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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

October 21, 1981

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Mr. Stephen L. Babcock
Executive Director, Administrative
Conference of the United States
2120 L Street, N.W.
Suite 500
Washington, D.C. 20037

Dear Mr. Babcock:

We have received a copy of your August 28, 1981, letter addressed to Mr. Judd Kutcher, Administrative Office of the United States Courts, concerning the effect of section 207 of the Equal Access to Justice Act. The question you raise is whether section 207 will bar the use of the permanent judgment appropriation, 31 U.S.C. § 724a, for the payment of court costs which were already authorized before enactment of the Equal Access to Justice Act. While no one has yet requested a formal decision on the point, the issue is certainly one we will have to consider. Our preliminary view is that section 207 should not affect the payment of awards authorized by pre-existing statutes.

The problem may be outlined as follows:

(1) Prior to the Equal Access to Justice Act, 28 U.S.C. § 2412 authorized courts to award costs against the United States, as enumerated in 28 U.S.C. § 1920, but not including attorney's fees. Costs awarded under 28 U.S.C. § 2412 are to be paid "as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States" -- that is, they are paid, upon certification by the General Accounting Office, from the permanent appropriation for judgments contained in 31 U.S.C. § 724a.

(2) The Equal Access to Justice Act, Title II of Public Law 96-481, was enacted on October 21, 1980, and became effective on October 1, 1981. Its purpose is to authorize the awarding of attorney's fees and expenses in a variety of situations, both administrative and judicial, where such awards had been previously unauthorized under the so-called "American rule." The new law dealt with judicial awards by amending 28 U.S.C. § 2412. The amended version re-enacted the existing provisions dealing with court costs, and added new sections to cover attorney's fees.

(3) Section 207 of the Act provides:

"The payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act is effective only to the extent and in such amounts as are provided in advance in appropriations Acts."

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We discussed the effect of section 207 in letters to the Speaker of the House of Representatives and the President of the Senate (B-40342, December 17, 1980) and in a letter to your office (B-40342.1, May 15, 1981). It clearly prohibits use of the judgment appropriation unless and until Congress makes a specific appropriation for that purpose (which to our knowledge it has not done) or addresses the problem by other legislative action.

(4) Since the Equal Access to Justice Act re-enacted the existing provisions of 28 U.S.C. § 2412 (sections 2412(a) and (c)(1) in the new law), it can be argued that the phrase "as provided in this Act" in section 207 applies to all of section 2412, including the pre-existing portions. Under this interpretation, the judgment appropriation would no longer be automatically available for court costs.

Our review of the statute and its legislative history suggests to us that this was not the intent of section 207 and that it should not be construed in this manner. The entire legislative history of section 207 is found in the Congressional Record for October 1, 1980, pages H-10213 through H-10218. Since we expect the effect of section 207 to be a recurring question, we will outline this legislative history in some detail. Page references are to the daily edition of the Congressional Record for October 1, 1980.

The conference report on H.R. 5612, which became Pub. L. No. 96-481, was issued on September 30, 1980 (H.R. Rep. No. 96-1434). The conference version of Title II (Equal Access to Justice Act) was identical to the version enacted into law except that it did not include section 207.

The House of Representatives took up its debate on the conference report on October 1, 1980. Representative Danielson raised a point of order, charging that the payment provisions of Title II constituted "an appropriation on a legislative bill, in violation of clause 2 of rule XX of the rules of the House of Representatives." (H-10214) The cited rule prohibits House conferees from agreeing to such a provision without prior authority of the House.

The Chair summarized the provisions in question and then stated:

"Thus the provision in the Senate amendment contained in the conference report extends the purposes to which an existing permanent appropriation [31 U.S.C. § 724a] may be put and allows the withdrawal directly from the Treasury, without approval in advance by appropriation acts, of funds to carry out the provisions of title II of the Senate amendment." (H-10214)

Accordingly, for the specific reason that the bill would have expanded the availability of the judgment appropriation, the Chair sustained the point of order. Thus, at this point, the bill was dead without some further legislative action.

Representative Smith then offered an amended version of the bill to cure the defect. The Smith amendment was identical to the conference version with the addition of one new section—section 207. Representative Smith explained that his amendment "modifies those provisions which have been ruled to be an appropriation on an authorization bill. It makes no other changes in the language." (H-10218)

Representative Danielson again raised a point of order, contending that the Smith amendment still amounted to an appropriation on a legislative bill. Representative Smith, arguing against the point of order, offered the following explanation:

"Mr. Speaker, I think it is very clear the way it [section 207] is worded that it is just an authorization for an appropriation. There has to be a specific appropriation, the same procedure we use in almost all laws around here." (H-10218)

Representative McDade then confirmed Representative Smith's statement, pointing out that section 207 "is boilerplate language." (The language has in fact become very common since enactment of the Congressional Budget Act of 1974, and is usually found in cases of contract authority to satisfy the requirements of 31 U.S.C. § 1351(a).)

The Chair then overruled the second point of order, the House accepted the conference report with the Smith amendment after some further debate, and the bill was ultimately signed into law with section 207.

Reviewing this legislative history, it seems clear that the purpose of section 207 was to cure the defect which prompted the Chair to sustain Representative Danielson's first point of order—the expansion of the availability of 31 U.S.C. § 724a. However, we find no indication of any intent to diminish its existing availability. Therefore, construing section 207 in light of its apparent purpose, we propose to apply 31 U.S.C. § 724a as follows:

(1) We will continue to certify for payment from the permanent judgment appropriation awards of costs and/or attorney's fees that were already authorized before the Equal Access to Justice Act was enacted. This will include court costs under the prior version of 28 U.S.C. § 2412

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and attorney's fees under the several statutes which already authorized them against the United States (for example, Title VII of the Civil Rights Act and the Freedom of Information Act).

(2) Unless and until Congress makes the appropriation required by section 207 or otherwise amends the law, we will not be able to certify awards newly authorized by the Equal Access to Justice Act. This result follows from section 207 itself and the prohibition in the Constitution against drawing money from the Treasury except under an appropriation made by law (article I, section 9).

In sum, by virtue of section 207, we view the Equal Access to Justice Act as neither expanding nor diminishing the availability of the permanent judgment appropriation. While the above discussion has been directed at judicial awards, it obviously applies with equal force to administrative awards of attorney's fees and expenses authorized by section 203 of the Act, to be codified at 5 U.S.C. § 504. Since no legal basis existed to pay administrative awards of attorney's fees from the judgment appropriation prior to the Equal Access to Justice Act, there continues to be none unless and until Congress makes an appropriation or takes other legislative action.

We are sending copies of this letter to the Acting Assistant Attorney General, Civil Division, Department of Justice, and the Director of the Administrative Office of the United States Courts.

Sincerely yours,

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel