bill includes provisions which would: (1) set the cap for attorneys' fees charged against the government at the average hourly pay level for senior government litigators (GS-15, step 5) plus an additional 50% of this rate for overhead (for a total rate of about $53 per hour); (2) limit the hourly compensation paid for attorneys who are salaried employees of a litigant to their hourly salary rate plus an overhead factor; and (3) impose the same limits on attorneys' fees assessed against state and local governments.

Proposals to "cap" attorneys' fee awards against the federal government, and state and local governments under civil rights statutes, have generated considerable controversy and opposition from civil rights and "public interest" groups over the past year. Attorneys' fee cap proposals are thought by public interest litigating organizations to strike at a vital source of their financial support. Accordingly, these groups have characterized fee cap proposals as "anti-civil rights" or "anti-environmental" proposals meant to "defund" public interest litigators. A proposal introduced last year to limit attorneys' fees assessed against state and local governments under federal civil rights statutes (by eliminating multipliers and bonuses) had no success in Congress -- even though it was supported strongly by the National Association of Attorneys General -- because it was successfully characterized by its opponents as "anti-civil rights" legislation.

The Department of Justice agrees with OMB that there is a real need for statutory guidance to the courts in this area. However, there appears to be little, if any, realistic chance that the Congress will pass a bill in this field in this session. In fact, the chances for any consideration of the bill by this Congress are questionable. The bill would be referred to the judiciary committees of both Houses, with a possible joint or sequential referral to either of the governmental operations committees. Prospects of consideration are particularly bleak with respect to the House Judiciary Committee.

For these reasons, the Department of Justice believes that the bill should be approached, not as an entry into a negotiation, but rather as a statement of the Administration's position. Thus, we would hope that our version does not unnecessarily open us up to attack, particularly by civil rights and environmental groups, as being obviously unreasonable. It is in this spirit that our two options are put forward. Indeed, perhaps the CCLP will wish to consider the question of whether the timing of this bill makes sense for the Administration at this point in the congressional cycle.

III. AREAS OF DISAGREEMENT BETWEEN DOJ AND OMB

If CCLP decides to recommend introducing an Administration bill, two questions concerning the specific content of the bill must be decided: (1) whether the fee cap should be tied to a government scale pay rate or simply set at the Equal Access to Justice Act rate of $75, and (2) whether hourly compensation to salaried attorneys should be limited to their hourly rate plus an overhead factor.

A. Issue 1 - Fee Cap Level

OMB has proposed setting the cap at the average level for senior government litigators (GS 15, step 5) plus 50% for overhead. This would amount to about $53 per hour. OMB believes that the fee cap should be tied to a government pay rate because many fee-shifting statutes are premised on the theory that people who sue the government for public benefit purposes are acting as "private attorneys general" and that compensation should, therefore, be consistent with rates paid to public attorneys. If $53 is deemed insufficient, OMB would, alternatively, propose that the legislation allow an additional 20% profit factor to raise the rate to about $64.

The Department of Justice proposes using the $75 per hour level that has recently been endorsed by the Congress in the Equal Access to Justice Act.

OMB Argues:

- It is a better strategy to start with a lower figure to leave room for negotiating on the Hill.
- The $53 figure has a rational basis (tied to government salaries), whereas $75 used by Congress in the Equal Access to Justice Act is somewhat arbitrary. Its use may make it more difficult to hold the line against increases in the future.
- The Equal Access to Justice Act is not a good analogue because it has a higher threshhold requirement for obtaining a fee award. Under that statute, awards are precluded even where the government loses the case if the government's action is "substantially justified."

DOJ Argues:

- The $75 figure is more defensible than the OMB formula because it has been endorsed recently by Congress in the Equal Access to Justice Act and because it makes allowance for contingency or risk factors (arising from the fact that fee awards are available only to prevailing parties) above and beyond an attorney's salary and overhead expenses.

- We should not approach the Congress with a low "negotiating position," because the House of Representatives will not give serious consideration to such a proposal and will refuse to negotiate on the bill.

- The primary purpose of this legislation is to eliminate the use of bonuses and multipliers. Unless the fee cap is set at a level which seems reasonable and includes an allowance for contingency factors above the government pay rate, Congress may be induced to add an amendment authorizing judges to use multipliers and bonuses.

- The "fee cap" found in the Equal Access to Justice Act provides a good analogue for setting a broader, general fee cap. Even though attorneys' fees are allowed under the Equal Access to Justice Act only where the government's position is "substantially unjustified," the calculation of the fee award is meant to be compensatory, not punitive. Congress did not intend that fees should be greater under EAJA than other statutes, but imposed a $75 cap as its judgment of the proper limit for reasonable attorneys' fees in the broad range of cases to which EAJA applies.

B. Issue No. 2 -- Salaried Attorneys

OMB has proposed that, where litigants use in-house attorneys and the $53 fee cap level is "significantly greater" than the litigant's actual attorneys' fee costs, fee awards should be limited to the actual costs, with an allowance for overhead. This limitation would apply to organizations in proceedings under the Equal Access to Justice Act. The rationale for this proposal is that attorneys' fee awards should be related to actual costs and should not confer a windfall on litigants. This limitation would have a significant impact on public interest organizations -- who often litigate with low-paid staff attorneys -- and could be criticized as an effort to defund public interest litigators.

If it is deemed advisable to mitigate such criticism, OMB would, alternatively, allow an additional 20% factor for profit, and expand the coverage of the provision to include all salaried attorneys, including associates in law firms. If the limitation were applied to all salaried attorneys, it could not be criticized as aimed primarily at public interest litigators.

The Department of Justice believes that neither version of this limitation should be included.

OMB Argues:

- Such a limitation in one or the other formulation is necessary to avoid windfalls to organizations using salaried attorneys.

DOJ Argues:

1. With respect to the first version applying only against in-house counsel of a litigant:

- The limitation would appear to bear most heavily on public interest groups and thus generate excessive controversy.

- Organizations with staff attorneys could often circumvent the limitation by restructuring their participation relationships with counsel in litigation. For instance, a public interest organization could avoid this provision by determining not to appear itself as a party litigant represented by its own attorneys but to represent another party with its attorneys.

2. With respect to the second version of this limitation applied to all salaried attorneys:

- Expansion of the limitation to salaried law firm attorneys could fail to silence the objections of public interest organizations while increasing the objections of private law firms.

- The limitation might draw strong opposition from the small business interests that the Equal Access to Justice Act was enacted to protect.

- The limitation, focusing on the hourly rates of private attorneys, could generate litigation over what the hourly rate of an individual attorney is (when benefits are calculated) and what constitutes an amount "significantly in excess" of that rate.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

3:30

MEMORANDUM

June 16, 1983

To: Dick Hauser
Bob Kabel

From: Mike Horowitz MH

Justice's memo on the attorney's fee bill is disappointing.

Their underlying view is set forth at page 2: they think the bill has no chance, that it will unduly alienate the "public interest" movement, that at most we ought to make a "statement" of our position and thereafter do little, and that, "[i]ndeed, perhaps [it] .. makes [no] sense for the Administration [to send up a bill] at this point in the congressional cycle."

We can of course convert dire predictions into self-fulfilling prophecies. But the Justice position is particularly upsetting in light of the following:

- It is our delays (and if leaked, the Attorney General's memo) that will create doubt as to the Administration's commitment and intentions. Hatch may be very angry at the most recent delays. (As you know, the Hatch June 16 hearing was postponed and now that the CCLP meeting is set for the 20th there is some doubt that we can be ready for the 27th-28th hearings.) And, the longer we delay, the more we permit unopposed lobbying -- Tommy Boggs now represents the public interest movement's Alliance for Justice in opposing any bill.

- Commitments were made to various State AG's that we would support a fee cap bill.

- OMB's readings on the Hill suggest the real possibility of Senate action. Hatch's staff estimates a clearly favorable majority in his subcommittee and a close and winnable vote in the full Judiciary Committee.

- Our proposal for substantial fee increases for Criminal Justice Act representations converts the bill from a fee cap into a fee reform bill. This should result in significant support within the legal community. (Given the pressure for CJA fee increases, the draft bill's chances will be materially improved; without our bill, CJA increases might pass this session and thereby lose critical leverage we now have to cap civil fees.)

- The bill has the support not only of a bipartisan coalition of Attorneys General, but also from the business and conservative communities. Press comments to date have been reasonably good.

- Not incidentally, the bill represents good and important public policy. If the Reagan Administration can't clear a slimmed-down and ultimately quite modest fee reform bill, who in heaven's name ever will?

State and local governments are being increasingly hit with adverse million dollar legal fee awards. Not only the "public interest" movement but, more alarmingly, the entire legal profession is becoming increasingly dependent on fees generated by an open-ended "private Attorney General" role that is authorized under more than 100 statutes. Thus far, and with continued careful management, our reform bill can be seen as an attack on the notion that justice is a function of how much we subsidize lawyers in civil actions -- while at the same time emphasizing our belief that people accused of crimes should receive adequate representation.

I hope that the CCLP meeting can result in clearance and commitment for a fee reform bill.